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NOTES
ON THE
CALIFORNIA REPORTS

**SUPPLEMENTARY TO THE 1906 EDITION OF
NOTES ON CALIFORNIA REPORTS**

**SHOWING THE PRESENT VALUE AS AUTHORITY OF EACH
CASE AS DISCLOSED BY THE**

CITATIONS

**OF THOSE CASES, IN ALL THE REPORTS, BOTH FEDERAL
AND STATE, NOT INCLUDED IN EITHER THE
1899 OR THE 1906 EDITIONS OF NOTES
ON CALIFORNIA REPORTS**

WITH

**PARALLEL REFERENCES TO AMERICAN STATE REPORTS,
LAWYERS' REPORTS ANNOTATED, AND THE
REPORTER SYSTEM**

BY

CHAS. L. THOMPSON
of the San Francisco Bar

SUPPLEMENT TWO

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ON THE

CALIFORNIA REPORTS.

CASES IN 66 CALIFORNIA.

66 Cal. 3-6, 4 Pac. 695, IN RE CABILLO.

Mayor may Act as Police Judge under charter of San Jose.

Approved in *In re Baxter*, 3 Cal. App. 721, 86 Pac. 1000, holding recorder's court same as police court.

66 Cal. 6-9, 4 Pac. 764, GLADDING v. CALIFORNIA ETC. INS. CO.

Agent of Insurer cannot Waive Condition in insurance policy when policy stipulates that he cannot.

Distinguished in *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 449, 119 Am. St. Rep. 234, 89 Pac. 106, holding general agent could waive condition against increased hazard, with full knowledge of facts, for increased premium.

Waiver of Provisions of Nonwaiver or written waiver of conditions and forfeitures in policies. See note, 107 Am. St. Rep. 132.

Oral Waiver or Estoppel as to forfeitures after issuance of policy and before loss, under policies requiring written consent or waiver. See note, 10 L. R. A. (n. s.) 1076.

Stipulation in Fire Insurance Policy against increase of risk is valid, and breach thereof avoids policy.

Approved in *Boardman v. Fireman's Fund Ins. Co.*, 14 Haw. 28, upholding stipulation that proofs of loss shall be made in sixty days, and holding recovery on policy after failure to make such proofs is barred.

66 Cal. 10-15, 56 Am. Rep. 73, 4 Pac. 773, PEOPLE v. JORDAN.

Order of Serving and Filing Notice of appeal is immaterial when contemporaneous.

Reaffirmed in *People v. Schmitz*, 7 Cal. App. 343, 94 Pac. 409.

To Constitute Crime of Obtaining Money under false pretenses, fraud must be accomplished by means of false pretenses made use of for purpose.

Approved in *People v. Lapique*, 10 Cal. App. 675, 103 Pac. 167, following rule; *People v. White*, 7 Cal. App. 102, 93 Pac. 685, holding defective information for obtaining money by false pretenses; *Williams v. State*, 77 Ohio St. 472, 83 N. E. 803, 14 L. R. A. (n. s.) 1197, where one made representation of value as existing fact, knowing

it to be false and intending it to influence another to part with property, and other was thereby induced to part with property, such facts sustain conviction for obtaining money by false pretenses.

66 Cal. 15-17, 4 Pac. 766, IRVING v. CUNNINGHAM.

Where Description in Deed is sufficient after rejecting false calls, effect will be given to deed.

Reaffirmed in Hall v. Bartlett, 158 Cal. 642, 112 Pac. 177.

66 Cal. 17-25, 4 Pac. 876, LAKE COUNTY v. SULPHUR ETC. MIN. CO.

Instance of Taxes Being Delinquent for some time before penalty therefor attached.

Approved in Ukiah Guaranty Co. v. Curry, 148 Cal. 258, 82 Pac. 1049, holding penalty for delinquent corporation tax under act of 1905 does not attach until issuance of governor's proclamation declaring charters will be forfeited for nonpayment.

Mistake in Name of Owner of real property does not avoid tax assessment thereon.

Approved in Hertzler v. Freeman, 12 N. D. 191, 96 N. W. 296, and Commercial Nat. Bank v. Schlitz, 6 Cal. App. 182, 91 Pac. 753, both following rule.

Distinguished in Houser & Haines Mfg. Co. v. Hargrove (Cal.), 59 Pac. 949, holding void assessment of personal property to person other than owner.

Description of Property in Assessment held insufficient to sustain tax sale thereon.

Approved in Williams v. Bowers, 197 Mass. 567, 84 N. E. 318, description of property in notice of tax sale held insufficient to support sale.

66 Cal. 27-30, 4 Pac. 777, LE BRETON v. SUPERIOR COURT.

Action for Settlement of Trust in Relation to real and personal property need not be brought in county where realty is situated.

Approved in State v. Superior Court Pierce Co., 55 Wash. 330, 133 Am. St. Rep. 1030, 104 Pac. 608, following rule; Wood v. Thompson, 5 Cal. App. 248, 90 Pac. 39, holding action to compel specific performance of contract to convey mines could be brought in county of defendant's residence although not county where mines were situated.

66 Cal. 31-32, 4 Pac. 915, VOGT v. COPE.

Published Reports of Sales of Stock Exchange are not competent evidence to show market value of stock, unless it is shown how reports were made up.

Approved in American etc. Co. v. Regents, 11 Idaho, 190, 81 Pac. 613, admitting evidence of hardware dealer as to cost of building materials who testified that he fixed prices from catalogue.

66 Cal. 33, 4 Pac. 883, LUKES v. LOGAN.

Settlement of Bill of Exceptions is proceeding in an action, within meaning of statute.

Approved in Richardson v. Bohney, 18 Idaho, 334, 109 Pac. 729, and Sherman v. Southern Pac. Co., 31 Nev. 288, 102 Pac. 258, both following rule.

66 Cal. 34-36, 4 Pac. 884, HARNEY v. McLERAN.

Denials upon Information and Belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 778.

66 Cal. 44-53, 4 Pac. 916, SUTTER ST. R. R. CO. v. BAUM.

Where Plaintiff Could not Determine in advance amount to be tendered on rescission of contract, offer in complaint to refund such sum as court might direct is sufficient tender.

Approved in California etc. Co. v. Schiappa-Pietra, 151 Cal. 740, 91 Pac. 596, following rule.

Validity of Contract Between Director and his corporation. See note, 139 Am. St. Rep. 612.

66 Cal. 54-59, 4 Pac. 945, RECLAMATION DISTRICT v. HAGAR.

Statutes Providing for Formation of swamp land reclamation districts are valid.

Approved in Mound City Land & Stock Co. v. Miller, 170 Mo. 256, 94 Am. St. Rep. 727, 70 S. W. 726, 60 L. R. A. 190, upholding Revised Statutes of 1889, section 8251, providing for formation of swamp land reclamation districts.

Legislature may Empower Board of supervisors to include lands in several counties in reclamation district.

Reaffirmed in State v. Fuller, 83 Neb. 786, 120 N. W. 495.

Procedure for Establishment of drains and sewers. See note, 60 L. R. A. 176, 216, 227.

Who is Liable for Expense of Drainage. See note, 58 L. R. A. 364.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 620.

Miscellaneous.—Cited in Reclamation Dist. No. 108 v. Hagar (Cal.), 4 Pac. 949, Reclamation Dist. No. 108 v. Hagar (Cal.), 4 Pac. 950; and Reclamation Dist. No. 108 v. Martin (Cal.), 4 Pac. 950, all companion cases.

66 Cal. 59-60, 4 Pac. 951, PEOPLE v. HAGAR.

Board of Supervisors has Power to determine what lands will be benefited by proposed reclamation district and to include such lands.

Approved in Rico v. Snider, 134 Fed. 958, holding court of equity could not determine in advance of board of supervisors question whether lands in district have been reclaimed, and enjoin board from exercise of its function; Ross v. Wright County, 128 Iowa, 440, 104 N. W. 511, 1 L. R. A. (n. s.) 431, upholding law providing there shall be no appeal from decision of board of supervisors relative to establishment of drainage ditches.

66 Cal. 61-68, 4 Pac. 952, WINANS v. SIERRA LUMBER CO.

Every Party to Contract must Do all in his power to minimize loss from breach by other party.

Approved in Russell v. Ross, 157 Cal. 181, 106 Pac. 586, upon failure of contractor to complete vessel, and refusal of surety to continue work, owner could finish work, making loss to contractor as light as possible.

Where Machine Sold was Unfit for purpose intended, purchaser had right to use it as far as possible in good faith, reserving right to damages sustained by partial breach.

Approved in *North Alaska etc. Co. v. Hobbs, Wall & Co.*, 159 Cal. 385, 113 Pac. 872, giving damages for partial breach when goods were accepted and used.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 73.

66 Cal. 69-72, 4 Pac. 958, **MURPHY v. HELMRICH.**

One Who Acts for Another without revealing his agency is liable on contract as principal.

Reaffirmed in *Whitney v. Woodmansee*, 15 Idaho, 739, 99 Pac. 969.

66 Cal. 72-74, 4 Pac. 963, **BANGS v. DUNN.**

Unearned Salary of Public Officer cannot be assigned.

Approved in *McGowan v. New Orleans*, 118 La. 430, 43 So. 40, 8 L. R. A. (n. s.) 1120, *First National Bk. of Columbus v. State*, 68 Neb. 482, 94 N. W. 633, *Wilkes v. Sievers*, 8 Cal. App. 662, 97 Pac. 679, and *Holt v. Thurman*, 111 Ky. 91, 98 Am. St. Rep. 399, 63 S. W. 282, all following rule; *People v. Monroe* (Cal.), 33 Pac. 777, holding false making of assignment of salary of public school teacher not to be forgery; *Serrill v. Wilder*, 77 Ohio St. 358, 83 N. E. 491, 14 L. R. A. (n. s.) 982, holding void contract of candidate to devote certain portion of official fees, if elected, to payment of certain joint obligation, in consideration of support of joint obligors.

Validity of Assignment of future wages or salary. See note, 5 L. R. A. (n. s.) 567.

66 Cal. 76-78, 4 Pac. 965, **LEHN v. SAN FRANCISCO.**

City is Liable for Damage to private property due to defective sewer.

Reaffirmed in *Hume v. Des Moines*, 146 Iowa, 641, 125 N. W. 852.

Duty and Liability of Municipality with respect to drainage. See note, 61 L. R. A. 701.

Municipal Liability for Injuries to property from sewerage system not constructed according to any adopted plan or upon defective plan. See note, 1 L. R. A. (n. s.) 953.

66 Cal. 79-80, 4 Pac. 987, **HARRIS v. HILLEGASS.**

Equity will not Refuse to Entertain Suit brought after unreasonable delay, regardless of plea of limitations.

Approved in *Patterson v. Hewitt*, 11 N. M. 24, 66 Pac. 558, 55 L. R. A. 658, and *Stevenson v. Boyd*, 153 Cal. 636, 96 Pac. 287, 19 L. R. A. (n. s.) 525, both refusing to enforce trust on ground of laches.

66 Cal. 87-92, 4 Pac. 1058, **CLARK v. CHILD.**

Execution of Wrongful Instrument includes delivery.

Approved in *Van Valkenburgh v. Oldham*, 12 Cal. App. 579, 108 Pac. 45, following rule.

66 Cal. 92-95, 4 Pac. 988, **PEREIRA v. CENTRAL PACIFIC R. R. CO.**

Where Railroad Contracts to Deliver Goods beyond its own line, it is liable for delays on lines over which goods are forwarded.

Approved in *Schwartz v. Panama R. R. Co.*, 155 Cal. 748, 103 Pac. 198, holding contract of shipment did not provide for delivery at

final destination; Colfax etc. Fruit Co. v. Southern Pac. Co. (Cal.), 46 Pac. 670, holding stipulation for cessation of carrier's liability at end of its own line overcome by further agreement for through passenger service, and company liable for delay due to its failure to notify each successive carrier of conditions of contract; Clark v. American Express Co., 130 Iowa, 260, 106 N. W. 645, when carrier's agent agreed to transport and deliver goods within specified time, carrier becomes only insurer of delivery within that time.

66 Cal. 96-97, 4 Pac. 987, RATHGEB v. TISCORNIA.

There is No Essential Difference between affidavit of merits which states that defendant "has fully and fairly stated the case" and one which states he "has fully and fairly stated facts of said case."

Reaffirmed in Eddy v. Houghton, 6 Cal. App. 88, 91 Pac. 398.

Change of Venue in Action for damages commenced in county in which none of defendants reside will be changed to proper county on motion of defendants who have appeared.

Approved in Cochrane v. McDonald, 4 Cal. Prob. 538, 545, denying motion for change of venue made on behalf of all but two of defendants, one of nonjoining defendants being resident of county of forum.

66 Cal. 97-98, 4 Pac. 1062, EHRlich v. EWALD.

When Debt is Secured by Pledge, pledgee has action for debt without first exhausting pledge.

Approved in Jones v. Evans, 6 Cal. App. 91, 91 Pac. 534, following rule.

Doctrine of Law of Case is Limited to rulings upon questions which were actually presented and considered upon former appeal.

Reaffirmed in Trower v. San Francisco, 157 Cal. 765, 109 Pac. 618.

66 Cal. 98-99, 4 Pac. 1065, SHARP v. MILLER.

Where Judgment and Order Denying new trial are reversed, parties are in same position as if case had never been tried, except that opinion on appeal must be followed as far as applicable on new trial.

Approved in Castagnino v. Balletta (Cal.), 21 Pac. 1099, holding law of decision on appeal where judgment is reversed and new trial ordered is not law applicable to pleadings when plaintiff changes cause of action from mechanic's lien to assumpsit.

66 Cal. 99-101, 4 Pac. 1061, PEOPLE v. SAMSELS.

Disqualification of Juror is not Ground for new trial.

Reaffirmed in State v. Coleman, 17 S. D. 619, 98 N. W. 181.

Objection to Competency of Juror taken after verdict is of no avail on motion for new trial.

Approved in People v. Duncan, 8 Cal. App. 198, 96 Pac. 420, holding objection to substitution of juror could not first be made after verdict.

66 Cal. 101-103, 4 Pac. 1066, PEOPLE v. OILER.

Sections 686 and 689, Penal Code, allowing depositions taken on preliminary examination of person charged with public offense to be read in evidence on trial, are valid.

Reaffirmed in People v. Clark, 151 Cal. 204, 90 Pac. 551.

Admissibility in Criminal Trial of testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 881.

66 Cal. 103-104, 4 Pac. 1093, PEOPLE v. HICKS.

Where Information Charges Property taken was personal property in possession of A, and was taken from his person against his will, it is sufficiently averred that property belonged to A.

Distinguished in *People v. Cleary*, 1 Cal. App. 52, 81 Pac. 754, holding indictment alleging taking of property from person of another did not allege ownership.

66 Cal. 105-112, 4 Pac. 1096, McNEIL v. FIRST CONGREGATIONAL SOCIETY.

Common-law Powers of Guardians. See note, 89 Am. St. Rep. 268, 273.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 543.

Position of Surviving Partners in partnership realty. See note, 28 L. R. A. 136.

Rights and Position of Creditors, purchasers, and other third parties in partnership realty. See note, 28 L. R. A. 173.

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 610.

Miscellaneous.—Cited in *Zintsmaster v. Aiken*, 173 Ind. 276, 90 N. E. 83, to point that repeal of statute by virtue of which alone court has jurisdiction deprives court of jurisdiction of proceeding then pending, unless repealing act contains saving clause.

66 Cal. 112-113, 4 Pac. 1089, EVANS v. BAILEY.

Alleged Cause of Action for Goods sold and delivered is not sustained by proof of delivery of goods delivered to defendant, to be sold on commission.

Approved in *Eidinger v. Sigwart*, 13 Cal. App. 674, 110 Pac. 524, reversing judgment for variance between allegation and proof.

Miscellaneous.—Cited in *Lehmann v. Schmidt* (Cal.), 24 Pac. 120.

66 Cal. 114-115, 4 Pac. 1091, ERENBERG v. PETERS.

Terms of Written Contract cannot be altered by parol.

Approved in *Neverman v. Bank of Case County*, 14 Okl. 421, 78 Pac. 383, following rule; *Cughan v. Larson*, 13 N. D. 379, 100 N. W. 1090, written contract of sale of land cannot be modified by unexecuted oral agreement.

66 Cal. 116-117, 4 Pac. 1094, GILMAN v. CURTIS.

Assignment of Life Insurance Policy for advances made by assignee vests legal title in him.

Approved in *Brett v. Warnick*, 44 Or. 524, 102 Am. St. Rep. 639, 75 Pac. 1065, sustaining assignment of life insurance policy for advance made upon faith of it.

Assignment of Life Insurance Policies. See note, 87 Am. St. Rep. 510, 511.

66 Cal. 117-121, 4 Pac. 1103, CALKINS v. STEINBACH.

Redemption of Land by Tenant in Common gives him only equitable lien on interests of cotenants for payment of their several proportions of redemption money.

Approved in *Anderson v. Snowden*, 44 Wash. 280, 120 Am. St. Rep. 998, 87 Pac. 358, holding payment of all of purchase price of lands by defendant, when plaintiff and defendant had agreed to purchase together, entitles plaintiff to decree declaring him to be half owner upon payment of one-half purchase price.

66 Cal. 123-129, 56 Am. Rep. 77, 4 Pac. 1106, EASTIN v. BANK OF STOCKTON.

Action may be Maintained for malicious prosecution of civil action.

Approved in *Runk v. San Diego Flume Co.* (Cal.), 43 Pac. 519, upholding complaint based on malicious prosecution of civil action.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 456, 465, 467.

66 Cal. 129, 4 Pac. 1143, BOYLE v. HITCHCOCK.

Objection to Street Assessment that it included amount for incidental expenses is waived by failure to appeal to supervisors.

Approved in *Bates v. Hadamson*, 2 Cal. App. 577, 84 Pac. 52, holding objection to excessive assessment through mistake of superintendent of streets waived by failure to appeal to supervisors.

66 Cal. 138-155, 56 Am. Rep. 80, 4 Pac. 1152, PEOPLE v. GOLD RUN DITCH ETC. CO.

Attorney General may Bring Suit in name of state to abate public nuisance.

Distinguished in *State v. Huston*, 21 Okl. 808, 97 Pac. 992, holding attorney general has no power to bring suit in name of state except when requested by governor or legislature.

In Action to Abate Public Nuisance, all persons engaged in the wrongful acts may be enjoined, jointly or severally.

Approved in *Farmer v. Behmer*, 9 Cal. App. 779, 100 Pac. 903, holding both lessor and lessee of house of prostitution could be enjoined in action to abate the nuisance; *Madison v. Ducktown Copper Co.*, 113 Tenn. 348, 83 S. W. 662, and *Ladew v. Tennessee Copper Co.*, 179 Fed. 255, both holding all persons carrying on operations which contributed to injury of plaintiff's property could be joined as defendants in action to abate nuisance, though each carried on operations independently; *United States v. Luce*, 141 Fed. 412, 413, 418, holding injunction lay to prevent several fish fertilizer factories from independently polluting atmosphere; *Warren v. Parkhurst*, 186 N. Y. 55, 78 N. E. 582, holding injunction lay to prevent several riparian proprietors from independently polluting stream to injury of lower proprietors; *Draper v. Brown*, 115 Wis. 370, 91 N. W. 1003, holding injunction lay against several persons who, acting independently, wrongfully caused lowering of level of lake.

Distinguished in *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 242, 87 N. E. 53, refusing to enjoin a number of servants of mining company, injured in its employ, from bringing damage suits against company.

Actions Against Two or More Persons creating or maintaining a nuisance. See note, 118 Am. St. Rep. 878.

Character of Liability of Several whose independent wrongs contribute to enhance degree or extent of injury. See note, 10 L. R. A. (n. s.) 170.

Any Contracting or Narrowing of public highway in land is a nuisance.

Approved in *Kern Island etc. Co. v. Bakersfield*, 151 Cal. 407, 90 Pac. 1053, holding unlawful use of highway as ditch created no prescriptive right to maintain same.

Unauthorized Obstruction of Navigable Stream is nuisance.

Approved in *Whittaker v. Stangvick*, 100 Minn. 391, 117 Am. St. Rep. 703, 111 N. W. 297, 10 L. R. A. (n. s.) 921, holding injunction lay to prevent shooting of duck across plaintiff's land, a narrow stream connecting two lakes.

State Legislature cannot by Attempted Legislation divest people of state of their rights in navigable waters of state for use of private business.

Distinguished in *Pacific Gas Imp. Co. v. Ellert*, 64 Fed. 434, holding state could dispose of its tide lands free from easement of upland owner.

Relative Rights of State and riparian owner in navigable waters. See note, 127 Am. St. Rep. 44.

Right to Continue Public Nuisance cannot be acquired by prescription.

Approved in *Trullinger v. Howe*, 53 Or. 226, 97 Pac. 551, 22 L. R. A. (n. s.) 545, reaffirming rule.

Distinguished in *Donahue v. Stockton Gas etc. Co.*, 6 Cal. App. 281, 92 Pac. 198, where action to abate pollution of stream at suit of individual did not affirmatively appear to be barred, demurrer on that ground was untenable.

Prescriptive Right to Maintain public nuisance. See note, 53 L. R. A. 891, 904.

Prescriptive Right to Pollute Stream. See note, 25 L. R. A. (n. s.) 590.

What are Public Nuisances. See note, 107 Am. St. Rep. 218, 235.

Injunctions by Municipalities Against Nuisances in waters and watercourses. See note, 40 L. R. A. 465.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 681.

Pollution of Stream by Mining. See note, 24 L. R. A. 65.

Title to Land Under Water. See note, 42 L. R. A. 171.

What Waters are Navigable. See note, 42 L. R. A. 326.

66 Cal. 157-161, 4 Pac. 441-1152, **DUNNE v. DUNNE.**

Acceptance by Devisee of Property given him by will charged with payment of legacies renders him personally liable for payment of such legacies.

Approved in *Keir v. Keir*, 155 Cal. 99, 99 Pac. 488, following rule.

Personal Liability of Devisees for charges imposed by the will. See notes, 129 Am. St. Rep. 1057; 5 Cal. Prob. 417.

Remedies for Enforcement of Legacy charged upon devise. See note, 30 L. R. A. (n. s.) 816.

66 Cal. 161-163, 4 Pac. 1147, HOBBS v. AMADOR ETC. CANAL CO.

It is Unlawful for Owner of Mining Claim to so work it as either directly or indirectly cover land of his neighbor with mining debris.

Approved in *Salstrom v. Orleans Bar Gold Min. Co.*, 153 Cal. 555, 96 Pac. 294, holding hydraulic miner liable for covering and washing away land of lower riparian proprietor; *American Smelting etc. Co. v. Godfrey*, 158 Fed. 232, 89 C. C. A. 139, sustaining injunction against smelter fumes as nuisance; *Hill v. Standard Min. Co.*, 12 Idaho, 240, 85 Pac. 912, sustaining complaint alleging damage to plaintiff's lands by deposit of mining debris from defendant's mine; *Good v. West Min. Co.*, 154 Mo. App. 599, 136 S. W. 243, applying rule where mine owner discharged refuse into ditch, thereby causing it to overflow and deposit debris on plaintiff's land; *Chessman v. Hale*, 31 Mont. 583, 79 Pac. 255, 68 L. R. A. 410, holding upper appropriator of water liable for injury to land below, due to washing of mining debris thereon; dissenting opinion in *Mountain Copper Co. v. United States*, 142 Fed. 647, 73 C. C. A. 621, majority refusing to enjoin copper smelter as public nuisance.

Pollution of Stream by Mining. See note, 24 L. R. A. 64.

66 Cal. 163-168, 4 Pac. 1165, TOMPKINS v. CLAY ST. R. R. CO.

Where Negligence of Two Common Carriers contribute to accident, one injured may recover from either or both.

Approved in *Kimie v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 387, 104 Pac. 989, and *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 407, 91 Pac. 439, both following rule; *Spear v. United Railroads*, 16 Cal. App. 660, 117 Pac. 967, where two parties have contributed to injury to third, though act of one was wanton and that of other simply negligent, doctrine of last clear chance does not relieve either where third party was not contributorily negligent; *McClain v. Lewiston Interstate etc. Assn.*, 17 Idaho, 78, 104 Pac. 1020, sustaining complaint alleging several persons to be joint tort-feasors in allowing dog to run loose on racetrack; *Miller v. United Rys. Co.*, 155 Mo. App. 541, 134 S. W. 1048, applying rule where street-car passenger was injured in collision between car and runaway moving van; *Strauhal v. Asiatic S. S. Co.*, 48 Or. 108, 85 Pac. 233, holding action lay against lumber company and navigation company jointly for causing death of plaintiff's decedent.

When Passenger is Injured by Collision of vehicles of two carriers, no presumption of negligence arises as against carrier in whose vehicle he was not a passenger.

Distinguished in *Kimie v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 384, 104 Pac. 988, holding evidence sufficient to submit question of negligence of other carrier to jury; *Cole v. Roebling Construction Co.*, 156 Cal. 448, 105 Pac. 257, holding court could render judgment by default against one of two joint tort-feasors and let action proceed as to the other.

Where Passenger Injured by Collision brings action against proprietors of both vehicles, a release to one upon consideration is release to both, and plaintiff is estopped to assert party to whom release was given was not in fault.

Approved in *Dulaney v. Buffman*, 173 Mo. 17, 73 S. W. 129, *Hubbard v. St. Louis & M. R. Ry. Co.*, 173 Mo. 255, 256, 72 S. W. 1074,

and Cleveland etc. Ry. Co. v. Hilligoss, 171 Ind. 425, 427, 131 Am. St. Rep. 258, 86 N. E. 488, 489, all following rule; Ducey v. Patterson, 37 Colo. 221, 119 Am. St. Rep. 284, 86 Pac. 111, 9 L. R. A. (n. s.) 1066, holding release as to a portion of joint judgment debtors, who were joint tort-feasors, releases all; Ryan v. Becker, 136 Iowa, 277, 111 N. W. 428, 14 L. R. A. (n. s.) 329, where one recovered judgment against two persons in separate suits for personal injuries in same transaction, satisfaction of second judgment annuls the first; Snyder v. Mut. Telephone Co., 135 Iowa, 229, 112 N. W. 781, where light company lineman was killed by coming in contact with guy wire connecting telephone company's poles, settlement with light company for valuable consideration releases telephone company also; Loso v. Lancaster County, 77 Neb. 473, 109 N. W. 755, 8 L. R. A. (n. s.) 618, doctrine of imputed negligence does not apply to person injured while riding in private vehicle where no privity exists between him and owner or driver; Robinson v. St. Johnsbury, 80 Vt. 140, 66 Atl. 818, 9 L. R. A. (n. s.) 1249, where express messenger released express company from liability for injury, such release was bar to suit against railroad, when messenger knew when employed of agreement of express company to indemnify railroad for damages paid for injury to servants of express company.

Release of One Joint Tort-feasor as affecting liability of others. See notes, 92 Am. St. Rep. 880, 881; 58 L. R. A. 307.

Effect of Release of Person not Liable from liability for a tort to release another. See note, 14 L. R. A. (n. s.) 322.

Imputed Negligence of Driver to Passenger. See note, 8 L. R. A. (n. s.) 600, 609, 615.

66 Cal. 171-176, 4 Pac. 1162, TUEBNER v. CALIFORNIA ST. R. R. CO.

Owner of Property must not Use It even in lawful business, in such manner as to interfere with another in legitimate use of his property.

Approved in Donahue v. Stockton Gas etc. Co., 6 Cal. App. 280, 92 Pac. 198, holding complaint stated cause of action for injury to plaintiff's land by discharge from gasworks.

Jury may Fix Reasonable Sum as damages for loss of value of property due to nuisance.

Approved in Judson v. L. A. Suburban Gas Co., 157 Cal. 172, 106 Pac. 583, holding trial court should determine amount of damage for personal discomfort from nuisance.

Presumption That Commission of Nuisance was not by statutory authority. See note, 70 L. R. A. 591.

66 Cal. 176-178, 4 Pac. 1175, BULL v. FORD.

Where Conveyance of Land in Fraud of creditors is void, such creditors may levy upon land as if no conveyance had been made.

Approved in Clifton v. Herrick, 16 Cal. App. 487, 117 Pac. 624, Bekins v. Dieterle, 5 Cal. App. 694, 91 Pac. 175, and Rountree v. Marshall, 6 Ariz. 417, 59 Pac. 110, both following rule.

Effect on Legal Title of Conveyance of land in fraud of creditors. See note, 67 L. R. A. 868.

66 Cal. 178-180, 4 Pac. 1169, **TISCHLER v. CALIFORNIA FARMERS' ETC. INSURANCE CO.**

Breach of Condition in Fire Insurance Policy relied on as defense must be specially pleaded.

Approved in *Smith v. Mut. etc. Ins. Co.*, 21 S. D. 442, 113 N. W. 97, following rule.

66 Cal. 180-181, 4 Pac. 1176, **MERRIFIELD v. LONGMIRE.**

Liability of Executors, Trustees, etc., for compound interest. See note, 29 L. R. A. 630.

66 Cal. 182-184, 4 Pac. 1188, **JESSEN v. SWEIGERT.**

Liability to Third Persons of lessors of personal property. See notes, 92 Am. St. Rep. 504, 536; 26 L. R. A. 200.

Violation of Police Ordinance as ground for private action. See note, 5 L. R. A. (n. s.) 261.

66 Cal. 184-186, 4 Pac. 1063, 1185, **PEOPLE v. RIGHETTI.**

Witness Who Swears Falsely in any material respect is to be distrusted in all his testimony.

Approved in *State v. Connors*, 37 Mont. 18, 94 Pac. 200, and *State v. Lee*, 34 Mont. 588, 87 Pac. 979, both upholding instruction in regard to credibility of testimony of witness who swears falsely in part; *Kaufman v. Boismier*, 25 Okl. 255, 105 Pac. 327, holding instruction in regard to distrust of testimony of witness who swears falsely did not prejudice defendant.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 681.

66 Cal. 187-188, 5 Pac. 77, **BEACH v. HODGDON.**

Action in Nature of Creditor's Bill to set aside conveyance on ground of fraud need not be brought in county where land is situated.

Approved in *Wood v. Thompson*, 5 Cal. App. 248, 90 Pac. 39, holding action to compel specific performance of contract to sell mines could be brought in county of defendant's residence, although not county where mines were situated.

66 Cal. 191-193, 56 Am. Rep. 100, 4 Pac. 1193, **LUNDY v. CENTRAL PACIFIC R. R. CO.**

Where Railroad Ticket is Conditioned that it will not be good after certain time from sale, passenger must commence journey within that time, but need not complete it.

Approved in *Rutherford v. St. Louis etc. Co.*, 28 Tex. Civ. App. 629, 67 S. W. 163, and *Morningstar v. Louisville etc. R. R. Co.*, 135 Ala. 255, 33 So. 157, both following rule.

Criticised in *Brian v. Oregon Short Line R. R. Co.*, 40 Mont. 116, 105 Pac. 491, 25 L. R. A. (n. s.) 459, holding passenger must finish journey within time limited on ticket extending over several roads where such time was reasonable.

Time Limit of Railway Ticket. See note, 87 Am. St. Rep. 257.

Use of Railway Ticket after expiration of time limited. See note, 16 L. R. A. 471.

66 Cal. 193-202, 5 Pac. 85, WILLIAMS v. SANTA CLARA MIN. ASSN.

Notice of Appeal from Judgment must be served on all parties whose interest will be affected by reversal.

Approved in *Merk v. Bowery Min. Co.*, 31 Mont. 304, 78 Pac. 521, reaffirming rule; *De Arnaz v. Jaynes (Cal.)*, 34 Pac. 224, and *Estate of Young*, 149 Cal. 175, 85 Pac. 145, both refusing to consider bill of exceptions on ground it had not been served on all adverse parties.

Judgment may be Modified on appeal, although all adverse parties are not served, provided such modification cannot affect rights of parties not served.

Approved in *Burnett v. Piercy*, 149 Cal. 182, 86 Pac. 604, following rule; *Bell v. San Francisco Savings Union*, 153 Cal. 71, 94 Pac. 228, holding judgment could be modified for benefit of adverse party not served with notice of appeal.

Deed of Trust is not Interest in property but encumbrance under section 1192, Code of Civil Procedure.

Distinguished in *Weber v. McCleverty*, 149 Cal. 322, 86 Pac. 709, holding deed of trust on homestead not lien or encumbrance, but passed title to trustees, rendering unnecessary presentment of their claim to administrator for allowance.

Mortgagee of Land is not Bound to give notice that he will not be responsible for cost of improvement to be erected thereon.

Approved in *Hollywood Lumber Co. v. Love*, 155 Cal. 271, 273, 274, 100 Pac. 699, 700, holding grantee of deed of trust need not give such notice; *Kuschel v. Hunter (Cal.)*, 50 Pac. 398, holding holder of vendor's lien not bound to give notice.

Lien of Recorded Mortgage or deed of trust takes priority over subsequent mechanic's lien.

Approved in *Valley Lumber Co. v. Wright*, 2 Cal. App. 290, 84 Pac. 59, following rule.

When Mechanics' Liens Superior to earlier mortgages. See note, 14 L. R. A. 305.

Term "Mining Claim" Applies to portion of mineral lands to which right of exclusive possession and enjoyment by private persons has been asserted by actual occupation or by compliance with local mining laws or customs.

Distinguished in *Escott v. Crescent Coal & Nav. Co.*, 56 Or. 194, 195, 106 Pac. 454, construing and upholding B. & C. Comp., section 5668, relating to liens on mining claims.

Section 1192, Code of Civil Procedure, relating to mechanics' liens, does not apply to mining work.

Approved in *Berentz v. Kern King Oil & Dev. Co. (Cal. App.)*, 84 Pac. 47, holding lien for drilling oil well applies only to land conveniently necessary for use of well.

Distinguished in *Higgins v. Carlotta Mining Co.*, 148 Cal. 704, 113 Am. St. Rep. 344, 84 Pac. 760, holding work done for purpose of opening up new bodies and discovering better ore comes within section 1192, Code of Civil Procedure.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 766.

66 Cal. 202-209, 5 Pac. 91, WATT v. WRIGHT.

Provision of Constitution requiring actions concerning real estate to be commenced in county where situated does not apply to actions then pending.

Reaffirmed in *Cassin v. Nicholson*, 154 Cal. 507, 98 Pac. 194.

Grantee of Mortgaged Premises may avail himself of bar of limitations although mortgagor himself by reason of absence of state may not.

Approved in *California Title Ins. etc. Co. v. Miller*, 3 Cal. App. 56, 84 Pac. 454, holding grantee of mortgagor could plead limitations although running of statute was interrupted as to mortgagor by his death; *Newhall v. Hatch* (Cal.), 64 Pac. 252, where foreclosure suit was dismissed by reason of mortgage liability being barred, and purchaser at execution sale under later judgment took in reliance thereon, a suit based on new promise of mortgagor is barred as to such purchaser; *Colonial & United States Mortgage Co. v. Northwest Thresher Co.*, 14 N. D. 160, 116 Am. St. Rep. 642, 103 N. W. 920, 78 L. R. A. 814, limitations do not run against right to foreclosure of mortgage while parties against whom cause of action has accrued are absent from state; *Graves v. Seifried*, 31 Utah, 211, 87 Pac. 676, holding third person who acquired interest in mortgaged property under tax deed could plead limitations to suit on mortgage although waived by mortgagor.

Distinguished in *Hibernia Sav. & Loan Soc. v. Farnham*, 153 Cal. 583, 126 Am. St. Rep. 129, 96 Pac. 12, holding where mortgagee had no notice of unrecorded deed of mortgagor, grantee could not plead limitations which would otherwise have run in his favor, although tolled as to mortgagor by his death.

Denied in *Du Bois v. First Nat. Bank*, 43 Colo. 405, 96 Pac. 171, holding grantor could arrest statute as to his grantee by new promise so long as grantor retained interest in premises.

Who may Plead Statute of limitations. See note, 104 Am. St. Rep. 748, 766.

Effect of Mortgagor's Absence from state to toll limitations as against foreclosure against his grantee. See note, 26 L. R. A. (n. s.) 900.

Successive Temporary Absences of mortgagor from state stops running of statute for total time of such absences.

Distinguished in *Stewart v. Stewart*, 152 Cal. 165, 92 Pac. 88, holding note barred when defendant removed from state and returned for occasional open visits at intervals for twenty years.

Failure of Officer Levying Attachment to post description of property attached upon premises when unoccupied is fatal to the levy.

Approved in *Steinfeld v. Menager*, 6 Ariz. 145, 53 Pac. 497, holding void levy of attachment on range when copy was not recorded; *Ireland v. Adair*, 12 N. D. 32, 102 Am. St. Rep. 561, 94 N. W. 767, holding void attachment when copy of warrant and notice showing property attached was not served upon persons against whom demand existed.

Distinguished in *Griffin v. American Gold Min. Co.*, 136 Fed. 73, 68 C. C. A. 637, holding attaching officer presumed to have posted description in absence of statement in his return.

66 Cal. 209-210, 5 Pac. 79, **LEWIS v. SOUTH PACIFIC COAST R. R. CO.**

Action Against Railroad to recover damages for injuries may be tried in county where injury was inflicted, and defendant corporation cannot have it removed to county of its principal place of business.

Distinguished in *Krogh v. Pacific Gateway etc. Co.*, 11 Cal. App. 240, 104 Pac. 699, holding action for damages from fraudulent repre-

representations of agent of corporation could be removed for trial to county of corporation's principal place of business; Grocers' Fruit etc. Union Co. v. Kern County Land Co., 150 Cal. 476, 89 Pac. 124, holding action against corporation for specific performance of contract to convey land could be commenced in county of its residence and could be removed on motion of corporation to county where land was situated.

66 Cal. 210-212, 5 Pac. 83, HOBART v. TILLSON.

Prohibition Does not Lie to restrain ministerial officer from performance of his functions.

Approved in McGinnis v. San Jose, 153 Cal. 714, 96 Pac. 368, holding mandamus did not lie to control discretion of city council as to whether they will advertise application for franchise; State v. Durand, 36 Utah, 102, 104 Pac. 763, holding that legislature in exercising power to provide remedy to review ruling of justice's court other than on appeal could not provide that ruling be reviewed on a prerogative writ.

Writ of Prohibition. See note, 111 Am. St. Rep. 943.

66 Cal. 218-223, 5 Pac. 96, TRUETT v. ADAMS.

When Terms Used in Description in grant are equivocal, ambiguous, or insufficient, subsequent acts of parties while in interest may be resorted to for purpose of ascertaining their intention.

Approved in Grant v. Bannister, 160 Cal. 781, 118 Pac. 255, reaffirming rule; Indianapolis v. Bd. of Church Extension, 28 Ind. App. 324, 62 N. E. 717, where plats made by different owners of tract laid out for city lots showed different widths of street, fact that city for forty years used only the less width and assessed property owners up to it bars its claim for greater width; Guillaume v. K. S. D. Land Co., 48 Or. 406, 86 Pac. 885, holding contract for sale of block describing it as designated on map on file in vendor's office gave sufficient description to sustain decree of specific performance; Sloan v. King, 33 Tex. Civ. App. 544, 77 S. W. 51, admitting parol evidence to dispel uncertainty which arose in effort to apply calls in deed to land.

66 Cal. 223-228, 5 Pac. 104, SALISBURY v. SHIRLEY.

Assignee of Lessee of Land is liable on breach of covenant in lease to pay rent and taxes.

Approved in Dietz v. Kucks (Cal.), 45 Pac. 833, holding lessee liable as surety to lessor on breach of lease by lessee's assignee; Indiana Nat. Gas etc. Co. v. Hinton, 159 Ind. 402, 64 N. E. 225, holding assignee of lessee of oil land liable for failure to bore wells and furnish gas in time stipulated in lease.

Liability of Assignee of leasehold for rent. See note, 14 L. R. A. 151, 156.

66 Cal. 228-230, 5 Pac. 154, PEOPLE v. VILLARINO.

Defendant may Withdraw Plea of not guilty at any time before trial for purpose of demurring or moving to set aside indictment.

Approved in People v. Staples, 149 Cal. 409, 86 Pac. 887, holding court could refuse to grant motion of defendant for leave to withdraw plea of guilty, after case was set by consent, and to move to set aside indictment where no ground was given for setting aside indictment; Oligschlager v. Territory, 15 Okl. 145, 79 Pac. 915, and Shivers v. Territory, 13 Okl. 475, 74 Pac. 902, both holding objection to indictment could not be raised on appeal when not objected to before plea.

66 Cal. 230-232, 5 Pac. 108, ROLLER v. SUTTER ST. R. R. CO.

Duty of Street-car Companies to avoid injuring children on track.
See note, 25 L. R. A. 663.

66 Cal. 233-234, 5 Pac. 158, TWOMEY v. PEOPLE'S ICE CO.

Where Contract of Hotel was to take ice exclusively from one factory, and factory was to furnish required amounts, purchase by hotel from another factory excused further performance by factory.

Approved in Los Angeles Gas etc. Co. v. Amal. Oil Co., 156 Cal. 781, 106 Pac. 58, holding contract for delivery of oil for period of years and payable monthly to be entire; Wood, Curtis & Co. v. Seurich, 5 Cal. App. 255, 90 Pac. 52, holding where purchaser of apples who was to pay for each carload as delivered failed to pay for one, vendor was excused from further delivery.

66 Cal. 235-236, 5 Pac. 157, PEOPLE v. LARUE.

Affidavit of Merits Reciting that affiant has fully and fairly stated his case and facts constituting defense to his attorney is insufficient.

Approved in Cooper-Power v. Hanlon, 7 Cal. App. 725, 95 Pac. 679, following rule; Jensen v. Dorr, 9 Cal. App. 19, 98 Pac. 46, holding affidavit of merits insufficient.

66 Cal. 241-243, 5 Pac. 219, ESTATE OF ROSE.

Miscellaneous.—Cited in In re Rose, 80 Cal. 176, 22 Pac. 89, on another appeal.

66 Cal. 243-247, 5 Pac. 217, WILSON v. HASTINGS.

Common-law Powers of guardians. See note, 89 Am. St. Rep. 273.

66 Cal. 247-251, 5 Pac. 223, TELL v. GIBSON.

Action for Personal Injuries to wife must be brought in name of husband and wife.

Approved in Basler v. Sacramento Gas etc. Co., 158 Cal. 522, 111 Pac. 533, holding husband necessary party to suit for personal injuries to wife; Gomez v. Scanlan, 155 Cal. 530, 102 Pac. 13, holding wife necessary party to action brought for her false imprisonment; Gomez v. Scanlan, 2 Cal. App. 580, 84 Pac. 50, applying rule in action for damages for false imprisonment of wife.

66 Cal. 253-259, 5 Pac. 232, OLD SAUCELITO LAND ETC. CO. v. COMMERCIAL UNION ASSUR. CO.

Stipulation in Fire Insurance Policy for arbitration of loss considered, and compliance therewith held to be condition subsequent to suing on policy.

Approved in Southern Home Ins. Co. v. Faulkner, 57 Fla. 197, 131 Am. St. Rep. 1098, 49 So. 543, Graham v. German-American Ins. Co., 75 Ohio St. 402, 79 N. E. 932, 15 L. R. A. (n. s.) 1055, and Leu v. Commercial etc. Ins. Co., 15 S. D. 363, 107 N. W. 60, all upholding stipulation for submission of loss to arbitrators as condition precedent to suit on fire policy; Gray v. Reliable Ins. Co., 26 Okl. 597, 598, 110 Pac. 729, 730, holding compliance with stipulation in policy in regard to notice of loss essential to right to sue thereon.

Distinguished in Winchester v. North British etc. Co., 160 Cal. 6, 116 Pac. 65, where fire policy requires written notice for appointment

of appraisers and that loss shall be payable sixty days after proof of damage and award by appraisers, insurer desiring appraisal must serve written notice within sixty days after proof of loss or right to arbitration is waived; *Williams v. Branning Mfg. Co.*, 154 N. C. 209, 70 S. E. 291, holding void agreement to submit to arbitration both liability and loss, not consummated by award.

Arbitration as Condition Precedent to action on insurance policy. See note, 15 L. R. A. (n. s.) 1069.

Agreements to Arbitrate. See note, 15 L. R. A. 143.

66 Cal. 262-264, 5 Pac. 222, EX PARTE FINLEY.

To Constitute Forgery, the forged instrument must be one which, if genuine, may injure another.

Approved in *People v. Ryana*, 8 Cal. App. 338, 96 Pac. 921, holding proof of loss to fire insurance company subject of forgery; *People v. Johnson*, 7 Cal. App. 129, 93 Pac. 1043, holding receipt subject of forgery, and it need not appear from information how it could defraud party by whom it purported to be issued; *People v. McPherson*, 6 Cal. App. 269, 91 Pac. 1099, upholding information for forgery; *People v. Munroe (Cal.)*, 33 Pac. 777, holding assignment of salary of public school teacher not subject to forgery, since such assignment is void.

Forgery of Worthless Instruments. See note, 24 L. R. A. 39.

Information for Forgery need not contain express allegation of existence of every fact, existence of which is assumed in the forgery.

Distinguished in *People v. Lanterman*, 9 Cal. App. 680, 100 Pac. 722, holding indictment against coroner for presenting false and fraudulent claim against county insufficient as to allegation of authority of supervisors to allow claim.

66 Cal. 264-266, 5 Pac. 238, SCHELL v. SIMON.

Where Land is Rented on shares, purchaser at execution sale of landlord's interest in growing crops becomes tenant in common therein with lessee.

Cited in *Garber v. Gianella (Cal.)*, 30 Pac. 842, arguendo.

Crops as Personalty for purpose of levy and sale. See note, 23 L. R. A. 261.

66 Cal. 266-270, 5 Pac. 229, 610, POLACK v. GURNER.

Removal from Possession of plaintiff in action to quiet title during pendency of suit does not change action to one for restitution of property.

Approved in *Bryan v. Tormey (Cal.)*, 21 Pac. 726, holding plaintiff out of possession had action to quiet title.

Miscellaneous.—Cited in *Chapman v. Polack (Cal.)*, 5 Pac. 232, companion case.

66 Cal. 271-278, 5 Pac. 240, PEOPLE v. GRAY.

Where Jurisdiction of Person is obtained by extradition, it is sufficient if offense charged upon extradition is same as that for which accused is put on trial.

Approved in *Ex parte Fischl*, 51 Tex. Cr. 64, 100 S. W. 774, holding where indictment was quashed in demanding state, accused was not entitled to reasonable time to leave state before arrest on indictment charging same facts.

Effect upon Prisoner's Rights of necessity of amendment of charge upon which extradited. See note, 25 L. R. A. 595.

In Prosecution for Embezzlement of public money, evidence of similar acts of defendants is admissible to prove guilty knowledge and criminal intent.

Approved in *People v. Connelly* (Cal.), 38 Pac. 42, *People v. Hatch*, 13 Cal. App. 536, 109 Pac. 1103, and *People v. Robertson*, 6 Cal. App. 519, 92 Pac. 500, all following rule; *People v. Whalen*, 154 Cal. 476, 98 Pac. 197, holding in action for obtaining money under false pretenses, evidence of similar attempted transactions is admissible; *People v. Harben*, 5 Cal. App. 33, 91 Pac. 400, admitting evidence of similar acts in action for passing fictitious bill of nonexistent bank; *State v. Ames*, 90 Minn. 193, 96 N. W. 333, upholding admission of evidence of other similar crimes of defendant.

Admissibility of Evidence of other crimes. See notes, 105 Am. St. Rep. 983; 62 L. R. A. 265.

Moneys Collected by Officer of state for use and benefit of state belong to state.

Approved in *People v. Robertson*, 6 Cal. App. 517, 92 Pac. 499, holding money irregularly received by deputy assessor in payment of taxes to be property of state so as to be subject of embezzlement.

Embezzlement. See note, 87 Am. St. Rep. 37, 47.

Failure to Request Court to instruct that the effect of certain evidence, admitted generally, be limited, waives right to such instruction.

Reaffirmed in *State v. Greene*, 33 Utah, 499, 94 Pac. 988.

66 Cal. 278-281, 5 Pac. 261, PEOPLE v. MARTINEZ.

Admissibility, on Trial for Murder, of testimony of accused at coroner's inquest. See note, 70 L. R. A. 34.

66 Cal. 281-287, 5 Pac. 353, SAVINGS & LOAN SOCIETY v. DEERING.

Where Trust Deed Provided for sale on default and deed given on such sale recites performance of conditions of sale, in action of ejectment by purchaser evidence dehors the deed is not necessary to title and right of possession.

Approved in *Mathews v. Nefsy*, 13 Wyo. 471, 110 Am. St. Rep. 1020, 81 Pac. 306, holding upon collateral attack recitals in sheriff's deed as to foreclosure sale presumed correct, and other evidence than deed not necessary to show title in grantee named therein.

66 Cal. 288-291, 5 Pac. 350, PEOPLE ex rel BELTNER v. RIVERSIDE.

Right to Enjoy and Exercise franchise of municipal corporation depends on compliance with provisions of statute authorizing organization.

Approved in *State v. Scales*, 21 Okl. 693, 97 Pac. 588, freeholders elected under Constitution, article XVIII, section 3, cannot adopt ordinance for nomination and election of officers provided for in charter framed by them unless voters ratify their acts.

66 Cal. 291-292, 5 Pac. 352, HELM v. CHAPMAN.

Section 1183, Code of Civil Procedure, gives lien on whole of mining claim for work, labor or materials furnished for structure on or in mining claim.

Approved in *Rakowski v. Wagoner*, 24 Okl. 285, 103 Pac. 633, upholding statute providing for county court to effect legislative intention.

Extent of Land to which mechanic's lien will attach. See note, 26 L. R. A. (n. s.) 835.

66 Cal. 292-293, 5 Pac. 353, LEVY v. SUPERIOR COURT.

Where Superior Court Erroneously dismisses appeal from justice's court for supposed insufficiency in undertaking, remedy is by certiorari to annul order of dismissal, before proceeding by mandamus to compel hearing of appeal.

Approved in *Richmond v. Houser* (Cal. App.), 96 Pac. 909, holding certiorari lies to review order of superior court remanding action in forcible detainer to justice's court; dissenting opinion in *People v. Latimer*, 160 Cal. 722, 117 Pac. 1054, majority refusing to review superior court order dissolving attachment against bank officer on refusal to give testimony before board of equalization, where board had then finally adjourned.

Distinguished in *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 479, 481, 114 Pac. 980, 981, holding mandamus and not certiorari was remedy to compel superior court to hear appeal from justice's court, hearing of which was refused for supposed lack of jurisdiction.

66 Cal. 300-302, 5 Pac. 486, RIVERSIDE LAND ETC. CO. v. JANSEN.

Title may be Quieted as against mere oral claim of easement.

Disapproved in *Allott v. American Strawboard Co.*, 237 Ill. 61, 86 N. E. 688, bill to quiet title only lies where cloud on title rests in written instruments or records.

66 Cal. 302-305, 5 Pac. 482, McKUNE v. CALIFORNIA SOUTHERN R. R. CO.

Railroad is Liable for Injury to employee caused by negligence of train despatcher.

Approved in *Wallace v. Boston & Maine R. R. Co.*, 72 N. H. 517, 57 Atl. 919, following rule.

Train Despatcher and Telegraph Operator as fellow-servants of trainmen. See note, 25 L. R. A. 389.

Vice-principalship as Determined with reference to character of act causing injury. See note, 54 L. R. A. 38, 92.

Duties of Master and Servant as to rules promulgated for safe conduct of business. See note, 43 L. R. A. 347.

66 Cal. 306-309, 5 Pac. 363, AMANN v. LOWELL.

Instruction Having No Reference to evidence is calculated to mislead, and is erroneous.

Approved in *Territory v. Hancock*, 4 Ariz. 156, 35 Pac. 1061, holding it error to instruct that jury may find defendant guilty of aggravated assault if he made assault with deadly weapon.

Right in Action by Undisclosed Principal to defenses available in action by agent. See note, 28 L. R. A. (n. s.) 228.

66 Cal. 309-310, 5 Pac. 516, CLEGHORN v. CLEGHORN.

Disqualification of Judge by prior connection with case. See note, 25 L. R. A. 115.

66 Cal. 311-316, 5 Pac. 490, EUREKA LAKE ETC. CANAL CO. v. SUPERIOR COURT.

Who may be Served With Process in suit against foreign corporation. See note, 23 L. R. A. 495.

Right of One Charged With Contempt to notice and hearing. See note, 10 L. R. A. (n. s.) 1101.

Pollution of Stream by Mining. See note, 24 L. R. A. 65.

Miscellaneous.—Cited in Eureka Lake & Yuba Canal Co. v. Superior Court (Cal.), 5 Pac. 493, companion case.

66 Cal. 317-330, 5 Pac. 495, DONOHUE v. MARIPOSA LAND ETC. CO.

Creation of Trusts in land by parol. See notes, 115 Am. St. Rep. 790; 5 Cal. Prob. 260.

66 Cal. 330-332, 5 Pac. 507, ESTATE OF NEISTRATH.

Property Specifically Devised cannot be charged with payment of general legacies.

Reaffirmed in Estate of Painter, 150 Cal. 504, 89 Pac. 100.

Distinguished in Estate of Ratto, 149 Cal. 554, 86 Pac. 1108, holding general unconditional legacy must be paid out of real property devised to residuary legatees when personal property was exhausted by expenses of administration and there was no property undevise by will.

66 Cal. 332-336, 5 Pac. 488, HENDERSON v. GRAMMAR.

Foreclosure of Mortgage against owner of swamp land certificate passes to purchaser all interest of mortgagor under his contract with state, and extinguishes junior unrecorded mortgage.

Approved in Wemple v. Yosemite Gold Min. Co., 4 Cal. App. 86, 87 Pac. 283, holding foreclosure of senior mortgage without joinder of junior mortgagee does not affect rights of junior mortgagee or his assignee.

Right of Junior Mortgagee to redeem from sale upon foreclosure of senior mortgage becomes barred by limitations when not kept alive by action on notes in lifetime of mortgagee.

Approved in Sanford v. Bergin, 156 Cal. 51, 103 Pac. 336, holding where mortgage debt was contracted orally out of state, it is barred in two years from date of deed unless time for action was legally extended to another date.

66 Cal. 339-340, 5 Pac. 364, FITCH v. DE YOUNG.

Publication Falsely Charging Publisher of another paper with selling support of his paper to certain corporations for money is libelous.

Approved in Livingston v. Page, 74 Vt. 362, 93 Am. St. Rep. 901, 52 Atl. 966, 59 L. R. A. 336, contract to use influence of newspaper to secure nomination for public office is void.

Contracts With Newspapers void as against public policy. See note, 93 Am. St. Rep. 906.

66 Cal. 341-343, 5 Pac. 512, MILLER v. VAN LOBEN SELS.

State Court has No Jurisdiction of action at law against consul of foreign government.

Approved in *De Leon v. Walters*, 163 Ala. 502, 50 So. 935, holding since act of 1875, state courts have concurrent jurisdiction with federal courts over actions against foreign consuls.

Exemption and Privileges of Consuls. See note, 45 L. R. A. 584.

66 Cal. 343-344, 5 Pac. 507, **MARYSVILLE v. NORTH BLOOMFIELD ETC. MIN. CO.**

Action to Abate Nuisance causing injury to real property must be tried in county where injured property is situated.

Approved in *Las Animas etc. Land Co. v. Fatjo*, 9 Cal. App. 321, 99 Pac. 395, holding action for negligent destruction of buildings by fire must be tried in county where buildings were situated.

66 Cal. 344-348, 5 Pac. 509, **PEOPLE v. TOMLINSON.**

Information for Embezzlement following substantially language of statute is sufficient.

Reaffirmed in *State v. Brown*, 38 Mont. 313, 99 Pac. 956.

Where Instructions as a Whole correctly state law, objection to particular instruction as being too general will not warrant reversal.

Approved in *People v. Besold*, 154 Cal. 370, 97 Pac. 874, holding instructions in murder case, taken as a whole, correctly stated law; *People v. Garnett*, 9 Cal. App. 205, 98 Pac. 252, holding vague and inaccurate instruction in regard to accidental killing while engaged in unlawful act did not prejudice defendant where other instructions as to degrees of murder were full and complete.

66 Cal. 351-353, 5 Pac. 615, **CAREAGA v. FERNOLD.**

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 896.

66 Cal. 353-356, 5 Pac. 613, **KRUSE v. CHESTER.**

Limitations of Evidence as to handwriting. See note, 64 L. R. A. 312.

66 Cal. 356-358, 5 Pac. 610, **CALLENDER v. PATTERSON.**

Property Owners Who Took Contract to improve street adjacent to their lots, and assigned interest in contract after work was done, and assessment made, are estopped to deny validity of contract and assessment in action by assignee to enforce same.

Approved in *Seng v. Payne*, 87 Neb. 817, 128 N. W. 627, property owner who joined in petition for location of ditch over his land and took contract for same is estopped, after completing contract and collection of assessment on adjacent lands, to deny validity of assessment on his own.

66 Cal. 361-365, 5 Pac. 617, **MCCORMICK v. SPRINGFIELD FIRE ETC. INS. CO.**

Stockholders are not Owners of property of corporation so as to aver it to be theirs in application for insurance.

Approved in *Watson v. Bonfils*, 116 Fed. 168, 53 C. C. A. 535, holding sole stockholder of corporation could not give valid deed to its property.

To Constitute Estoppel by Acts of insurer after fire, such acts must operate as fraud on insured who has altered his position to his prejudice in reliance upon them.

Approved in *Goorberg v. Western Assurance Co.*, 150 Cal. 519, 119 Am. St. Rep. 246, 89 Pac. 133, 10 L. R. A. (n. s.) 876, holding insurer who discovered after fire that insured held goods only as pledge and thereafter retained premium was not estopped to defend on ground of title.

66 Cal. 365-368, 5 Pac. 620, RICHARDS v. WETMORE.

Rights of Children in homestead of parent. See note, 56 L. R. A. 51.

66 Cal. 366-368, 5 Pac. 621, PEOPLE v. PAPE.

Conviction for Assault with deadly weapon may be had under information charging assault to murder.

Reaffirmed in *Territory of Arizona v. West*, 4 Ariz. 217, 36 Pac. 209.

Assault to Kill. See note, 98 Am. St. Rep. 360.

What Weapons may be Considered deadly under law of homicide and assault. See note, 21 L. R. A. (n. s.) 507.

66 Cal. 368-369, 5 Pac. 622, HAGERTY v. POWERS.

Parent's Liability for Torts of Minor. See note, 10 L. R. A. (n. s.) 944.

66 Cal. 371-374, 5 Pac. 624, SAVINGS & LOAN SOCIETY v. MEEKS.

Mortgage of Separate Real Property of married woman may be reformed so as to correct clerical mistakes in description, when such mistakes are confessed by mortgagor.

Approved in *Herring v. Filts*, 43 Fla. 64, 99 Am. St. Rep. 108, 30 So. 807, following rule; *Silliman v. Taylor*, 35 Tex. Civ. App. 493, 80 S. W. 653, correcting mistake in mortgage executed by husband and wife on homestead.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 875.

66 Cal. 379-383, 5 Pac. 683, HALL v. SHOTWELL.

Where Deed Conveys Certain number of acres, and other terms of description are uncertain, acreage is essential part of description.

Reaffirmed in *Currier v. Jones*, 121 Iowa, 164, 96 N. W. 767.

66 Cal. 383-386, 5 Pac. 672, WHITE v. CONWAY.

In Action for Accounting and dissolution of partnership, decree ordering sale of property and payment of debt to one partner, and personal judgment against others for balance, if any, is not final until such balance has been ascertained.

Approved in *Doudell v. Shoo*, 159 Cal. 453, 114 Pac. 581, holding decree determining fact of partnership and existence of mutual and undetermined claim not final.

66 Cal. 387-388, 5 Pac. 675, ALEXANDER v. MUNICIPAL COURT OF APPEALS.

Error in Exercise of Court's Jurisdiction cannot be reviewed on certiorari.

Distinguished in *Moore v. Rennick*, 1 Alaska, 174, holding writ lies to review ruling of justice's court in case where no appeal lay.

66 Cal. 394-397, 5 Pac. 677, PEOPLE v. BEAM.

Information Charging Assault with deadly weapon with intent to commit murder does not charge two offenses.

Reaffirmed in *People v. Izlar*, 8 Cal. App. 604, 97 Pac. 686.

Refusal to Grant Continuance in criminal case after commencement of trial for absence of material witness is not error if no cause shown why application for continuance not made sooner.

Reaffirmed in *People v. Barnnovich*, 16 Cal. App. 431, 117 Pac. 574.

66 Cal. 398-400, 5 Pac. 688, SMITH v. WOODVILLE ETC. MIN. CO.

Admissibility in Evidence against third person of books, reports and the like other than books of account. See note, 125 Am. St. Rep. 858.

66 Cal. 400-401, 5 Pac. 686, PEOPLE v. TREADWELL.

Appeal from Judgment of justice's court convicting attorney of embezzlement operates as suspension of judgment, and bars disbarment proceedings based thereon pending appeal.

Approved in *State v. Sale*, 188 Mo. 501, 87 S. W. 969, appeal from conviction of attorney for indictable offense held to prevent disbarment on production of record pending appeal.

Distinguished in *McKannay v. Horton*, 151 Cal. 720, 121 Am. St. Rep. 146, 91 Pac. 602, 13 L. R. A. (n. s.) 661, holding operation of judgment convicting mayor of felony, so far as creating vacancy in office, was not suspended by perfecting appeal.

Disbarment for Criminal Acts prior to conviction therefor. See note, 114 Am. St. Rep. 841.

66 Cal. 403-415, 5 Pac. 796, 903, CUMMINGS v. CONLAN.

In Absence of Findings on material issues decision is against law.

Approved in *Hamilton v. Murray*, 29 Mont. 86, 74 Pac. 76, and *Brown v. Macey*, 13 Idaho, 455, 90 Pac. 339, 341, both following rule.

66 Cal. 416-423, 5 Pac. 910, BAILEY v. RICHARDSON.

Where Lessee, After Subletting, assigns to lessor, lessor comes in as assignee of reversion.

Approved in *Mitchell v. Young*, 80 Ark. 444, 117 Am. St. Rep. 89, 97 S. W. 454, 7 L. R. A. (n. s.) 221, interest of sublessee held to continue after surrender by lessee to lessor.

Liability of Assignee of leasehold for rent. See note, 14 L. R. A. 154.

Covenant of Lessor to Pay for repairs or improvements as one running with land. See note, 4 L. R. A. (n. s.) 466.

66 Cal. 423-431, 56 Am. Rep. 102, 6 Pac. 1, PEOPLE v. RAE.

Larceny by Trick and Device and obtaining property by false pretenses distinguished.

Approved in *State v. Loser*, 132 Iowa, 427, 104 N. W. 340, holding where indictment charged conspiracy to cheat by false pretenses, charge considered and held to describe crime of larceny; *State v. Germain*, 54 Or. 399, 103 Pac. 523, to sustain conviction for false pretenses, prosecutor must have been induced to part with title of property; *State v. Edwards*, 51 W. Va. 227, 41 S. E. 431, 59 L. R. A. 465, holding facts of case show larceny by trick and device.

Larceny. See note, 88 Am. St. Rep. 569, 572, 578.

66 Cal. 432-441, 6 Pac. 7, ESTATE OF APPLE.

So Far as Creditors of Decedent are concerned, each state will deal with his property within its jurisdiction according to its own laws.

Approved in *Richards v. Blaisdell*, 12 Cal. App. 111, 106 Pac. 737, rejecting claim against local administrator allowed by administrator of foreign state.

Conflict of Laws as to Wills. See note, 2 L. R. A. (n. s.) 468.

Where Civil Code is Silent, common-law rule governs.

Approved in *Estate of Callen*, 152 Cal. 770, 93 Pac. 1012, holding section 2176, Political Code, provides for responsibility for maintenance of person in state hospital.

Personal Property in California of testator dying in Europe, but domiciled in Nevada, should be distributed according to law of Nevada.

Approved in *Estate of Bergin*, 4 Cal. Prob. 471, following rule; *Estate of Dwyer*, 159 Cal. 683, 115 Pac. 243, where testatrix residing in Louisiana had contracted to sell property in California, proceeds collected after her death were distributable under law of Louisiana.

Whether Probate Court will Order delivery of property or its proceeds to foreign administrator or itself decree distribution is matter of judicial discretion.

Approved in *Estate of Skerrett*, 2 Cal. Prob. 555, following rule.

Legacy of Particular Thing, specified and distinguished from all others of same kind belonging to testator, is specific.

Reaffirmed in *In re Campbell*, 27 Utah, 366, 75 Pac. 853.

Annuity is Bequest of certain specified sums periodically.

Approved in *Nehls v. Sauer*, 119 Iowa, 441, 93 N. W. 346, holding where grantee in deed covenanted to pay grantor two hundred dollars a year during his life, such to be lien on land, payment was annuity, and not rent.

Conflict of Laws as to rights and obligations of married women. See note, 85 Am. St. Rep. 563.

66 Cal. 446-447, 6 Pac. 84, PERINE v. TEAGUE.

Notice to Quit is not Essential where by its terms written lease expires.

Approved in *Craig v. Gray*, 1 Cal. App. 599, 82 Pac. 700, holding complaint in unlawful detainer after expiration of written lease need not allege notice to quit or to terminate lease.

66 Cal. 448-451, 6 Pac. 78, EX PARTE MOUNT.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 267, 273.

Limit of Amount of License Fees. See note, 30 L. R. A. 422.

License Fee for Use of streets by vehicles. See note, 36 L. R. A. 415.

Grading License Tax According to volume of business, or capital employed. See note, 17 L. R. A. (n. s.) 898.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

66 Cal. 451-455, 6 Pac. 86, BEAN v. PIONEER MINING CO.

Note Signed in Name of corporation, by its agent, without seal attached, held to be note of company, consideration having passed to it.

Approved in *Judell v. Goldfield Realty Co.*, 32 Nev. 360, 108 Pac. 458, where corporation took over business of another and held out its secretary as having authority to settle claims of creditors of such other, and corporation accepted benefit of settlement so made, creditor could enforce note executed in name of corporation by secretary in payment of his claim; *Aungst v. Creque*, 72 Ohio St. 556, 74 N. E. 1074, note in similar form held to be note of corporation.

Personal Liability of Officers on note made for corporation. See note, 19 L. R. A. 676.

Liability of Principal on negotiable paper executed by agent. See note, 21 L. R. A. (n. s.) 1085.

Extrinsic Evidence to Show who is liable as maker of note. See note, 20 L. R. A. 706.

66 Cal. 457-459, 6 Pac. 92, JONES v. WADDY.

Statement in Declaration of homestead that declarant is head of family is sufficient.

Disapproved in *Mellen v. McMannis*, 9 Idaho, 424, 75 Pac. 99, holding declarant must state probative facts making him head of family.

66 Cal. 462-468, 6 Pac. 94, CROSS v. SACRAMENTO SAVINGS BANK.

Evidence to Impeach Account stated is inadmissible in absence of averment of fraud or mistake.

Approved in *Johnson v. Gallatin-Valley Mill Co.*, 38 Mont. 89, 98 Pac. 885, holding fraud or mistake not established in suit to reopen account stated.

Effect of Balances Struck in pass-books. See note, 134 Am. St. Rep. 1024.

66 Cal. 468-469, 6 Pac. 99, PEOPLE v. MILLER.

Person Acting Involuntarily, as an accomplice. See note, 98 Am. St. Rep. 160.

Coercion as Defense to Crime. See notes, 106 Am. St. Rep. 722; 19 L. R. A. 358.

Who is an Accomplice. See note, 138 Am. St. Rep. 276.

66 Cal. 469-472, 6 Pac. 100, BIAGI v. HOWES.

Notice of Decision must be in writing to set time running against service of notice of intention to move for new trial.

Distinguished in *Estate of Keating*, 158 Cal. 114, 110 Pac. 111, discussing appeal for failure to file transcript within ten days after entry of order, though written notice of entry was not given.

66 Cal. 473-475, 6 Pac. 129, TAPE v. HURLEY.

Where Statute is Plain and unambiguous, whether it be expressed in general or limited terms, no room is left for construction.

Approved in *Estate of Spinetti*, 3 Cof. Prob. 308, grandchild whose mother is living is not entitled to allowance from grandfather's estate.

66 Cal. 476-478, 6 Pac. 130, DOOLAN v. McCAULEY.

Right to Rents on Lease of intestate's property. See note, 40 L. R. A. 323.

Right of Tenant to Acquire Title not inconsistent with landlord's at commencement of tenancy. See note, 53 L. R. A. 941.

66 Cal. 478-480, 6 Pac. 134, MOSELEY v. HENEY.

Husband must Sue to Recover wife's earnings in absence of agreement making such her separate property.

Approved in *Reade v. de Lea*, 14 N. M. 451, 95 Pac. 133, holding valid deed of husband alone to community property.

In Absence of Agreement between spouses that proceeds of wife's labor shall be her separate property, they are community property.

Approved in *McMurray v. Bodwell*, 16 Cal. App. 582, 117 Pac. 630, holding evidence on issue as to whether there was agreement that money saved by wife from household allowance was to be her separate property, insufficient to overcome presumption that it was community property.

66 Cal. 480-484, 6 Pac. 132, CHESTER v. HILL.

Authority of Pledgee to Compromise obligations held as collateral. See note, 28 L. R. A. (n. s.) 981.

66 Cal. 484-486, 6 Pac. 135, DORLAND v. CUNNINGHAM.

Order on Motion for New Trial cannot be set aside by trial court.

Approved in *Estate of Byrne*, 3 Cal. Prob. 70, denying right to set aside order settling final account on motion.

66 Cal. 487-492, 6 Pac. 326, ESTATE OF KIDDER.

Fraud is Never to be Presumed, but must be proved by satisfactory evidence.

Approved in *Fox v. Hale etc. Silver Min. Co. (Cal.)*, 53 Pac. 38, holding fraud could not be conjectured from fact that defendants had been guilty of other independent frauds; *Painter v. Painter (Cal.)*, 36 Pac. 869, holding fraud in partnership accounts not proven.

Lost or Destroyed Wills and proceedings for their probate. See notes, 110 Am. St. Rep. 451; 2 Cal. Prob. 431.

66 Cal. 492-506, 56 Am. Rep. 109, 6 Pac. 317, REARDON v. SAN FRANCISCO.

Municipal Corporation is Liable for special consequential damages to adjoining proprietor over and above common injury to other abutters on street, resulting from construction of sewer.

Approved in *Sievers v. Root*, 10 Cal. App. 340, 101 Pac. 926, holding when official grade was once established it could not be changed without compensation for injury to abutting owner who had made valuable improvements on faith of former grade; *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 444, 82 Pac. 641, holding railroad using street under city license liable for injury to abutting owner in blocking ingress to his lot; *De Long v. Warren (Cal.)*, 36 Pac. 1009, holding damages peculiar to property of abutting owner due to filling in of street in changing to new grade recoverable of one who does the filling; *Chapman v. City of Staunton*, 246 Ill. 398, 92 N. E. 906, holding city liable for injury to property caused by raising sidewalk fourteen inches above floor level of building; *Sallden v. Little Falls*, 102 Minn. 361, 120 Am. St. Rep. 635, 113 N. W. 885, 13 L. R. A.

(n. s.) 790, holding abutting property owner entitled to compensation for damages caused by first establishment of street grade; *Dickerman v. City of Duluth*, 88 Minn. 293, 92 N. W. 1120, holding city liable for consequential damages caused by change of street grade in constructing viaduct over railroad.

Distinguished in *Johnson v. St. Louis*, 172 Fed. 34, 96 C. C. A. 617, holding damage to adjacent land owner from construction of sewer not recoverable under Missouri Constitution.

Damage to Abutting Owner by first grading and improvement of street. See note, 23 L. R. A. 660.

Where Compensation for Special Injury to private property by reason of street improvement has not been made in condemnation proceedings, it may be recovered in action at law.

Approved in *Sievers v. Root*, 10 Cal. App. 340, 101 Pac. 926, and *Williams v. Los Angeles Ry. Co.*, 150 Cal. 597, 89 Pac. 332, both holding damages for special injuries resulting from use of street by railway could be recovered in action at law.

66 Cal. 509-512, 56 Am. Rep. 117, 6 Pac. 329, **BENNETT v. TRUEBODY.**

Employer is not Responsible for negligence of independent contractors employed by him.

Approved in *Johnson v. Helbing*, 6 Cal. App. 429, 92 Pac. 362, following rule; *Midgette v. Branning Mfg. Co.*, 150 N. C. 343, 64 S. E. 9, lessee of mill with contract to operate it for owners, held not to be independent contractor; *McHarge v. Newcomer*, 117 Tenn. 602, 100 S. W. 701, 9 L. R. A. (n. s.) 298, holding awning maker putting up awning on store to be independent contractor, and owner of store not liable for injury to pedestrian caused by fall of awning.

Who are Independent Contractors. See note, 65 L. R. A. 456, 465, 506.

General Rules as to Absence of liability of employer for torts of independent contractor. See note, 65 L. R. A. 649.

66 Cal. 512-514, 6 Pac. 331, **RANDALL v. HUNTER.**

Where Partnership Agreement provides existing individual debt shall be assumed by firm, either partner may execute note of firm to secure such debt.

Approved in *Kennedy & Shaw Lumber Co. v. Taylor (Cal.)*, 31 Pac. 1123, holding partnership assumed payment for material sold and delivered to contractor before agreement of partnership was made, and afterward used in the work.

Assumption by Partnership of partners' individual debts. See note, 29 L. R. A. 694.

66 Cal. 514-517, 6 Pac. 384, **TRISCONY v. BRANDENSTEIN.**

Liability of Owner for Trespass of cattle. See note, 22 L. R. A. 56.

66 Cal. 517-520, 6 Pac. 386, **HEALY v. O'BRIEN.**

Deed Absolute in Form intended as security for money is mortgage only.

Approved in *Halloran v. Holmes*, 13 N. D. 420, 101 N. W. 314, following rule; *Murdock v. Clarke (Cal.)*, 24 Pac. 274, holding deed to

secure payment to be mortgage although grantee was put in possession under agreement for accounting for rents and profits.

66 Cal. 520-522, 6 Pac. 388, COONEY v. FURLONG.

Failure to Prepare and Serve statement is waiver of right to move for new trial.

Approved in *Packer v. Doray* (Cal.), 34 Pac. 629, where notice of motion for new trial did not contain required specification of errors, it was radically defective and could not be amended after time for filing had expired.

Distinguished in *Sherman v. Southern Pac. Co.*, 31 Nev. 287, 102 Pac. 257, holding court could extend time to move for new trial upon excusable default of counsel to move within stipulated time.

66 Cal. 524-525, 6 Pac. 389, PARDEE v. GRAY.

Nature and Elements of unlawful detainer. See note, 120 Am. St. Rep. 55.

66 Cal. 525-530, 6 Pac. 381, SPOTTISWOOD v. WEIR.

Statement on Motion for New Trial and bill of exceptions may be incorporated in one paper.

Approved in *Martin v. Southern Pacific Co.*, 150 Cal. 130, 88 Pac. 703, following rule.

Comparison of Handwriting. See note, 62 L. R. A. 836.

Competency of Handwritings as standards for comparison. See note, 63 L. R. A. 438.

66 Cal. 530-533, 6 Pac. 390, NALLY v. McDONALD.

Limitations Do not Run against claim presented to administrator until disallowed.

Approved in *Morgan's Estate*, 46 Or. 238, 77 Pac. 610, holding statute tolled until owner of claim presented received notice of disallowance.

Authority of One of several executors or administrators. See notes, 127 Am. St. Rep. 386; 5 Cof. Prob. 382.

66 Cal. 534-536, 6 Pac. 394, PEOPLE v. FAGAN.

Possession of Property recently stolen does not justify conviction for larceny, but is a circumstance to be considered in determining guilt.

Approved in *People v. Horton*, 7 Cal. App. 36, 93 Pac. 382, criticising instruction in regard to possession of stolen property but holding that in view of the evidence it was not prejudicial.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 495.

66 Cal. 536-541, 6 Pac. 417, MULDOON v. LYNCH.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 54.

66 Cal. 541-542, 6 Pac. 420, STANDLEY v. STEPHENS.

One Entering into Possession of leased land by consent of lessee cannot acquire right adverse to landlord without first surrendering possession.

Approved in *Millett v. Lagomarsino* (Cal.), 38 Pac. 309, holding possession under owner's title was not adverse although occupant had a tax title to the land.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 106.

Estoppel of Subtenant to Question original landlord's title. See note, 7 L. R. A. (n. s.) 931.

66 Cal. 542-544, 6 Pac. 451, **GOLDSTEIN v. NUNAN.**

Employment by Vendee of one of vendors after sale of personal property is circumstance tending to show want of actual change of possession.

Approved in *Bucher v. Allen*, 11 Cal. App. 651, 105 Pac. 943, holding question of actual change of possession of personal property one of fact for court.

66 Cal. 546-548, 6 Pac. 452, **WOOD v. McDONALD.**

Previous Demand is Unnecessary in action of claim and delivery when answer admits such demand would have been unavailing.

Approved in *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 233, 90 Pac. 41, holding demand unnecessary in suit for accounting.

66 Cal. 551-572, 5 Pac. 263, 6 Pac. 481, **PEOPLE v. CENTER.**

In Action to Quiet Title to maintain defense on ground of adverse claim, defendant must set up such claim, and owner in possession may require nature and character of adverse interest to be exposed and determined.

Approved in *Woody v. Hinds*, 30 Mont. 192, 76 Pac. 2, holding in action to quiet title to mining claim under section 2326, United States Revised Statutes, purpose of proceeding is to determine adverse claim, and duty is upon adverse claimant to make discovery of his right.

Distinguished in *Hakalan Plantation Co. v. Kahuena*, 14 Haw. 194, holding general denial in quiet title suit does not operate as disclaimer.

Failure to Find on Material Issue does not warrant reversal if omitted finding must have been adverse to appellant.

Approved in *Gerth v. Gerth*, 7 Cal. App. 737, 95 Pac. 905, *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 571, 86 Pac. 824, and *Frantz v. Harper* (Cal.), 62 Pac. 603, all following rule; *Craig v. Gray*, 1 Cal. App. 601, 82 Pac. 701, holding failure to find on issue was immaterial when finding could not have changed judgment in any event.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 627.

Equitable Relief Against Forfeiture of estate. See note, 69 L. R. A. 836.

Effect of Legal Remedy upon equitable jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 73, 74.

66 Cal. 572-573, 6 Pac. 492, 493, **POMEROY v. GREGORY.**

Where Allegations of Complaint are not denied, findings thereon are immaterial.

Reaffirmed in *Pratt v. Welcome*, 6 Cal. App. 478, 92 Pac. 501.

Creditor Who has Appeared in insolvency proceedings cannot object to discharge on ground of defects in publication of notice to creditors.

Approved in *In re Yoell*, 131 Cal. 582, 63 Pac. 913, following rule.

66 Cal. 575-576, 6 Pac. 491, FULTON v. ONESTI.

In Malicious Prosecution, where facts are undisputed, court should instruct jury that there was or was not probable cause.

Approved in *McDonald v. Atlantic etc. R. R. Co.*, 3 Ariz. 99, 21 Pac. 339, holding undisputed evidence showed probable cause as matter of law.

66 Cal. 572-579, 6 Pac. 689, MORGANSTERN v. THRIFT.

Cotenants in Mines. See note, 91 Am. St. Rep. 867.

66 Cal. 579-593, 56 Am. Rep. 119, 6 Pac. 637, HART v. WESTERN UNION TEL. CO.

Risks of Negligence Assumed by contract with carrier as including gross negligence. See note, 1 L. R. A. (n. s.) 675.

Validity of Limitation of liability for unrepeatd telegrams. See note, 11 L. R. A. (n. s.) 561, 564, 565.

66 Cal. 594-596, 6 Pac. 698, PEOPLE v. BARNES.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 905.

66 Cal. 597-602, 56 Am. Rep. 126, 6 Pac. 691, PEOPLE v. MAYES.

Conviction for Rape may be had upon uncorroborated testimony of prosecutrix.

Approved in *People v. Ah Lung*, 2 Cal. App. 280, 83 Pac. 297, upholding conviction for rape when corroborating evidence was slight.

Upon Trial for Rape, prosecutrix may testify that she complained of the outrage.

Distinguished in *People v. Gonzalez*, 6 Cal. App. 259, 91 Pac. 1014, holding complaint six weeks after act is inadmissible; *State v. Fowler*, 13 Idaho, 322, 89 Pac. 758, and *People v. Wilmot* (Cal.), 72 Pac. 839, both upholding admission of evidence of fact of complaint of prosecutrix but not details.

66 Cal. 602-606, 6 Pac. 695, PEOPLE v. O'BRIEN.

Defendant Who Testifies in his own behalf cannot be cross-examined on any matter not included in examination in chief.

Approved in *People v. Smith*, 9 Cal. App. 648, 99 Pac. 1113, and *People v. Gallagher* (Cal.), 33 Pac. 893, both following rule.

Cross-examination of Defendant in criminal cases. See note, 15 L. R. A. 669.

66 Cal. 606-632, 6 Pac. 748, McLANE v. PLACERVILLE ETO. R. R. CO.

Mortgage may Provide that in default trustees shall take possession and manage property prior to foreclosure.

Distinguished in *Union Trust Co. v. General Electric Co.*, 152 Mich. 577, 116 N. W. 383, holding where mortgage to secure bonds provided trustee might, on default, at request of one-half bondholders, apply for receiver and foreclosure, such receiver was not matter of right but contingent upon mismanagement.

Expenses of Trustee and Receiver reasonably incurred in discharge of trust should be allowed.

Approved in *Hickey v. Parrot Silver & Copper Co.*, 32 Mont. 155, 108 Am. St. Rep. 510, 79 Pac. 701, holding compensation of receiver determined by responsibility demanded and extent and nature of property.

Priority of Claims Against Property in hands of receiver over recorded liens. See note, 2 L. R. A. (n. s.) 1043.

66 Cal. 632-635, 6 Pac. 734, HATCH v. STONEMAN.

Time for Submission of constitutional amendment to people must be fixed by act of legislature, approved by governor.

Distinguished in *Warfield v. Vandiver*, 101 Md. 118, 60 Atl. 542, bill proposing constitutional amendment need not be submitted to governor.

Mandamus to Governor. See note, 6 L. R. A. (n. s.) 72.

66 Cal. 636-642, 6 Pac. 737, SCHROEDER v. WITTRAM.

Test of Jurisdiction is whether plaintiff's pleadings show prima facie that court can properly entertain suit.

Approved in *Wilson v. Atlanta etc. Ry. Co.*, 115 Ga. 181, 41 S. E. 704, plea in abatement based on pendency of another action which alleges court in which such action brought has jurisdiction of case under allegations of declaration therein filed is sufficient.

Jurisdiction of Justice Court over action to recover deposit made by vendee under executory contract for sale of land is not ousted by fact that title to land is incidentally called in question on trial.

Approved in *Sheppard v. Coeur D'Alene Lumber Co.*, 62 Wash. 14, 15, 112 Pac. 933, action for use and occupation is not one affecting title to land which must be brought where land is situated, though answer sets up title in defendant.

Justice Court has Jurisdiction of action to recover deposit made by vendor under executory contract for sale of land when condition of deposit fails.

Approved in *Fry v. Dunn*, 70 Kan. 337, 78 Pac. 815, holding vendee could recover deposit paid on executory contract of purchase of land when condition of contract failed.

Criticised in *Dungan v. Clark*, 159 Cal. 32, 112 Pac. 719, justice's court has no jurisdiction of action on note where failure of consideration was alleged for reason payee did not own pumping plant on land sold as consideration of note; *Legum v. Blank*, 105 Md. 133, 65 Atl. 1074, suit to recover earnest-money paid on contract for purchase of land on ground rents were subground and not original could not be brought in justice's court.

66 Cal. 642-645, 6 Pac. 744, COUNTY OF SANTA CLARA v. SOUTHERN PACIFIC R. R. CO.

Corporate Taxation and the Commerce Clause. See note, 60 L. R. A. 685.

Miscellaneous.—Cited in *County of Santa Clara v. Central Pac. R. Co.* (Cal.), 6 Pac. 745, companion case.

66 Cal. 654-658, 6 Pac. 741, PEOPLE v. HAMMOND.

Vacancy cannot Exist in Office so long as incumbent discharges duties and successor is not regularly elected.

Approved in *State v. Acton*, 31 Mont. 42, 77 Pac. 301, holding office of school superintendent did not become vacant upon tie vote, but incumbent held over.

66 Cal. 658-661, 6 Pac. 746, DAVIS v. PORTER.

Interest cannot be Collected on unpaid interest on city bonds.

Approved in *Hewel v. Hugin*, 3 Cal. App. 255, 84 Pac. 1005, 1007, applying rule to irrigation bonds.

66 Cal. 662-668, 6 Pac. 859, PEOPLE v. LEE AH CHUCK.

Penal Code, Section 858 et seq., provides for preliminary examination of defendant prior to his being committed and held to answer.

Approved in *State v. McGreevey*, 17 Idaho, 461, 105 Pac. 1049, holding prosecutor cannot file information against accused until committed by magistrate and for offense only for which committed.

Witness for Prosecution in criminal case may be cross-examined to show his hostility to defendant before defendant opens defense.

Approved in *Grayson v. State*, 162 Ala. 84, 50 So. 350, following rule; *People v. Mack*, 14 Cal. App. 15, 110 Pac. 968, holding statement of witness could be shown for purpose of showing bias in favor of defendant; *Taggart v. Bosch* (Cal.), 48 Pac. 1094, holding cross-examination of plaintiff improperly excluded.

66 Cal. 668-677, 4 Pac. 1144, 6 Pac. 700, 846, PEOPLE v. CUNNINGHAM.

When Defendant in Larceny Case gave evidence of innocent possession of cattle by purchase, evidence was admissible to show steer stolen from third person was found in defendant's possession among the cattle of complaining witness.

Approved in *People v. Ruef*, 14 Cal. App. 602, 114 Pac. 65, holding admissible in prosecution for bribery evidence of other similar crimes.

Admissibility of Evidence of other crimes. See notes, 105 Am. St. Rep. 980, 981; 62 L. R. A. 299.

66 Cal. 677-682, 6 Pac. 863, RHODES v. NAGLEE.

Admissibility of Evidence of Family relations of plaintiff on question of damages in defamation action. See note, 23 L. R. A. (n. s.) 362.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 67 CALIFORNIA.

67 Cal. 1-5, 6 Pac. 867, TYRRELL v. BALDWIN.

Voluntary Appearance of Defendant in ejectment renders judgment against him unassailable on collateral attack, though his name did not appear in pleadings, nor was inserted by amendment.

Distinguished in *State v. King*, 64 W. Va. 560, 63 S. E. 474, holding persons not parties where decree was rendered not bound though they encouraged and aided in prosecution of appeal therefrom.

When Several Judgments have been rendered in actions between same parties in respect to same subject matter, judgment last in point of time is conclusive.

Approved in *Ballerino v. Superior Court*, 2 Cal. App. 760, 84 Pac. 226, holding improper judgment was properly vacated on motion of plaintiff and proper judgment entered.

Effect of Judgment Against Tenant as res judicata. See note, 122 Am. St. Rep. 28.

Effect of Judgment Entered against dead person. See note, 49 L. R. A. 160, 170.

67 Cal. 7-11, 6 Pac. 850, RHODES v. BORDEN.

Note not Specifying Place of payment, but executed in this state subsequent to insolvent law, in favor of resident of another state, is not barred by discharge of maker from debts under that law.

Approved in *Stone v. Hammell* (Cal.), 22 Pac. 206, holding rights of creditor not affected by discharge of debtor in insolvency when neither creditor nor debtor were within jurisdiction of court.

67 Cal. 11-13, 6 Pac. 873, PEOPLE v. HARTWELL.

Willful Refusal to Perform Duties of public office works forfeiture.

Approved in *People v. Davidson*, 2 Cal. App. 98, 83 Pac. 160, holding constable who voluntarily gave up office and accepted office of deputy under successor, whose election was invalid, thereby lost his right to hold over.

Distinguished in *Bergeron v. Parker*, 4 Cal. App. 174, 87 Pac. 250, holding arrest and detention of public officer for more than three months did not create vacancy.

Abandonment of Public Office. See note, 113 Am. St. Rep. 518.

67 Cal. 13-18, 56 Am. Rep. 713, 6 Pac. 869, GALLAGHER v. MARKET ST. RY. CO.

Mortuary Tables are Admissible in estimating probable duration of life to determine probable damages from injury.

Approved in *Townsend v. Briggs* (Cal.), 32 Pac. 309, following rule.

Books to Which Medical Expert refers are inadmissible in support of his testimony.

Criticised in *Lynes v. Northern Pac. Ry. Co.*, 43 Mont. 329, 117 Pac. 85, admitting tables relating to efficiency of air-brakes prepared by manufacturer as corroborating testimony of expert.

Scientific Books and Treatises as evidence. See note, 40 L. R. A. 563.

67 Cal. 21-23, 7 Pac. 1, PEOPLE v. PLATT.

It is Necessary to the Implication of a repeal that the objects of two statutes be the same. If they are not, both will stand though they refer to same subject.

Approved in *Wilburn v. Territory*, 10 N. M. 408, 62 Pac. 971, holding sections 15 and 16, chapter 47, Laws of 1884, not repealed by section 8, chapter 80, Laws of 1891, both relating to larceny.

Miscellaneous.—Cited in *People v. Berman* (Cal.), 7 Pac. 3, companion case.

67 Cal. 24-25, 7 Pac. 3, HALEY v. HALEY.

Where Cruelty Consisting in false charges of adultery was urged as ground of divorce, evidence considered and held not to corroborate charge.

Distinguished in *McDonald v. McDonald*, 155 Cal. 671, 672, 102 Pac. 930, 25 L. R. A. (n. s.) 45, holding it not essential to corroborate testimony as to mental suffering entailed by reason of defendant's acts, except by such corroboration as is affected by evidence showing nature and circumstances of the acts.

Necessity of Corroboration of party to divorce as to mental suffering, intent, or other state of mind. See note, 25 L. R. A. (n. s.) 45.

67 Cal. 27-29, 7 Pac. 4, TROJAN MINING CO. v. FIREMEN'S INS. CO.

Recovery Denied on Insurance Policy for failure to keep watchman in and upon unoccupied premises under clause of contract.

Reaffirmed in *Rankin v. Amazon Ins. Co.* (Cal.), 25 Pac. 262.

Miscellaneous.—Cited in *Trojan Min. Co. v. American etc. Ins. Co. of St. Louis* (Cal.), 7 Pac. 6, and *Trojan Min. Co. v. Citizens' Ins. Co. of Missouri* (Cal.), 7 Pac. 6, both companion cases.

67 Cal. 32-36, 7 Pac. 50, WOOD v. FRANKS.

Preference by Mortgage or Sale as assignment for creditors. See note, 37 L. R. A. 340.

67 Cal. 41-43, 7 Pac. 34, LEARNED v. CASTLE.

Miscellaneous.—Cited in *Learned v. Castle*, 78 Cal. 464, 18 Pac. 873, on another appeal.

67 Cal. 43-45, 7 Pac. 33, BRANDON v. LEDDY.

Deed Showing upon Face it applies equally to two lots is void for uncertainty.

Approved in *McCormick v. Parsons*, 195 Mo. 102, 92 S. W. 1164, holding void provision in deed of trust that one acre should be released for every six hundred dollars paid thereon, such description being insufficient to identify land to be released; *Burns v. Witter*, 56 Or. 371, 108 Pac. 130, holding memorandum of sale of real estate contained sufficient description to support suit for specific performance; dissenting opinion in *Union Lumber Co. v. Simon*, 150 Cal. 754, 89 Pac. 1081, majority upholding description in claim of lien which served through name of owner to identify the property.

Distinguished in *Hall v. Bartlett*, 158 Cal. 642, 643, 112 Pac. 177, 178, holding varying descriptions in deeds not to be inconsistent.

67 Cal. 45-53, 7 Pac. 41, CONNIFF v. SAN FRANCISCO.

City is Liable for Damages caused by cutting off natural drainage of water while raising street grade.

Approved in *Hume v. City of Des Moines*, 146 Iowa, 641, 125 N. W. 852, holding city liable for damages caused by backing up water due to filling drains while raising grade of street.

Neither Individual nor Public Corporation has right to collect surface water and precipitate it upon land of another.

Approved in *Heir v. Krull*, 160 Cal. 444, 117 Pac. 531, reaffirming rule; *Hopkins v. Clemson College*, 221 U. S. 647, 31 Sup. Ct. 658, 55 L. Ed. 896, holding state agricultural college liable for overflow of adjacent lands caused by erection of embankment; *Barron v. Memphis*, 113 Tenn. 93, 106 Am. St. Rep. 810, 80 S. W. 833, holding city liable for washing away of riparian land caused by diversion of current by erection of pier for bridge; *Lynch v. Clarke*, 25 R. I. 501, 56 Atl. 781, *arguendo*.

Distinguished in *Myers v. Nelson* (Cal.), 44 Pac. 802, holding where owners of lands adjacent to highway constructed ditches and turned abnormal flow through culvert, owner of lower lands could not dam culvert on highway to protect his lands.

Right of Land Owner to accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 715.

Swales and Ravines as Watercourses. See note, 15 L. R. A. 632.

67 Cal. 54-55, 7 Pac. 37, PEOPLE v. TIERNEY.

Prosecutrix in Rape may give evidence of fact of making complaint but not of particulars related.

Approved in *People v. Wilmot* (Cal.), 72 Pac. 839, following rule.

67 Cal. 55-56, 7 Pac. 49, PEOPLE v. MCGILVER.

Evidence of Subsequent Offense is admissible if connected with offense charged.

Approved in *People v. Ruef*, 14 Cal. App. 602, 114 Pac. 65, admitting evidence of other crimes perpetrated under common scheme; *People v. Cahill*, 11 Cal. App. 690, 106 Pac. 117, holding where accused committed two offenses near same time, evidence of offense not charged was admissible to show motive or other fact bearing on crime charged.

Evidence of Other Crimes in criminal cases. See note, 62 L. R. A. 286.

67 Cal. 57-59, 7 Pac. 47, MEHERIN v. OAKS.

Chattel Mortgage is Deemed recorded when deposited with proper officer in recorder's office, although defectively recorded by such officer.

Distinguished in *Watkins v. Wilhoit* (Cal.), 35 Pac. 650, holding notice not imparted by record of instrument until placed on book, and then it relates back to time of deposit.

Effect of Defective Recording of legal instruments on rights of third persons. See note, 96 Am. St. Rep. 403.

Effect of Failure to Execute and record chattel mortgages. See note, 137 Am. St. Rep. 493.

Miscellaneous.—Cited in *Oaks v. Scheifferly*, 74 Cal. 479, 16 Pac. 253, referring historically to principal case.

67 Cal. 59-65, 7 Pac. 123, CALIFORNIA SOUTHERN R. R. CO. v. SOUTHERN PACIFIC R. R. CO.

In Condemnation Proceedings, judgment on assessment of damages and public use is final judgment, and final order of condemnation is special order after judgment.

Approved in *Lincoln Northern Ry. Co. v. Wiswell*, 8 Cal. App. 581, 97 Pac. 537, following rule.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 304.

Value of Improvements Made by one taking property by eminent domain as element of damages. See note, 16 L. R. A. 805.

67 Cal. 65-67, 7 Pac. 135, POWERS v. CRANE.

Statutory Undertaking of Three Hundred Dollars given on appeal from judgment for foreclosure of chattel mortgage operates as stay of execution, and, if further undertaking be given to stay execution, it cannot be enforced against sureties for want of consideration.

Approved in *Estate of McGinn*, 3 Cal. Prob. 129, undertaking for double costs in case where no undertaking is required to stay execution is invalid and unenforceable.

67 Cal. 67-68, 7 Pac. 122, SOUTHERN PACIFIC R. R. CO. v. McCUSKER.

Patent Issued in Pursuance of grant of Congress to railroad may be collaterally attacked by showing lands were swamp lands and therefore excluded from patent.

Approved in *Williams v. San Pedro*, 153 Cal. 48, 94 Pac. 236, holding void certificate of purchase of tide lands in San Pedro, on ground such lands were excluded from operation of law authorizing sale; *United Land Assn. v. Knight* (Cal.), 23 Pac. 271, holding plaintiff in ejectment could attack patent under which defendant claimed on ground of lack of jurisdiction in land office to issue it.

Miscellaneous.—Cited in *Southern Pac. R. Co. v. McCusker* (Cal.), 7 Pac. 123, companion case.

67 Cal. 71-76, 7 Pac. 131, SCOTT v. SIERRA LUMBER CO.

Trustees Under Deed of Trust can sell only according to terms of power of sale therein.

Approved in *Charles Green Real Estate Co. v. St. Louis Mut. House Bldg. Co.*, 196 Mo. 371, 93 S. W. 1114, following rule.

Sales Under Powers in mortgages and trust deeds. See note, 92 Am. St. Rep. 591.

Receiver cannot be Appointed in ejectment.

Distinguished in *First Nat. Bank v. Superior Court*, 12 Cal. App. 343, 107 Pac. 326, refusing prohibition directed to levy and sale of property in hands of receiver appointed in action at law when party had acquiesced in such appointment for a year.

67 Cal. 77-79, 7 Pac. 177, **BARNETT v. CONTRA COSTA COUNTY.**

A County is not Liable for Injury caused by neglect to repair highways, streets, and bridges within its limits.

Approved in *Healdsburg etc. P. Co. v. Healdsburg*, 5 Cal. App. 561, 90 Pac. 956, holding municipal corporation not liable for torts ultra vires; *James v. Trustees of Wellston Township*, 18 Okl. 66, 90 Pac. 103, holding township not liable for injury sustained from defect in highway.

Distinguished in *Carson v. City of Genesee*, 9 Idaho, 251, 108 Am. St. Rep. 127, 74 Pac. 864, holding city liable for injury caused by defective sidewalk, in absence of statute on the subject.

What Municipal Corporations are Answerable for injuries due to defects in street and other public places. See note, 108 Am. St. Rep. 165.

Municipal Liability to Persons injured by defects in, or want of repair of streets. See note, 103 Am. St. Rep. 261.

Liabilities of Counties for Torts and negligence. See note, 39 L. R. A. 34.

67 Cal. 79-83, 7 Pac. 136, **NIDEVER v. HALL.**

Where Words are not Slanderous Per Se, extraneous facts showing their slanderous meaning must be alleged and proved.

Approved in *Greene v. Murdock*, 1 Cal. App. 139, 81 Pac. 993, where complaint alleged words spoken were understood by hearers as imputing crime, and answer admitted words, and alleged their truth, but denied other allegations, nonsuit should have been granted when plaintiff did not prove how words were understood.

67 Cal. 84-85, 7 Pac. 143, **WEIHE v. STATHAM.**

Probate Court must Settle Accounts of administrators.

Approved in *Elizalde v. Murphy*, 4 Cal. App. 118, 87 Pac. 247, holding allowance of attorney's fees, expenses, and for extraordinary services of administrator could only be adjudicated in probate court in settlement of accounts of administrator.

Allowance of Claim by Administrator and probate judge is not conclusive on heirs, and they may contest such allowance in subsequent proceedings of probate court.

Approved in *Haub v. Leggett*, 160 Cal. 494, 117 Pac. 557, allowance and approval in part only of claim against estate of decedent is no bar to action for whole claim.

67 Cal. 86-89, 7 Pac. 139, 476, **OAKLAND BANK OF SAVINGS v. APPLGARTH.**

Tender is not Invalidated by insufficiency of amount tendered if no objection be made at time.

Approved in *Bundy v. Wills*, 88 Neb. 559, 130 N. W. 275, following rule; *Herberger v. Husmann* (Cal.), 24 Pac. 1059, agreement to surrender title on disaffirmance of contract of sale by vendee is complied with by offer, in notice of disaffirmance, to surrender claims on repayment of purchase money.

67 Cal. 89-92, 7 Pac. 192, MYERS v. REINSTEIN.

Action to Enforce Resulting Trust against representatives of deceased is not founded upon claim or demand against deceased, and cestui que trust may testify as to facts occurring prior to death of trustee.

Approved in *Wadleigh v. Phelps*, 149 Cal. 640, 87 Pac. 99, admitting evidence in action to redeem mortgaged property of matters of fact occurring before death of mortgagor.

Distinguished in *Delmoe v. Long*, 35 Mont. 150, 88 Pac. 780, holding complainant in suit to enforce trust in mining claim against executors of complainant's alleged co-owner was incompetent to testify as to matters occurring before death of latter.

Miscellaneous.—Cited in *In re Williams' Estate* (Cal.), 32 Pac. 242, to point that property in hands of administrator, not legal asset of estate, may be recovered by owner without presenting claims against estate.

67 Cal. 93-94, 7 Pac. 195, KUTZ v. FLEISHER.

Contract Between Brokers whereby one agrees to purchase and sell stocks for the account of the other, to advance money for purpose and pay assessments on stocks purchased, need not be in writing.

Approved in *Macomber v. Conradt* (Cal.), 37 Pac. 902, following rule; *Wiger v. Carr*, 131 Wis. 587, 111 N. W. 658, 11 L. R. A. (n. s.) 650, upholding oral agreement to purchase corporate stock for another.

Necessity for Written Commission to purchase personal property. See note, 11 L. R. A. (n. s.) 650.

Statute of Frauds—Agreements not to be performed within a year. See note, 138 Am. St. Rep. 597.

Effect of Statute of Frauds upon parol contracts for services performable within a year, though not so intended. See note, 15 L. R. A. (n. s.) 324.

67 Cal. 102-103, 7 Pac. 186, EX PARTE WHITE.

Release of Prisoner on habeas corpus after judgment and sentence. See note, 87 Am. St. Rep. 177.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 652.

67 Cal. 103-104, 7 Pac. 178, PEOPLE v. MURRAY.

Information Charging Burglary in language of statute is sufficient.

Approved in *State v. Swan*, 31 Utah, 342, 88 Pac. 14, upholding information in language of statute.

67 Cal. 106-108, 7 Pac. 198, STEPHENSON v. HAWKINS.

Want of Consideration is not Ground for canceling written instrument in absence of showing of fraud or mistake in its execution.

Approved in *Mueller v. Renkes*, 31 Mont. 105, 77 Pac. 514, holding mere inadequacy of consideration for deed did not render it invalid.

Reinstatement of Mortgage Released or discharged by mistake. See note, 58 L. R. A. 805.

Miscellaneous.—Cited in *Merced Co. v. Hicks* (Cal.), 7 Pac. 180, 181, companion cases.

67 Cal. 108-109, 7 Pac. 179, MERCED COUNTY v. HICKS.

Appearance by Attorney at Request of one of several defendants not served with summons, although purporting to be for all, does not bind those who did not authorize such appearance.

Approved in *People v. Western Meat Co.*, 13 Cal. App. 545, 110 Pac. 340, holding corporation not bound by appearance of attorney in its behalf when not authorized.

67 Cal. 111-113, 7 Pac. 197, HORSWELL v. RUIZ.

Mere Naked Possession of mineral land gives no rights as against subsequent locator in good faith who makes valid location of property.

Approved in *Holmes v. Salamanca Gold Min. etc. Co.*, 5 Cal. App. 664, 91 Pac. 162, following rule; *Hanson v. Craig*, 170 Fed. 65, 95 C. C. A. 338, holding where two locators of association claims, which overlap, are sinking shafts at same time, first to discover mineral has priority of right; *Cook v. Klonos*, 164 Fed. 536, 90 C. C. A. 403, holding first discoverer of mineral on mining location had prior right; *Johanson v. White*, 160 Fed. 903, 88 C. C. A. 83, holding where two locators were in possession peaceably, first discoverer of gold had prior right; *Jordan v. Duke*, 4 Ariz. 282, 36 Pac. 897, holding location of mining claim necessary to give right of possession.

Discovery of Mineral in mining claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 167, 185.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 782, 846.

67 Cal. 113-115, 7 Pac. 260, PEOPLE v. LENNOX.

Where Defendant Pleads Guilty, he cannot withdraw his plea and plead not guilty after punishment has been fixed.

Reaffirmed in *People v. Dabner*, 153 Cal. 403, 95 Pac. 882.

Where Defendant Pleads Guilty of murder, court may examine witnesses to determine degree of guilt.

Approved in *State v. Johnson*, 21 Okl. 46, 1 Okl. Cr. 161, 96 Pac. 29, 22 L. R. A. (n. s.) 463, where defendant pleaded guilty after jury was impaneled, and court instructed jury to determine punishment, which was fixed at death, conviction was not according to law.

67 Cal. 115-116, 7 Pac. 200, WOOD v. SUPERIOR COURT.

When Sureties on Appeal Bond from justice's court fail to justify within five days after notice of exception, appeal must be regarded as if no undertaking had been given.

Approved in *Crowley Launch etc. Co. v. Superior Court*, 10 Cal. App. 345, 101 Pac. 936, following rule; *Hoffman v. Lewis*, 31 Utah, 191, 87 Pac. 171, dismissing appeal from justice's court for failure to file bond.

Distinguished in *W. P. Jeffries Co. v. Superior Court*, 13 Cal. App. 198, 109 Pac. 148, holding service of notice of filing of under-

taking by appellant from justice's court not necessary to give superior court jurisdiction.

67 Cal. 116-119, 7 Pac. 261, ROSBOROUGH v. BOARDMAN.

Public Office Does not Become Vacant except upon happening of one of events enumerated in section 996, Political Code.

Approved in *State v. Acton*, 31 Mont. 39, 77 Pac. 300, holding tie vote for candidates for office did not render it vacant at end of term, but former incumbent held over.

Criticised in *State v. Foster*, 38 Mont. 591, 104 Pac. 864, holding when tie vote occurred, office became vacant at end of expiring term and commission could appoint.

Miscellaneous.—Cited in *Robinson v. Boardman* (Cal.), 7 Pac. 264, companion case.

67 Cal. 120-122, 7 Pac. 264, McORARY v. BEAUDRY.

Use of All Water Appropriated for sale, rental, or distribution is declared to be public use.

Approved in *Hildreth v. Montecito Creek Water Co.* (Cal.), 70 Pac. 673, holding water appropriated by company for purpose of distribution to those who were entitled to it by appropriation to be for public use under Constitution.

Each Member in Municipality, by paying fixed rate, has right to reasonable quantity of water.

Approved in *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 89, 106 Pac. 407, holding public service water company could not confer upon consumer any preferential right to use of any part of water; *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 588, 93 Pac. 494, holding those entitled to use of water of public service company could compel service regardless of change of ownership of company; *Cozens v. North Fork Ditch Co.*, 2 Cal. App. 414, 84 Pac. 346, holding irrigation company bound to supply land within flow of its ditch upon same terms as to those who have purchased lands from company if supply is sufficient.

Distinguished in *State v. Washington Irr. Co.*, 41 Wash. 286, 111 Am. St. Rep. 1019, 83 Pac. 309, holding mandamus does not lie to compel irrigation company to comply with contract to furnish water when there was adequate remedy at law.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 40, 90.

Duties, Performance of Which may be compelled by mandamus. See note, 125 Am. St. Rep. 515.

67 Cal. 124, 7 Pac. 306, GEROLD v. BRUNSWICK & BALKE CO.

Order Granting New Trial on ground of insufficiency of evidence will not be set aside except where manifest abuse of discretion appears.

Approved in *Haas v. Whittier* (Cal.), 21 Pac. 547, following rule.

67 Cal. 125-126, 7 Pac. 444, CHENEY v. NEWBERRY & CO.

Partnership Doing Business under fictitious name can make valid assignment of partnership claim although they cannot sue thereon by reason of not having filed required certificate.

Reaffirmed in *Wing Ho v. Baldwin*, 70 Cal. 196, 11 Pac. 565.

67 Cal. 126-127, 7 Pac. 445, CHENEY v. NEWBERRY & CO.

Assignee of Partnership Claim may maintain suit thereon although suit by partnership is barred by reason of not having filed certificate required in section 2468, Civil Code.

Distinguished in *In re Farmers' Supply Co.*, 170 Fed. 504, holding requirement that copartnership doing business under fictitious name shall file certificate as prerequisite to right to sue does not apply to suits in federal courts.

67 Cal. 127-130, 7 Pac. 426, MAIN v. CASSELY.

Corporation is Liable on its promissory note, consideration for which it has received and retained, although executed in pursuance of ultra vires contract.

Approved in *Tilden v. Goldy Machine Co.*, 9 Cal. App. 13, 98 Pac. 40, holding corporation estopped to deny liability on note given by agent where it received benefit of consideration; *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 464, 466, 84 Pac. 322, 323, holding corporation liable for services rendered and accepted, although contract claimed to be ultra vires; *Laidlaw v. Pacific Bank (Cal.)*, 67 Pac. 899, holding bank could not defend against action to recover money expended for its benefit on ground it could not legally be bound by contract to pay; *Bank of Yolo v. Weaver (Cal.)*, 31 Pac. 160, holding corporation liable for money borrowed by secretary upon authorization of directors and expended for use of corporation; *Jones v. Stoddart*, 8 Idaho, 218, 67 Pac. 651, holding president of business corporation had implied power to transfer negotiable note so as to enable purchaser to take free from equities of which he had no notice; *Bankers' Mut. Casualty Co. v. First Nat. Bk. of Council Bluffs*, 131 Iowa, 467, 108 N. W. 1050, holding insurance company cannot defend in suit on burglary insurance policy on ground its issuance was ultra vires; *Judell v. Goldfield Realty Co.*, 32 Nev. 360, 108 Pac. 458, holding corporation liable on note given by secretary in name of corporation where it had received benefits of transaction for which note was given.

Estoppel of Corporation to set up plea of ultra vires. See note, 20 L. R. A. 774.

67 Cal. 130-133, 7 Pac. 442, MARINI v. GRAHAM.

Any Obstruction of Street is a public nuisance.

Approved in *People v. McCue*, 150 Cal. 197, 88 Pac. 900, following rule; *Bischof v. Merchants' Nat. Bank*, 75 Neb. 841, 106 N. W. 997, 5 L. R. A. (n. s.) 486, pillars supporting building with base projecting into street about three feet are public nuisance.

Sidewalks are Part of Public Streets of city and obstruction thereof is nuisance.

Approved in *Davidson v. Utah Ind. Tel. Co.*, 34 Utah, 254, 97 Pac. 125, holding telephone guy wire over space allotted for sidewalk was on public street.

Private Individual cannot Maintain action to abate public nuisance without showing special injury.

Approved in *People v. Budd (Cal.)*, 47 Pac. 594, holding citizen not so beneficially interested in appointment of police commissioner as to be entitled to mandamus to compel governor to make appointment.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 671, 679, 680.

67 Cal. 139-141, 7 Pac. 430, **CAMPE v. LASSEN**.

It is not Necessary in Pleading Judgment of court of general jurisdiction to aver facts conferring jurisdiction.

Approved in San Francisco etc. Land Co. v. Hartung, 138 Cal. 230, 71 Pac. 340, holding jurisdiction of superior court to appoint executors of will is presumed and need not be pleaded.

67 Cal. 141-143, 7 Pac. 421, **DURVEA v. BOUCHER**.

Error in Notice of Location of mining claim as to quarter section in which situated will not invalidate it if remaining portions of description are sufficient to identify land.

Approved in Green v. Gavin, 10 Cal. App. 334, 101 Pac. 932, upholding inartificial notice of location.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 836.

67 Cal. 143-147, 7 Pac. 413, **DAVIDSON v. KNOX**.

Complaint on Partnership Obligation considered and held to be complaint against individual partners.

Approved in Maclay Co. v. Meads, 14 Cal. App. 371, 373, 112 Pac. 199, following rule; Good v. Red River Valley Co., 12 N. M. 251, 78 Pac. 47, holding action against G. H. and K. under firm name of Good & Co. is action against individual partner; Guthiel v. Gilmer, 27 Utah, 509, 76 Pac. 632, arguendo.

In Action Under Code of Civil Procedure, section 388, it is unnecessary to name all associates as defendants, as judgment binds only joint property of association.

Approved in John Bollman Co. v. Bachman, 16 Cal. App. 592, 117 Pac. 691, under Code of Civil Procedure, section 388, filing of complaint against partnership as sole defendant does not stop limitations on cause of action against partners individually.

Service of Process Sufficient to constitute due process of law. See note, 50 L. R. A. 596.

Miscellaneous.—Cited in Golden State etc. Iron Works v. Davidson, 73 Cal. 392, 15 Pac. 21, referring historically to principal case; Mokelumne etc. Min. Co. v. Knox (Cal.), 7 Pac. 415, companion case.

67 Cal. 149-152, 7 Pac. 422, **McGREGOR v. DONELLY**.

Where Parties to Illegal Contract are in pari delicto, neither can recover, and the law leaves the parties as they were.

Approved in Ripperdan v. Weldy, 149 Cal. 676, 87 Pac. 280, following rule; Prince v. Gosnell, 19 Okl. 182, 92 Pac. 166, contract by homesteader to alienate portion of tract occupied by him as such, when he should acquire title, is against public policy and void; McMillan v. Wright, 56 Wash. 118, 105 Pac. 178, equity will not make new and valid contract for parties who made contract which was invalid as against public policy.

67 Cal. 154-156, 7 Pac. 418, **DOYLE v. CALLAGHAN**.

Complaint Considered and Held to state cause of action for conversion of stocks and not for deceit in procuring release from claims.

Approved in Tafft v. Presidio & Ferries R. Co. (Cal.), 22 Pac. 487, holding complaint states cause of action for conversion and not for

negligence in allowing fraudulent transfer of stock on books by one holding power of attorney to deal with stock in question.

67 Cal. 159-164, 7 Pac. 431, RAYNOR v. MINTZER.

Miscellaneous.—Cited in Raynor v. Mintzer, 72 Cal. 588, 18 Pac. 84, on another appeal.

67 Cal. 165, 7 Pac. 449, LITTLE v. JACKS.

Notice of Intention to Vacate Judgment cannot be amended to make it notice to move for new trial after expiration of statutory time for giving such notice.

Approved in Packer v. Doray (Cal.), 34 Pac. 629, holding notice of motion for new trial could not be amended after statutory time by inserting specification of errors relied on; Caldwell v. Wells, 16 Idaho, 463, 101 Pac. 813, holding motion for new trial should be directed to verdict or decision and not against judgment.

67 Cal. 166-168, 7 Pac. 445, PEOPLE ex rel. HARBOR COMMISSIONERS v. POTRERO ETC. R. R. CO.

Right to Obstruct or Destroy rights of navigation. See note, 59 L. R. A. 40, 64.

67 Cal. 171-174, 7 Pac. 450, BUXTON v. TRAVER.

Occupant of Unsurveyed Public Lands has mere privilege of pre-emption which does not amount to legal or equitable estate in land.

Approved in Graham v. Great Falls W. P. & T. Co., 30 Mont. 401, 402, 76 Pac. 811, holding entry not perfected gave entryman no right as against later bona fide purchaser.

Distinguished in Cooper v. Wilder (Cal.), 41 Pac. 27, holding one who died after two years from entry on timber culture claim left equitable estate therein capable of devise, and title vested in devisee upon issuance of patent.

67 Cal. 176-178, 7 Pac. 480, REYNOLDS v. REYNOLDS.

After Appeal Trial Court cannot modify judgment appealed from so as in effect to prevent review of alleged errors brought up by bill of exceptions.

Approved in In re Bullard's Estate (Cal.), 31 Pac. 1120, holding probate court could make no new or further findings or decree in regard to matters involved after appeal from order; Hynes v. Barnes, 30 Mont. 28, 75 Pac. 524, holding after appeal from judgment in replevin trial court could not change decree to one in alternative.

When Parties to Divorce Admit condonation and ask dismissal, court should order dismissal and thereafter husband cannot be compelled to pay counsel fees for wife.

Approved in Hillman v. Hillman, 42 Wash. 597, 114 Am. St. Rep. 135, 85 Pac. 62, holding after divorce suit compromised and dismissed attorneys cannot intervene for purpose of obtaining judgment for fees against husband and wife.

Liability of Wife and Husband for legal services to her in divorce suit. See note, 24 L. R. A. 633.

67 Cal. 178-182, 7 Pac. 477, HIBERNIA SAVINGS ETC. SOCIETY v. CONLIN.

Where Mortgage is Given to secure debt of third person, cause of action thereon and running of limitations do not depend upon exist-

once of person competent to sue, the mortgagor having died before debt became due.

Distinguished in *Heeser v. Taylor*, 1 Cal. App. 621, 82 Pac. 978, holding mortgage debt not barred when suit was brought to foreclose four years after due, but within one year after granting of letters of administration on estate of deceased, the debt not being due at time of his death.

Want of Administration of Estate does not suspend limitations upon cause of action in favor of estate.

Reaffirmed in *Sanford v. Bergin*, 156 Cal. 55, 103 Pac. 337.

67 Cal. 182-184, 7 Pac. 488, BURKE v. EDGAR.

De Facto Officer is not Entitled to salary annexed to office.

Approved in *Bannerman v. Boyle*, 160 Cal. 199, 116 Pac. 732, applying rule under Political Code, sections 936, 937, as amended in 1891, where no action concerning title to office is begun.

Distinguished in *Merkley v. Williams*, 3 Cal. App. 270, 84 Pac. 1016, holding under Political Code, section 936, as amended, officer de facto pending contest entitled to salary for actual time served.

67 Cal. 185-221, 7 Pac. 456, 635, 8 Pac. 709, SHARON v. SHARON.

Appeal on Same Transcript from judgment and order denying new trial requires only single bond for costs in sum of three hundred dollars.

Distinguished in *Corcoran v. Desmond*, 71 Cal. 102, 11 Pac. 816, holding insufficient single undertaking when there were two separate appeals.

Order Pendente Lite Awarding Alimony and counsel fees in divorce is appealable.

Approved in *Kessler v. Kessler*, 2 Cal. App. 513, 83 Pac. 259, *White v. White*, 86 Cal. 213, 24 Pac. 1030, *White v. White* (Cal.), 24 Pac. 276, *McKay v. McKay* (Cal.), 52 Pac. 1131, *Dole v. Gear*, 14 Haw. 567, and *Clay v. Clay*, 56 Or. 540, 541, 109 Pac. 129, all following rule; *Stewart v. Stewart*, 156 Cal. 654, 105 Pac. 956, order denying wife's application for costs in divorce is appealable; *Van Horn v. Van Horn*, 48 Wash. 390, 125 Am. St. Rep. 940, 93 Pac. 670, holding action would not lie in Washington on interlocutory order of California court awarding temporary alimony; dissenting opinion in *Harron v. Harron*, 123 Cal. 511, 56 Pac. 334, majority refusing to dismiss appeal from special order after final judgment in divorce for payment of counsel fees and costs on appeal.

Distinguished in *Bordeaux v. Bordeaux*, 32 Mont. 161, 80 Pac. 6, holding denial of counsel fees in divorce suit before trial not appealable and therefore reviewable on appeal from final judgment; *Kapp v. Kapp*, 31 Nev. 73, 99 Pac. 1078, holding order increasing alimony pendente lite not appealable.

Divorce is Action in Equity within meaning of Constitution conferring appellate jurisdiction on supreme court.

Approved in *Stewart v. Torrance*, 9 Cal. App. 210, 98 Pac. 397, holding supreme court has exclusive jurisdiction of appeal in divorce; *Hiner v. Hiner*, 5 Cal. App. 548, 90 Pac. 957, holding party having cause of action for divorce may maintain separate action in equity for maintenance.

Order Pendente Lite in Divorce may be enforced by appointment of receiver.

Reaffirmed in *McAneny v. Superior Court*, 150 Cal. 8, 87 Pac. 1021.

Miscellaneous.—Cited in *Sharon v. Sharon*, 68 Cal. 343, 9 Pac. 196, on another appeal.

67 Cal. 221-223, 7 Pac. 658, **CREIGHTON v. KAWEAH CANAL ETC. CO.**

Diversion of Water from Natural Watercourse will be restrained only so far as natural flow is concerned.

Approved in *Pomona Land etc. Co. v. San Antonio Water Co.*, 152 Cal. 623, 93 Pac. 884, holding water saved from seepage which would not naturally flow in stream is not part of flow of stream under contract for division of such flow; *Miller v. Wheeler*, 54 Wash. 437, 103 Pac. 644, 23 L. R. A. (n. s.) 1065, where defendants brought onto their lands waters from another watershed, they could impound the waste and excess of such waters after use and use it on other land, regardless of claims of prior appropriator of water of stream into whose watershed such water was brought.

67 Cal. 223-224, 7 Pac. 645, **PEOPLE v. BEZY.**

In Murder Trial; Evidence of good character of deceased is inadmissible against defendant.

Approved in *Kelly v. People*, 228 Ill. 86, 82 N. E. 200, 12 L. R. A. (n. s.) 1169, following rule.

Admissibility of Evidence of Character or reputation of deceased in homicide cases. See notes, 124 Am. St. Rep. 1035; 3 L. R. A. (n. s.) 368.

Evidence of Good Character to create doubt of guilt. See note, 103 Am. St. Rep. 897.

Evidence of Threats in prosecution for homicide. See note, 89 Am. St. Rep. 696.

67 Cal. 231-234, 7 Pac. 640, **PEOPLE v. VIERRA.**

Prosecutor is not Limited to offense for which prisoner was committed, but may file information for any offense disclosed by depositions.

Disapproved in *State v. McGreevey*, 17 Idaho, 461, 105 Pac. 1049, holding information can be filed only for offense for which accused was committed.

67 Cal. 235-237, 7 Pac. 682, **BROWN v. WILLIS.**

Personal Liability of Mortgagor cannot be enforced until after sale of mortgaged premises, and then for deficiency only.

Reaffirmed in *Boucofski v. Jacobsen*, 36 Utah, 178, 104 Pac. 122.

Holder of Note Secured by second mortgage cannot, after foreclosure of prior mortgage, by suit to which he was party defendant, maintain action on note against maker.

Distinguished in *Green v. Frick*, 25 S. D. 350, 126 N. W. 582, mortgagor cannot assert in his own defense on foreclosure rights of prior mortgagee under foreclosure by advertisement, without connecting himself with those rights.

Waiver of Junior Lien by Failure to assert it in foreclosure. See note, 68 L. R. A. 329.

67 Cal. 237-238, 7 Pac. 645, SOMERS v. OVERHAULSER.

Payment of Part of Purchase Price of land for another raises resulting trust pro tanto.

Approved in Breitenbucher v. Oppenheim, 160 Cal. 104, 116 Pac. 58, Gerety v. O'Sheehan, 9 Cal. App. 449, 99 Pac. 546, and Moultrie v. Wright, 154 Cal. 523, 98 Pac. 259, all following rule.

67 Cal. 238-244, 7 Pac. 664, ESTATE OF HILL.

Surety Compelled to Pay Principal debt has legal demand for reimbursement enforceable against principal or his estate, for amount actually expended.

Approved in Stone v. Hammell (Cal.), 22 Pac. 205, following rule.

67 Cal. 249-255, 7 Pac. 661, SCOLLAY v. BUTTE COUNTY.

Powers Conferred on Municipal Corporation involving exercise of judgment and discretion cannot be delegated to others.

Approved in Floyd County v. Owego Bridge Co., 143 Ky. 697, 137 S. W. 239, fiscal court of county could not appoint bridge commissioners with power to select sites and let contracts for bridges; Jewell Belting Co. v. Village of Bertha, 90 Minn. 11, 97 N. W. 424, holding village council could not delegate power of selecting and contracting for fire apparatus to a committee.

Board of Supervisors may Employ attorneys other than district attorney to conduct suits for county.

Approved in County of Santa Cruz v. Barnes, 9 Ariz. 48, 76 Pac. 623, following rule.

67 Cal. 255-257, 7 Pac. 676, WALTON v. KARNES.

Where Defendant Advances Money to plaintiff to make payments on land with agreement for repayment, and takes contract of purchase in his own name, he holds such lands by resulting trust for defendant.

Approved in Prefumo v. Russell, 148 Cal. 456, 83 Pac. 812, where deed was given to secure money advanced for purchase of land, it was in effect a mortgage; Levy v. Ryland, 32 Nev. 466, 468, 109 Pac. 907, 908, party advancing whole purchase price of land purchased for joint benefit of himself and another and taking title in own name holds title to undivided half in trust for such other when his share of purchase price is promptly paid.

Statute of Frauds Does not Apply to resulting trusts.

Approved in Lynch v. Herrig, 32 Mont. 276, 80 Pac. 243, and Pittock v. Pittock, 15 Idaho, 432, 98 Pac. 721, both following rule.

67 Cal. 258-260, 7 Pac. 680, PICO v. COHN.

Order Granting New Trial on ground of insufficiency of evidence will not be disturbed on appeal unless clear abuse of discretion appears.

Approved in Morgan v. Los Angeles Pacific Co., 13 Cal. App. 14, 108 Pac. 737, following rule.

67 Cal. 262-263, 7 Pac. 679, SMITH v. CUNNINGHAM.

Replevin by or Against One in adverse possession of land or things severed. See note, 69 L. R. A. 734.

67 Cal. 267-272, 7 Pac. 684, JUNKAUS v. BERGIN.

One Entitled to Take a Quantity of water from stream may change point of diversion at pleasure, if rights of other appropriators are not thereby injured.

Approved in *Anderson v. Bassman*, 140 Fed. 23, holding right of appropriator not changed whether water was taken from stream in California or Nevada.

Change of Use or Channel of water appropriated. See note, 30 L. R. A. 385.

Right of Prior Appropriator of water. See note, 30 L. R. A. 672.

67 Cal. 272-275, 7 Pac. 689, **BRAHAM v. HOSTETTER.**

Action for Damages for Diversion of water against several independent owners cannot be joined with action for injunction to restrain diversion, since the causes are several for damages while only one for injunction.

Approved in *First Nat. Bk. v. Johnson Land Mtg. Co.*, 17 S. D. 529, 97 N. W. 750, complaint to quiet title showing in first cause of action no interest of one of joint plaintiffs, and in second cause interest of both, is bad for misjoinder of causes.

67 Cal. 275-279, 7 Pac. 693, **ORE v. STEWART.**

Action to Quiet Title may be Maintained Although title is in United States.

Approved in *Foss v. Dam*, 1 Alaska, 347, following rule; *Hayford v. Wallace* (Cal.), 46 Pac. 295, holding holder of equitable title could bring action to quiet title; *Johnson v. Hurst*, 10 Idaho, 326, 77 Pac. 791, holding action could be maintained to quiet title to any interest or estate cognizable by law; *Shields v. Johnson*, 10 Idaho, 481, 79 Pac. 393, upholding suit to quiet title to leasehold estate of party in possession.

Title Acquired by United States patent feeds mortgage already given purporting to convey fee.

Approved in *Jones v. Chalfant* (Cal.), 31 Pac. 258, *Stewart v. Powers* (Cal.), 33 Pac. 490, and *Stark v. Morgan*, 73 Kan. 463, 85 Pac. 571, 6 L. R. A. (n. s.) 934, all following rule.

Mortgage by One Seeking Entry under pre-emption or homestead laws is valid.

Approved in *Stark v. Morgan*, 73 Kan. 458, 85 Pac. 569, 6 L. R. A. (n. s.) 934, and *Hafermann v. Gross*, 199 U. S. 347, 26 Sup. Ct. 80, 50 L. Ed. 220, both reaffirming rule.

Mortgage upon Public Lands executed by homesteader prior to patent or final proof. See note, 6 L. R. A. (n. s.) 934.

67 Cal. 279-282, 7 Pac. 703, **MELONE v. DAVIS.**

Distributee may Sue Administrator in his personal capacity for distributive share due under decree of distribution.

Approved in *St. Mary's Hospital v. Perry*, 152 Cal. 340, 343, 92 Pac. 865, 866, following rule.

No Action can be Maintained against administrator, as such, that is founded upon malfeasance or misfeasance.

Approved in *Renwick v. Garland*, 1 Cal. App. 238, 82 Pac. 90, holding estate not liable on unauthorized contract of executrix to drill well on property of estate.

67 Cal. 283-285, 7 Pac. 699, **BELL v. McOLELLAN.**

Evidence Held to Show That Sale under which plaintiff claimed title to personal property was void as to creditors of vendor because unaccompanied by actual and continued change of possession.

Approved in *Roberts v. Burr* (Cal.), 54 Pac. 852, where there was no substantial conflict of testimony as to change of possession, question was one of law and could be reviewed on appeal; *Kennedy v. Conroy* (Cal.), 44 Pac. 796, where stepfather gave to his stepson, who was living with him, bill of sale to stock on ranch and made unrecorded lease of ranch, such bill of sale was void as to creditors, there being no open change of possession.

67 Cal. 286-289, 7 Pac. 701, OLARY v. HAZLITT.

Findings of Facts Need not Follow language of pleadings.

Reaffirmed in *O'Neill v. Quarnstrom*, 6 Cal. App. 471, 92 Pac. 392.

Lodes or Veins Within Placer Claims. See note, 50 L. R. A. 293.

67 Cal. 293-296, 7 Pac. 705, SACRAMENTO LUMBER CO. v. WAGNER.

One in Whose Favor Contract was made may maintain action thereon, although not a party thereto and consideration did not move from him.

Approved in *Northup v. Altadena etc. Syndicate*, 6 Cal. App. 102, 91 Pac. 422, where business of maker of note was transferred to corporation which assumed all his liabilities, payee could sue corporation thereon.

Right of Third Party to Sue upon contract made for his benefit. See note, 25 L. R. A. 264, 266.

Right of Action on Contract made for benefit of stranger. See note, 2 L. R. A. (n. s.) 785.

67 Cal. 296-299, 7 Pac. 908, ZELLERBACH v. ALLENBERG.

Judgment at Law will be Set Aside on ground of fraud only when fraud was practiced in obtaining judgment.

Approved in *United States v. Spohrer*, 175 Fed. 448, holding United States could maintain suit to set aside certificate of naturalization procured by fraud in state court; *James v. Gibson*, 73 Ark. 444, 84 S. W. 486, judgment of probate court allowing claim not impeachable on collateral attack except for fraud in procuring it; *City of Guthrie v. McKennon*, 19 Okl. 315, 91 Pac. 855, sustaining demurrer to complaint to set aside judgment for fraud which revealed defendant had sufficient notice to put him on inquiry so as to disclose his defenses.

Distinguished in *Donovan v. Miller*, 12 Idaho, 607, 88 Pac. 83, 9 L. R. A. (n. s.) 524, refusing to restrain enforcement of judgment on ground of mistakes in law and negligence of attorneys.

Foreign Judgments. See note, 94 Am. St. Rep. 549.

67 Cal. 299-301, 7 Pac. 710, SHELDON v. MULL.

Actual Possession of Land may be had without fences or inclosure.

Approved in *Daubenbiss v. White* (Cal.), 31 Pac. 362, following rule.

67 Cal. 303-308, 7 Pac. 738, COGLAN v. BEARD.

In Election Contest, Ballots are not inadmissible in evidence by reason of fact they were in possession of contestant for short time as de facto county officer.

Approved in *Murphy v. Lentz*, 131 Iowa, 332, 108 N. W. 531, holding where de facto deputy auditor undertook duties of office, fact that he was candidate for auditor at subsequent election did not disqualify

him to receive and care for returns made while he was in charge, so as to deprive him of benefit of recount in event of contest.

Scope and Effect of Election Law provisions for preserving ballots. See note, 30 L. R. A. (n. s.) 602.

In Election Contest, Ballots are best evidence of votes, if not tampered with, and burden is upon contestant to show fact.

Reaffirmed in *Avery v. Williams*, 8 Ariz. 360, 76 Pac. 464.

Specification of Errors in Bill of exceptions that findings are not justified by evidence must state particulars in which evidence is alleged insufficient.

Approved in *Later v. Haywood*, 14 Idaho, 48, 93 Pac. 375, following rule; *Davis v. Lamb* (Cal.), 35 Pac. 308, refusing to review denial of motion for new trial on ground of insufficiency of evidence where bill of exceptions failed to specify exceptions on that ground.

Miscellaneous.—Cited in *McClelland v. Bullis*, 34 Colo. 81, 81 Pac. 774, to point that in equity findings of jury are merely advisory.

67 Cal. 313-314, 7 Pac. 708, CLUNIE v. SACRAMENTO LUMBER CO.

In Action for Specific Performance of parol sale of land entered into by agent, declarations of such agent a year after consummation of agreement with respect to terms thereof are inadmissible.

Approved in *Mutter v. I. X. L. Lime Co.* (Cal.), 42 Pac. 1070, holding inadmissible declarations of plaintiff's agent made after suit begun; *Hogan v. Kelly*, 29 Mont. 489, 75 Pac. 82, holding inadmissible on issue as to title under bill of sale written declarations of agent of plaintiff's vendor to defendants, not connected with subject of suit.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 334.

67 Cal. 315-317, 7 Pac. 723, CONNER v. STANLEY.

Where Questions Propounded to Expert involve precise questions jury is to pass upon, they invade province of jury and are erroneous.

Distinguished in *People v. Bowers* (Cal.), 18 Pac. 667, holding in poisoning case state could ask expert cause of death when there was some evidence to support facts hypothetically stated in questions.

Right of Witness to Give Opinion on issue of sanity or mental capacity. See note, 36 L. R. A. 66.

67 Cal. 317-318, 7 Pac. 722, COX v. WOODS.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 918.

67 Cal. 319-324, 7 Pac. 769, DUFOUR v. CENTRAL PACIFIC R. R. CO.

To Authorize Recovery for Injury occasioned by negligence of another, party injured must have exercised such reasonable care to avoid injury as prudent person would have done under circumstances.

Approved in *Wardlaw v. California Ry. Co.* (Cal.), 42 Pac. 1076, holding person injured while boarding train between cars by means of bumper guilty of such contributory negligence as precludes recovery; *Johnson v. Thomas* (Cal.), 43 Pac. 579, holding under facts of case question of contributory negligence was for jury.

When Negligence is Relied on to defeat recovery for injury, defendant's failure to use great care will not defeat action.

Approved in *Antonian v. Southern Pacific Co.*, 9 Cal. App. 734, 100 Pac. 884, upholding instruction in regard to conduct of defendant when in peril of injury as affecting contributory negligence.

Instruction That Jury must Take into consideration all circumstances surrounding case is not erroneous as charging consideration of anything outside evidence.

Approved in *Stanley v. Cedar Rapids & M. Cy. Ry. Co.*, 119 Iowa, 536, 93 N. W. 493, holding instruction as to damages for personal injury not erroneous in omitting to specifically state such damages must be determined from evidence.

67 Cal. 325-330, 7 Pac. 741, TRYON v. HUNTOON.

Color of Title. See note, 88 Am. St. Rep. 709.

67 Cal. 330-332, 7 Pac. 746, FINN v. SPAGNOLI.

Venue may be Changed pending settlement of statement on motion for new trial when incoming judge is disqualified.

Reaffirmed in *State v. District Court*, 33 Mont. 145, 82 Pac. 791.

Distinguished in *Smith v. King of Arizona Min. etc. Co.*, 9 Ariz. 231, 80 Pac. 358, holding venue could not be changed after trial upon filing affidavit of prejudice.

Criticised in dissenting opinion in *State v. District Court*, 33 Mont. 153, 154, 82 Pac. 792, 794, majority following rule.

67 Cal. 332-334, 7 Pac. 753, BOTTO v. VANDAMENT.

Judgment on Pleadings is not authorized if answer deny material allegations, although special defense pleaded admits them.

Approved in *Casci v. Ozalli*, 158 Cal. 283, 110 Pac. 933, when complaint to quiet title alleged ownership and possession, and answer denied this allegation, judgment for plaintiff should not be given on pleadings; *The Snipsic Co. v. Smith*, 7 Cal. App. 151, 93 Pac. 1035, holding admission in affirmative defense did not justify general denial in answer; *Finley v. Tucson*, 7 Ariz. 112, 60 Pac. 873, upholding judgment on pleadings where answer did not deny any material allegations of complaint, or set up new matter in defense.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 204, 208.

67 Cal. 339-341, 7 Pac. 732, DREYFUSS v. TOMPKINS.

Clerical Error in Entry of judgment may be corrected on motion at any time, even after appeal and affirmance of judgment.

Approved in *Cubitt v. Cubitt*, 74 Kan. 359, 86 Pac. 477, following rule; *San Francisco v. Brown*, 153 Cal. 651, 96 Pac. 284, holding court could correct judgment incorrectly entered at suggestion of opposing counsel, although six months had elapsed from entry.

67 Cal. 341-346, 7 Pac. 776, WIXSON v. DEVINE.

Judgment-roll in Former Action offered as bar may be examined to determine identity of issues.

Reaffirmed in *Page v. Graver*, 5 Cal. App. 386, 90 Pac. 483.

Former Recovery by Plaintiff operates as estoppel on defendant and cannot properly be pleaded.

Approved in *Ahlers v. Smiley*, 11 Cal. App. 346, 104 Pac. 998, following rule; *Peck v. Noee*, 154 Cal. 354, 97 Pac. 866, holding in suit

against stockholders of foreign corporation, plea in answer of exemption from individual liability under constitution of foreign state was deemed denied, and plaintiff could show such corporation was organized for purpose of doing business in California.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 669.

67 Cal. 350-352, 7 Pac. 745, **PEOPLE v. PRICE.**

Verdict of Guilty of Grand Larceny is sufficient, there being no degrees to that crime.

Disapproved in *McLane v. Territory*, 8 Ariz. 155, 71 Pac. 939, holding verdict of "guilty as charged" in indictment for grand larceny insufficient as not specifying degree.

67 Cal. 353-359, 7 Pac. 724, **IN RE TREADWELL.**

If Attorney be Found Guilty of acts indicating professional moral depravity, the court can, without previous conviction of criminal offense, disbar him.

Approved in *Matter of Danford*, 157 Cal. 428, 108 Pac. 324, where accusation for disbarment stated criminal offense, proceeding for disbarment on that ground was not precluded in advance of termination of criminal prosecution.

Disbarment for Criminal Acts prior to conviction therefor. See note, 114 Am. St. Rep. 840.

Disbarment or Suspension of Attorney for withholding client's money or property. See note, 19 L. R. A. (n. s.) 414.

67 Cal. 359-362, 56 Am. Rep. 713, 7 Pac. 728, **EX PARTE LICHTENSTEIN.**

Legislature may Limit Rate of interest charged by pawnbroker.

Approved in *Levinson v. Boas*, 150 Cal. 191, 88 Pac. 827, 12 L. R. A. (n. s.) 375, holding void contract of pledge in violation of provisions of Penal Code regulating pawnbrokers.

Distinguished in *Ex parte Sohneke*, 148 Cal. 268, 113 Am. St. Rep. 236, 82 Pac. 959, 2 L. R. A. (n. s.) 813, holding void act of March 20, 1905, fixing rates of interest and charges on chattel mortgages on specified kinds of personal property.

Constitutionality of Statutory Discrimination as to interest rates. See note, 27 L. R. A. (n. s.) 899.

67 Cal. 362-364, 7 Pac. 758, **DE LAURENCEL v. DE BOOM.**

Words "All My Heirs" in will construed.

Cited in *Estate of De Bernede*, 4 Cal. Prob. 493, arguendo.

67 Cal. 368-373, 7 Pac. 784, **COOK v. LION FIRE INS. CO.**

Conclusiveness of Proof of Loss as against insured or his beneficiaries. See note, 44 L. R. A. 856.

Miscellaneous.—Cited in *Pac. Paving Co. v. Vizelech*, 1 Cal. App. 283, 82 Pac. 82.

67 Cal. 373-376, 7 Pac. 787, **CLANTON v. COWARD.**

Court may Allow Plaintiff to remit from verdict excess over amount demanded in complaint and take judgment accordingly.

Approved in *Bentley v. Hurlburt*, 153 Cal. 803, 96 Pac. 893, holding plaintiff could file waiver of excess in judgment pending motion for new trial, and court could deny such motion in order unconditional in form reciting the waiver.

In Action by Surety on Note against principal for reimbursement, complaint which alleges plaintiff signed note as surety only, for accommodation of defendant, need not allege request from defendant to plaintiff to pay same.

Approved in *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 373, 111 N. W. 528, complaint demanding contribution for payment of judgment by surety after appeal, considered and held to sufficiently aver affirmance of judgment on appeal.

67 Cal. 378-380, 7 Pac. 720, PEOPLE v. O'NEAL.

Instruction in Regard to Testimony of defendant testifying in his own behalf considered and held proper.

Approved in *People v. Bowers* (Cal.), 18 Pac. 668, and *People v. Ryan*, 152 Cal. 368, 92 Pac. 855, both approving instruction in regard to testimony of witness in his own behalf.

Right of Court to Caution Jury as to believing testimony of accused in his own behalf. See note, 19 L. R. A. (n. s.) 818.

67 Cal. 380-384, 7 Pac. 763, ESTATE OF GUILFORD.

Effect of State Constitutions and statutes upon inheritance by or from alien. See note, 31 L. R. A. 87.

67 Cal. 385-387, 7 Pac. 766, ESTATE OF LEOPOLD.

Effect of State Constitutions and statutes upon inheritance by or from alien. See note, 31 L. R. A. 88.

67 Cal. 387-395, 7 Pac. 804, MAULDIN v. COX.

Married Woman may Maintain Action to recover homestead in her own name without joining husband.

Approved in *MacLeod v. Moran*, 11 Cal. App. 627, 105 Pac. 934, holding wife could sue alone for homestead which had been conveyed to trustees under trust deed, and by them to husband who, by his sale deed, had conveyed to third party.

Adverse Possession to Set Statute of limitations in motion must be open and notorious, and owner must have notice of adverse claim.

Approved in *Southern Cal. R. Co. v. Slauson* (Cal.), 68 Pac. 108, holding limitations did not run in favor of railroad which built road on land under title of owner, under agreement to build station thereon, until contract was fulfilled by railroad; *Millett v. Lagomarsino* (Cal.), 38 Pac. 309, 310, holding possession taken under owner's title not adverse although occupant later acquired tax deed to premises.

During Coverture Homestead cannot be Held adversely by either spouse.

Distinguished in *Union Oil Co. v. Stewart*, 158 Cal. 155, 110 Pac. 315, wife could hold adversely claim deserted by husband, who had delivered land into her possession.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 927.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1185, 1189, 1200, 1201.

Estoppel to Deny landlord's title. See note, 89 Am. St. Rep. 67, 92

Nature and Elements of unlawful detainer. See note, 120 Am. St. Rep. 56.

67 Cal. 395-401, 7 Pac. 838, KEYBERS v. McCOMBER.

Where Summons from Justice's Court contained statement that upon failure to answer "plaintiff would take judgment for amount claimed in complaint," and not that he would "apply to court for relief demanded," judgment so taken is not void upon collateral attack.

Approved in Stanley v. Rachofsky, 50 Or. 475, 93 Pac. 355, holding summons gave sufficient notice to defendant.

Property Concealed by Attachment Creditor is presumed to be claimed exempt and a selection pro tanto for his exemption.

Reaffirmed in Florida Loan etc. Co. v. Crabb, 45 Fla. 310, 33 So. 524.

67 Cal. 402-404, 7 Pac. 826, WHITE v. DISHER.

Witness False in One Part of his testimony is to be distrusted in other parts.

Approved in State v. Lee, 34 Mont. 588, 87 Pac. 979, criticising instruction given as to distrust of testimony of witness false in part.

67 Cal. 405-406, 7 Pac. 767, HEDGES v. SUPERIOR COURT.

Affidavit in Contempt Proceedings for violating injunction is sufficient if it sets out acts done in violation of writ and avers parties accused knew its terms.

Approved in State v. Sieber, 49 Or. 9, 88 Pac. 316, following rule.

67 Cal. 406-411, 7 Pac. 810, EMPIRE GOLD MIN. CO. v. BONANZA ETC. MIN. CO.

Motion Made to Retax Costs before entry of judgment may be reviewed on appeal from judgment, but if made after entry it can be reviewed only on separate appeal.

Approved in Irrgang v. Ott, 9 Cal. App. 446, 99 Pac. 531, holding order settling cost bill included in judgment reviewable on appeal therefrom; Kearne v. Pittsburg Lead Min. Co., 17 Idaho, 195, 105 Pac. 66, holding order settling cost bill after entry of judgment reviewable only on separate appeal.

67 Cal. 412-422, 56 Am. Rep. 716, 7 Pac. 828, PEOPLE v. RICHARDS.

Failure to Prosecute All Conspirators named in information does not render it bad as to those prosecuted.

Approved in Cohen v. United States, 157 Fed. 654, 85 C. C. A. 113, following rule; Eacock v. State, 169 Ind. 504, 82 N. E. 1046, where several persons charged with conspiracy were tried separately, judgment could be pronounced against one before conviction of others; People v. Smith, 239 Ill. 108, 87 N. E. 892, that conspirator designated in indictment as unknown, when evidence shows he was known, to to grand jury is not fatal to judgment against others; State v. Dreany, 65 Kan. 294, 69 Pac. 182, holding it not essential to sufficiency of information charging conspiracy that all parties known be jointly charged with offense.

67 Cal. 427-429, 7 Pac. 843, PEOPLE v. LANGTON.

Every Person is Presumed to Intend what his acts indicate his intention to have been.

Approved in People v. Petruzo, 13 Cal. App. 580, 110 Pac. 328, approving instruction in regard to presumption of intention from acts in murder case; People v. Grill, 3 Cal. App. 518, 86 Pac. 615,

holding it error to charge that unless it was shown by evidence that defendant's intention was other than his acts indicated, law would not hold him guiltless.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 476.

67 Cal. 429-433, 7 Pac. 814, **EEL RIVER ETC. R. R. CO. v. FIELD.**

Right to Relocate Railroad. See note, 36 L. R. A. 512.

67 Cal. 433-437, 7 Pac. 819, **CITY OF LOS ANGELES v. SOUTHERN PACIFIC R. R. CO.**

License Tax on Steam Railroads entering Los Angeles is valid.

Approved in Los Angeles v. Los Angeles Gas etc. Co., 152 Cal. 768, 93 Pac. 1007, upholding uniform tax on all engaged in business of furnishing gas, heat, light and power in Los Angeles.

67 Cal. 438-441, 7 Pac. 817, **WENZEL v. COMMERCIAL INS. CO.**

Condition in Insurance Policy as to keeping watchman on premises held not to be complied with, when watchman habitually slept some distance away.

Reaffirmed in Rankin v. Amazon Ins. Co. (Cal.), 25 Pac. 262.

67 Cal. 441-444, 7 Pac. 848, **SHARP v. BLANKENSHIP.**

When Owners Fix Disputed Boundary and acquiesce therein for period of adverse possession by limitation, they are estopped to dispute correctness of such line.

Reaffirmed in Furst v. Satterfield, 44 Ind. App. 618, 89 N. E. 907, and Welborn v. Kimmerling, 46 Ind. App. 102, 89 N. E. 519.

67 Cal. 444-447, 7 Pac. 906, **ESTATE OF DALRYMPLE.**

Burden of Proof is upon Those who contest probate of will.

Approved in Clements v. McGinn (Cal.), 33 Pac. 924, following rule.

67 Cal. 447-451, 8 Pac. 49, **ARGUELLO v. BOURS.**

In Action of Ejectment by vendor against vendee in possession under contract of purchase, compliance with terms of contract by vendee is defense to action.

Approved in Talley v. Kingfisher Imp. Co., 24 Okl. 475, 103 Pac. 592, following rule.

In Action of Ejectment where defendant pleads executed contract of purchase he should aver price paid was just and fair.

Approved in Swanston v. Clark, 153 Cal. 303, 95 Pac. 1119, holding defective defendant's plea of rescission which admitted making valuable improvements by plaintiff but averred no offer to compensate; Kiger v. The McCarthy Co., 10 Cal. App. 310, 101 Pac. 929, holding defective complaint for specific performance which made no allegation as to adequacy of price; Kerr v. Moore, 6 Cal. App. 306, 92 Pac. 107, upholding as sufficient averment of adequacy of purchase price in suit for specific performance of contract to sell land; Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987, holding equitable defense in ejectment should have been pleaded; Miller v. Waddingham (Cal.), 25 Pac. 691, holding defendant in ejectment who based defense on equity as against legal title should make such fact appear.

Miscellaneous.—Cited in Burke v. Bours (Cal.), 26 Pac. 102, on another appeal.

67 Cal. 451-452, 8 Pac. 2, MURPHY v. SNYDER.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 406.

67 Cal. 453-454, 7 Pac. 710, DALZELL v. SUPERIOR COURT.

Service of Notice of Appeal within statutory time is essential to appellate jurisdiction.

Approved in *Niles v. Gonzalez*, 152 Cal. 93, 92 Pac. 75, holding voluntary appearance in appellate court waiver of notice; *State v. Brown*, 30 Nev. 499, 98 Pac. 872, holding immaterial order of service and of filing of notice of appeal from justice's court; *Peter v. Kalez*, 11 Idaho, 560, 83 Pac. 528, discussing sufficiency of service of notice of motion for new trial.

67 Cal. 457, 8 Pac. 39, LUTZ v. CHRISTY.

Order Refusing to Set Aside Order distributing estate of decedent and settling final account of executor is not appealable.

Approved in *In re Kelly's Estate*, 31 Mont. 357, 78 Pac. 579, following rule; *In re Seymour*, 15 Cal. App. 290, 114 Pac. 1024, appeal does not lie from probate order directing manner of disposing of decedent's body.

67 Cal. 458-461, 8 Pac. 12, SHUMWAY v. LEAKEY.

In Absence of Proof, Law of another state is presumed to be same as in this state.

Approved in *O'Sullivan v. Griffith*, 153 Cal. 507, 95 Pac. 875, *Estate of Mackay*, 3 Cal. Prob. 341, *Wilhite v. Skelton*, 5 Ind. Ter. 631, 82 S. W. 935, and *Easton v. George Wostenholm & Son*, 137 Fed. 530, 70 C. C. A. 108, all following rule.

Presumption as to Law of other states. See note, 21 L. R. A. 469.

How Case Determined When Proper foreign law not proved. See note, 67 L. R. A. 43.

Conflict of Laws as to matrimonial property. See note, 57 L. R. A. 355.

67 Cal. 461-464, 8 Pac. 14, QUINN v. WINDMILLER.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 688.

67 Cal. 464-469, 8 Pac. 40, FRIEND ETC. LUMBER CO. v. MILLER.

Loss Resulting to Vendee from failure to realize upon contract with third person is too remote to be recovered as damages from vendor for delay in delivering goods.

Approved in *Pacific Club v. Commercial etc. Ins. Co.*, 12 Cal. App. 509, 107 Pac. 731, holding allegation that earthquake broke water-mains and so prevented extinguishment of fire insufficient to show earthquake was, in legal contemplation, cause of fire.

Loss of Profits of Sale or purchase as damages. See note, 52 L. R. A. 227.

67 Cal. 472-473, 8 Pac. 36, ARNOLD v. KAHN.

Service of Process Sufficient to constitute due process of law. See note, 50 L. R. A. 581.

67 Cal. 474-477, 8 Pac. 31, LOWDEN v. FREY.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 267.

67 Cal. 477-482, 8 Pac. 17, BULLARD v. STONE.

Market Value of Commodity in action for damages for failure to deliver is determined according to section 3354, Civil Code.

Distinguished in *Connell v. Harron*, 7 Cal. App. 748, 95 Pac. 917, holding price at which other machines of different patterns could be purchased in nearest market, though similar to machine purchased, could not be deemed equivalent of machine purchased.

By Market Value is Meant price for which equivalent could be reasonably and fairly purchased at or near place where property should have been delivered and within reasonable time thereafter.

Approved in *Redhead Bros. v. Wyo. Cattle Investment Co.*, 126 Iowa, 421, 102 N. W. 147, following rule.

When Defendant Neglected to Move to strike out allegation of special damage and did not object to testimony thereon, he cannot assign admission of such evidence as error.

Approved in *Durkee v. Chino Land & Water Co.*, 151 Cal. 571, 91 Pac. 393, holding when action was tried on assumption that certain rule of damages was correct, defendant against whom judgment was given cannot question it on appeal; *Southwestern Cotton Seed Oil Co. v. Bank of Stroud*, 12 Okl. 179, 70 Pac. 206, refusing to review alleged error not assigned for review by petition in error as well as by motion for new trial.

67 Cal. 483-485, 8 Pac. 34, AXTELL v. GERLACH.

Sale of Land for Delinquent Taxes for any sum in excess of amount chargeable by law is void.

Approved in *Remmer v. Hotchkiss*, 14 Cal. App. 561, following rule; *Hotchkiss v. Hansberger*, 15 Cal. App. 606, 115 Pac. 958, holding void tax deed showing on face amount for which property was sold was excessive.

Injunction may be Granted against issuance of void tax deed to make effectual principal relief in suit to quiet title.

Approved in *Dorris v. McManus*, 3 Cal. App. 582, 86 Pac. 912, holding injunction merely ancillary to principal relief in action to quiet title and could not injure appellant.

67 Cal. 485-490, 8 Pac. 22, BOSTON TUNNEL CO. v. MCKENZIE.

Motion for New Trial cannot be based on ground of insufficiency of evidence to support judgment.

Reaffirmed in *Elizalde v. Murphy*, 11 Cal. App. 41, 103 Pac. 907, and *Caldwell v. Wells*, 16 Idaho, 463, 101 Pac. 813.

Notice of Motion for New Trial on ground of insufficiency of evidence to support findings is valid.

Approved in *Haight v. Tryon (Cal.)*, 34 Pac. 713, following rule.

Tax Sale for Amount in Excess of what is lawfully chargeable is void.

Approved in *Remmer v. Hotchkiss*, 14 Cal. App. 562, following rule; *Hotchkiss v. Hansberger*, 15 Cal. App. 606, 115 Pac. 958, holding void tax deed showing on face amount for which property was sold was excessive.

67 Cal. 491-493, 8 Pac. 20, REED v. DRAIS.

Witness Called to Testify as to value of land must possess means to form intelligent opinion.

Approved in *Norris v. Crandall* (Cal.), 65 Pac. 571, holding lawyer engaged for twenty years as examiner of titles for loan companies, who testifies he is acquainted with value of certain lands, should be permitted to testify thereto.

67 Cal. 497-500, 8 Pac. 27, REYNOLDS v. SNOW.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 81.

67 Cal. 500-501, 8 Pac. 45, CAMERON v. CARROLL.

Court may in Its Sound Discretion set aside judgment rendered on failure of defendant to appear at trial.

Approved in *Riddle v. Quinn*, 32 Utah, 352, 90 Pac. 896, holding court could set aside judgment had on failure of defendant to appear when plaintiff had violated court rule in regard to giving notice of setting cause on calendar.

67 Cal. 501-503, 8 Pac. 43, RECLAMATION DISTRICT v. PARVIN.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 620.

67 Cal. 503-505, 8 Pac. 37, O'BRIEN v. COLUSA COUNTY.

Section 3804, Political Code, does not authorize board of supervisors to order refund of license tax erroneously or illegally collected.

Approved in *Trower v. San Francisco*, 157 Cal. 769, 109 Pac. 620, holding fees illegally exacted by county clerk not recoverable under this section.

Right to Recover License Fee unlawfully exacted under color of authority. See note, 22 L. R. A. 866, 868.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 437.

67 Cal. 505-511, 8 Pac. 59, FRESNO ENTERPRISE CO. v. ALLEN.

Sureties are Liable on Bond of officer of corporation only for his defaults during term for which elected.

Approved in *Ida County Sav. Bank v. Seidensticker*, 128 Iowa, 58, 111 Am. St. Rep. '189, 102 N. W. 823, following rule.

Liability of Sureties on official bond after expiration of term of office. See note, 103 Am. St. Rep. 933.

Liability of Surety upon fidelity bond for defalcations subsequent to reappointment made before expiration of original term, or during indefinite term. See note, 11 L. R. A. (n. s.) 494.

Bonds Given to Individuals and private corporations are subject of private contract, by which parties may bind themselves in any manner or to any extent, not violative of public policy or positive statute.

Approved in *Humboldt Sav. etc. Society v. Wennerhold* (Cal.), 20 Pac. 555, under terms of bond of secretary of building association, sureties were liable for moneys received by him and entered on pass-books but not on association books, and appropriated to his own use.

67 Cal. 518-525, 8 Pac. 174, BUTCHER v. VACA VALLEY AND CLEAR LAKE R. R. CO.

In Action Against Railroad for damages from fires set by engines, evidence of other similar fires along track is admissible.

Approved in Glanz v. Chicago M. & St. Paul Ry. Co., 119 Iowa, 615, 93 N. W. 576, following rule; Big R. Lead Co. v. St. Louis Iron Mt. etc. R. R. Co., 123 Mo. App. 405, 101 S. W. 639, holding evidence sufficient to warrant inference fire was started by locomotive.

Where Complaint Alleged Fire was set to plaintiff's property by defendant suffering it to escape from locomotive, proof that fire was first set to adjacent property and passed thence to plaintiff's is no variance.

Reaffirmed in Florida etc. Ry. Co. v. Welch, 53 Fla. 163, 44 So. 255.

67 Cal. 526-531, 8 Pac. 84, PEOPLE v. LA RUE.

Swamp and Reclamation District is public corporation for municipal purposes.

Approved in Mound City etc. Co. v. Miller, 170 Mo. 256, 94 Am. St. Rep. 727, 70 S. W. 726, 60 L. R. A. 190, reaffirming rule; People v. San Joaquin Valley Agricultural Assn., 151 Cal. 805, 91 Pac. 744, holding district agricultural association public corporation; Whipple v. Tuxworth, 81 Ark. 402, 99 S. W. 90, applying rule to improvement district.

Criticised in Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 405, 105 Pac. 280, holding reclamation district not corporation under section 284, Civil Code, nor under section 1, article XII, Constitution, nor municipal corporation under section 6 of same article.

Legality of Organization of reclamation district cannot be collaterally attacked.

Approved in Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 409, 105 Pac. 281, following rule.

Corporation De Facto may Legally Do and perform every act which it could do as de jure corporation.

Approved in Creditors' Union v. Lundy, 16 Cal. App. 571, 117 Pac. 626, corporation de facto may sue on note assigned to it; Reclamation District v. McPhee, 13 Cal. App. 388, 109 Pac. 1108, upholding assessment made by de facto reclamation district; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 416, 105 Pac. 284, upholding reclamation district assessment made by de facto assessment commissioner; People's Ditch Co. v. Land and Water Co. (Cal.), 44 Pac. 177, holding de facto corporation may assert corporate character against all the world except in direct proceeding by attorney general to test its franchise; Purdin v. Washington Nat. Bldg. etc. Assn., 41 Wash. 397, 83 Pac. 724, holding question of legality of irrigation district could not be raised in suit to recover land sold for nonpayment of irrigation tax.

67 Cal. 532-536, 8 Pac. 70, WRIGHT v. CENTRAL CALIFORNIA COLONY WATER CO.

Stockholder may Vote All His Shares for whole number of directors to be elected, or cumulate upon one candidate, or distribute them among as many candidates as he sees fit.

Approved in *People v. Deneen*, 247 Ill. 302, 93 N. E. 442, holding cumulative voting law applies to primary election for representatives to General Assembly; *State v. Swanger*, 190 Mo. 576, 89 S. W. 876, 2 L. R. A. (n. s.) 121, holding provision that each share shall have one vote does not prevent issue of preferred stock not carrying voting power.

By-law Regulation of Elections by private corporations. See note, 18 L. R. A. 584.

67 Cal. 536-541, 8 Pac. 63, GOAD v. MOULTON.

No Consideration Need be Expressed in deed in order to give it effect.

Approved in *Schultz v. McLean* (Cal.), 25 Pac. 430, holding cestui que trust who had joined with trustee in deed to trust property could not complain deed passed no title or was void for want of consideration.

Married Woman may Make any contract respecting property which she could make if unmarried.

Distinguished in *Bank of Commerce v. Baldwin*, 14 Idaho, 81, 93 Pac. 506, holding married woman could not become surety for another, such contract not being essential to enjoyment of her separate estate.

Power of Married Woman, under statute giving her sole control of separate estate, to become surety. See note, 17 L. R. A. (n. s.) 678.

67 Cal. 543-546, 8 Pac. 82, SHIRLEY v. BISHOP.

Erection of Wharf Materially Obstructing access to private property on waterfront will be enjoined as nuisance.

Approved in *McCloskey v. Pacific Coast Co.*, 160 Fed. 797, 22 L. R. A. (n. s.) 673, 87 C. C. A. 568, following rule; *Heine v. Roth*, 2 Alaska, 422, granting injunction against continued trespass on shore lands in front of plaintiff's property destroying ingress and egress.

Right to Erect Wharves. See note, 40 L. R. A. 642.

Right of Owner of Upland to access to navigable water. See note, 40 L. R. A. 597.

67 Cal. 547-566, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46, HIBBERD v. SMITH.

Written Instrument in Form of conveyance of land does not take effect as deed unless delivered with intent it shall so operate.

Approved in *McGrath v. Hyde* (Cal.), 21 Pac. 949, and *Follmer v. Rohrer*, 148 Cal. 758, 112 Pac. 546, both holding evidence showed delivery of deed; *Beebe v. Coffin*, 153 Cal. 177, 94 Pac. 768, holding release of mortgage delivered to mortgagor in sealed envelope without mortgagor's knowledge of contents, with instructions limiting its taking effect until after death and kept in safe deposit box of mortgagee, not to be gift causa mortis; *Drinkwater v. Hollar*, 6 Cal. App. 122, 91 Pac. 666, holding delivery of deed by agent of both parties without authority of grantor not valid delivery; *Towne v. Towne*, 6 Cal. App. 701, 92 Pac. 1052, holding presumption of intention to deliver deed by manual tradition and continued possession by grantee not overcome; *Emmons v. Harding*, 162 Ind. 164, 70 N. E. 145, holding evidence of delivery to grantee sufficient to go to jury.

Delivery of Deed to Third Person, or record, or delivery for record, by grantor. See note, 54 L. R. A. 874, 905.

Upon Execution Sale of real property, purchaser acquires only interest of judgment debtor therein.

Approved in *Woods v. Kellerman*, 3 Cal. App. 425, 89 Pac. 359, holding purchaser at execution sale under junior lien took land subject to senior liens. .

Sheriff's Failure to Comply with law in execution sale does not render deed void, but only voidable upon application of parties to the writ.

Approved in *Weldon v. Rogers*, 157 Cal. 413, 108 Pac. 267, holding title of purchaser at sheriff's sale did not depend upon return of writ; *Orton v. Brown*, 113 Cal. 568, 45 Pac. 837, holding not void, though irregular, execution sale of several articles of personal property in one lot.

67 Cal. 567-577, 8 Pac. 94, SWIFT v. SAN FRANCISCO STOCK AND EXCHANGE BOARD.

Where by Constitution of Voluntary Association a payment was to be made upon death of member to persons designated by him, and he made no designation, personal representative cannot sue therefor.

Approved in *Warner v. Modern Woodmen of America*, 67 Neb. 242, 108 Am. St. Rep. 634, 93 N. W. 400, 61 L. R. A. 603, where benefit certificate of fraternal society was payable to legal heirs and he died without heirs, fund reverts to society.

Disposition of Fund in Benefit Society upon failure of beneficiary. See note, 17 L. R. A. (n. s.) 1085.

Whether Benefit Association is an insurance company. See note, 38 L. R. A. 38, 57.

67 Cal. 577-580, 8 Pac. 91, LOWER KINGS RIVER ETC. DITCH CO. v. KINGS RIVER ETC. CANAL CO.

Amended Complaint may be Filed upon proper showing after expiration of time for filing such without leave.

Approved in *Carter v. Paige* (Cal.), 20 Pac. 730, holding filing amended complaint after time allowed in order allowing amendment to be irregularity only.

67 Cal. 580-582, 8 Pac. 93, CARIT v. WILLIAMS.

Pending Appeal from Final Order after judgment for payment of money, undertaking on appeal being waived, but no appeal having been taken from judgment, supreme court cannot stay execution on judgment.

Reaffirmed in *Weldon v. Rogers*, 154 Cal. 636, 637, 89 Pac. 1071.

67 Cal. 582-584, 8 Pac. 185, PELLIER v. GILLESPIE.

Affidavit Showing Service of summons on defendants in same county need not state all were residents of same county.

Reaffirmed in *Mantle v. Casey*, 31 Mont. 411, 78 Pac. 592.

In Action to Foreclose Mortgage, allegation that grantee of mortgagor agreed to pay mortgage debt is sufficient to sustain personal judgment against grantee for deficiency.

Approved in *Heim v. Butin* (Cal.), 40 Pac. 41, where purchaser of mortgaged premises agreed to assume mortgage debt, both purchaser

and mortgagor were proper parties to foreclosure, and mortgagor was entitled to have deficiency judgment entered against purchaser.

Description of Property in Mortgage and decree examined and held sufficient.

Approved in *Merryman v. Kirby*, 13 Cal. App. 347, 109 Pac. 637, holding description of land in complaint in ejectment sufficient to identify it.

67 Cal. 585-589, 8 Pac. 181, ESTATE OF SKERRETT.

Undelivered Deed and Letter, both in handwriting of deceased, construed together and held to constitute valid will.

Distinguished in *In re Noyes' Estate*, 40 Mont. 197, 105 Pac. 1019, 26 L. R. A. (n. s.) 1145, holding void holographic will with part of date printed; *In re Noyes' Estate*, 40 Mont. 238, 240, 106 Pac. 357, holding letter not referring directly to imperfectly executed will could not together with such will constitute a valid will; *Grigsby Legatees v. Willis' Estate*, 25 Tex. Civ. 5, 59 S. W. 576, acknowledged note written by testator and directed to her daughter held to be codicil to will; *Dexter v. Witte*, 138 Wis. 80, 119 N. W. 893, deed unambiguous on face and not explained by any contemporaneous writing could not be probated as will.

What Constitutes a Testamentary Writing. See notes, 89 Am. St. Rep. 495; 5 Cof. Prob. 18.

Letter as Will. See note, 15 L. R. A. 636.

Extrinsic Evidence to Show testamentary character of instrument. See note, 13 L. R. A. (n. s.) 1204.

Holographic Wills. See notes, 104 Am. St. Rep. 27, 29; 1 Cof. Prob. 433, 437, 439.

67 Cal. 591-595, 8 Pac. 311, MEADE v. WATSON.

Sufficiency of Fences. See note, 22 L. R. A. 106.

Miscellaneous.—Cited in *Meade v. Watson* (Cal.), 8 Pac. 314, companion case.

67 Cal. 599-601, 8 Pac. 320, WALKER v. BREM.

Findings are not Necessary as to admitted facts.

Reaffirmed in *Fouch v. Bates*, 18 Idaho, 383, 110 Pac. 268.

Where Naked Legal Title is Acquired by mistake in including land in deed, such mistake is defense to action of ejectment brought by holder of legal title, without reforming deed.

Reaffirmed in *King v. Dugan*, 150 Cal. 263, 88 Pac. 927.

67 Cal. 601-607, 8 Pac. 316, BRICHMAN v. ROSS.

When Property of Defendant is found in possession of stranger, mere production of writ of attachment does not justify its seizure.

Approved in *McRae v. Lachman*, 8 Cal. App. 243, 96 Pac. 506, holding sheriff must justify levy of writ of attachment upon property of mortgagor in possession of mortgagee by showing plaintiff was creditor of mortgagor; *Cheeseman v. Fenton*, 13 Wyo. 449, 110 Am. St. Rep. 1010, 80 Pac. 826, and *Moriund v. Johnson*, 140 Mo. App. 354, 124 S. W. 82, both holding sheriff must show validity of writ and regularity of levy.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 96.

67 Cal. 607-610, 8 Pac. 377, RODGERS v. CENTRAL PACIFIC R. R. CO.

It is Duty of Employer to inform employee of special risks known to employer, and failing to do so he is liable for injury suffered from such risks.

Approved in *Bone v. Ophir Silver Min. Co.*, 149 Cal. 294, 86 Pac. 685, holding mining company liable for injury to servant due to unexploded blasts, location of which he was ignorant; *Thompson v. Cal. Construction Co.*, 148 Cal. 37, 82 Pac. 368, holding employer not liable for injury to employee in quarry when employee had equal means of knowing danger with employer.

Where Negligence of Defendants has combined with act of God, with inevitable accident, in producing injury complained of, defendant is liable.

Approved in *Rodgers v. Missouri Pac. Ry. Co.*, 75 Kan. 232, 121 Am. St. Rep. 416, 88 Pac. 888, holding negligent delay in carriage of goods not amounting to conversion did not render carrier liable for loss of goods at destination due to act of God.

67 Cal. 610-614, 8 Pac. 440, HOULT v. BALDWIN.

On Breach by Seller of Either implied warranty or express warranty that article manufactured and sold would do good work of particular kind, buyer has right to rescind sale.

Approved in *Luitweiler etc. Engine Co. v. Ukiah Water etc. Co.*, 16 Cal. App. 205, 116 Pac. 710, upholding rescission of sale and recovery of price paid on breach of warranty on sale of pump warranted to operate without pulsation or water hammer.

Right to Reject Goods for breach of warranty. See note, 27 L. R. A. (n. s.) 924.

Implied Warranty of Fitness of property bought for special purpose. See note, 22 L. R. A. 193, 196.

67 Cal. 615-621, 8 Pac. 436, TAYLOR v. CENTRAL PACIFIC R. R. CO.

Findings are Unnecessary as to facts admitted by pleadings.

Approved in *Pratt v. Welcome*, 6 Cal. App. 478, 92 Pac. 501, and *Fouch v. Bates*, 18 Idaho, 383, 110 Pac. 268, both following rule.

Possession of Land to Impart notice of rights of holder must be actual, open, notorious and exclusive.

Distinguished in *Campbell v. Grennan*, 13 Cal. App. 485, 110 Pac. 158, holding purchaser who purchased lot knowing house belonging to another extended over line of lot took subject to such use.

Effect of Possession of real property as notice. See notes, 104 Am. St. Rep. 337; 13 L. R. A. (n. s.) 65, 79, 86.

67 Cal. 621-623, 8 Pac. 379, ENOS v. SUN INSURANCE CO.

Where Fire Insurance Policy Expressly Exempts insurer from being bound by act not stipulated for in policy on application, notice to agent as to matters not contained in either does not bind company.

Approved in *Cayford v. Metropolitan Life Ins. Co.*, 5 Cal. App. 718, 91 Pac. 267, holding local solicitor could not extend time of payment of premium under terms of policy, and policy was void for non-payment.

Waiver of Provisions of nonwaiver or written waiver of conditions and forfeiture in policies. See note, 107 Am. St. Rep. 132.

Effect of Nonwaiver Agreement on conditions existing at inception of policy. See note, 13 L. R. A. (n. s.) 856.

Distinguished in *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 449, 119 Am. St. Rep. 234, 89 Pac. 106, holding general agent could accept increased risk for increased premium.

67 Cal. 624, 8 Pac. 383, **PEOPLE v. STROTHER.**

Amendment of 1884 to Section 9, article XIII, Constitution, was properly adopted.

Approved in *People v. Loomis*, 135 Mich. 562, 98 N. W. 264, holding proposed constitutional amendment was sufficiently entered on journals of both houses.

Effect of Noncompliance with prescribed method of amending constitution. See note, 10 L. R. A. (n. s.) 152.

67 Cal. 627-632, 9 Pac. 833, **PEOPLE ex rel. LEVERSON v. THOMPSON.**

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 69.

67 Cal. 634, 8 Pac. 445, **GRANGERS' BUSINESS ASSN. v. CLARK.**

In Action by Corporation to foreclose mortgage given for money loaned by corporation, mortgagor is estopped to deny power of corporation to make the contract.

Approved in *Frese v. Mutual Life Ins. Co.*, 11 Cal. App. 394, 105 Pac. 269, holding beneficiary of life policy could not claim procurement of loan and assignment of policy as security was ultra vires, when fully executed prior to death of insured.

67 Cal. 635-637, 8 Pac. 444, **SWEENEY v. STANFORD.**

Partnership Doing Business under fictitious name must comply with section 2468, Civil Code, as prerequisite to suit by partnership.

Approved in *Sutton & Co. v. Coast Trading Co.*, 49 Wash. 701, 96 Pac. 431, upholding contract of partnership made before filing certificate, but such filing is prerequisite to bringing suit.

Distinguished in *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 577, 112 Pac. 458, negative allegation in defense that plaintiff corporation had not paid license tax must be proven by defendant; *Nicholson v. Auburn Gold Min. etc. Co.*, 6 Cal. App. 548, 92 Pac. 651, holding failure to file certificate avoidable only by plea in abatement, and compliance with statute before filing such plea is sufficient; *In re Farmers' Supply Co.*, 170 Fed. 504, holding partnership need not file certificate as condition to suing in federal courts.

67 Cal. 637-642, 8 Pac. 497, **ESTATE OF SWAIN.**

When Claims have Been Allowed by administrator, burden of proving them improperly allowed is upon one who seeks to set them aside.

Approved in *Shiels v. Nathan*, 12 Cal. App. 616, 108 Pac. 39, and *In re More's Estate* (Cal.), 54 Pac. 150, both following rule.

Allowance of Certain Claims against estate defectively verified sustained in subsequent contest by heirs.

Approved in *Empire State Min. Co. v. Mitchell*, 29 Mont. 59, 74 Pac. 81, upholding affidavit of attorney of corporation in presenting claim against estate, when affidavit recited all officers were absent from county.

Statement of Claims against estates of decedents. See notes, 130 Am. St. Rep. 313, 320; 5 Cof. Prob. 299, 306.

"Claim" Against Estate Refers to such debts or demands against decedent as might have been enforced against him in lifetime by personal actions for recovery of money, and upon which money judgment could have been rendered.

Approved in *Houtz v. Commissioners of Uinta Co.*, 11 Wyo. 171, 70 Pac. 843, following rule.

67 Cal. 643-645, 8 Pac. 514, GUARDIANSHIP OF DANNEKER.

Where Courts of Two Counties have equal rights of jurisdiction over guardianship, that of court first attaching is exclusive.

Approved in *Guardianship of Treadwell*, 3 Cof. Prob. 316, and *Estate of Deisen*, 2 Cof. Prob. 466, 467, both following rule; *In re Burton*, 5 Cof. Prob. 237, applying rule to suit in equity.

67 Cal. 646-651, 8 Pac. 600, PEOPLE v. ROBERTSON.

Where Defendant in Murder Case commenced the affray, he must, to plead self-defense, have really and in good faith sought to withdraw from combat before act was committed.

Approved in *People v. Reed* (Cal.), 52 Pac. 836, holding defendant had not abandoned quarrel and did not sustain plea of self-defense; *People v. Button* (Cal.), 38 Pac. 202, holding defendant had sought to withdraw before homicide, and killed in self-defense; *State v. Shockley*, 29 Utah, 40, 88, 110 Am. St. Rep. 639, 80 Pac. 870, 887, holding abandonment of quarrel by aggressor before killing in alleged self-defense not shown.

Right of Self-defense by original aggressor. See notes, 109 Am. St. Rep. 823; 45 L. R. A. 698, 702.

Criminal Law. See note, 110 Am. St. Rep. 665.

Court may Refuse to Call for prosecution eye-witnesses of commission of crime.

Reaffirmed in *Dillon v. State*, 137 Wis. 660, 119 N. W. 354.

67 Cal. 652-655, 8 Pac. 504, DENT v. BIRD.

Miscellaneous.—Cited in *Hall v. Hebard* (Cal.), 8 Pac. 507, companion case.

67 Cal. 656-657, 8 Pac. 594, TAYLOR v. MIDDLETON.

In Ejectment for Mining Claim, whether prior location shown by evidence was abandoned or forfeited is question for jury.

Reaffirmed in *Gear v. Ford*, 4 Cal. App. 562, 88 Pac. 603.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 860.

67 Cal. 657-659, 8 Pac. 523, MYRES v. SURRYHNE.

Agent Employed to Exchange real estate cannot recover compensation unless services were performed under contract in writing subscribed by principal.

Approved in *Perkins v. Cooper* (Cal.), 24 Pac. 377, holding agent to sell real estate could not recover commission from executors as individuals when his authority was a letter from one executor only as executor; *Beahler v. Clark*, 32 Ind. App. 226, 68 N. E. 614, denying recovery on common count for services rendered for procuring purchaser for real estate when broker's contract was not in writing.

Distinguished in *Peirce v. Wheeler*, 44 Wash. 329, 87 Pac. 362, holding lack of written authority of agent to sell land did not affect validity of contract of sale in suit for specific performance.

Necessity That Authority of Agent to purchase or sell realty be written to enable him to recover compensation. See note, 9 L. R. A. (n. s.) 935.

67 Cal. 659-661, 8 Pac. 501, **LAKE PLEASANTON WATER CO. v. CONTRA COSTA WATER CO.**

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 157, 158.

67 Cal. 661-663, 8 Pac. 507, **HIRSCHFELD v. CROSS.**

Probate Court is Guardian of estates of deceased persons and has control of person appointed by it to administer estate, subject to review as provided by law.

Reaffirmed in *In re More's Estate* (Cal.), 54 Pac. 150.

67 Cal. 663-664, 8 Pac. 595, **OAKLAND GAS LIGHT CO. v. DAMERON.**

Finding That Action was not Barred by statute of limitations, or by sections of code specified is sufficient.

Approved in *Ybarra v. Sylvany* (Cal.), 31 Pac. 1115, and *Luco v. Toro* (Cal.), 18 Pac. 868, both holding sufficient, as not stating mere conclusion of law, finding that action has barred by code sections pleaded; *Lillis v. People Ditch Co.* (Cal.), 29 Pac. 781, upholding finding that "action is barred by statute of limitations."

In Ejectment, Where Possession is by tenants, landlord may be joined with them as defendant.

Approved in *Moore v. Moore* (Cal.), 34 Pac. 91, following rule.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 68 CALIFORNIA.

68 Cal. 1-4, 8 Pac. 609, SCRIVENER v. DIETZ.

Regularity of Affidavit for attachment cannot be collaterally attacked by stranger to suit.

Approved in *Hillman v. Griffin* (Cal.), 59 Pac. 195, following rule; *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 745, 91 Pac. 418, holding in action on bond given to release attachment validity of attachment and truth of affidavit could not be questioned; *Ballew v. Young*, 24 Okl. 194, 103 Pac. 628, holding intervener in attachment proceeding who claims attached property could only make such objections to irregularity of attachment as could be made by attack in collateral proceeding.

Right of Creditors to Question validity of attachment. See note, 35 L. R. A. 777.

68 Cal. 5-8, 8 Pac. 605, STEWART v. TAYLOR.

Judgment in Replevin must be in alternative.

Reaffirmed in *Hynes v. Barnes*, 30 Mont. 27, 75 Pac. 523.

Pending Appeal from Order denying motion for new trial, lower court has no authority to vacate or set aside same.

Approved in *Hynes v. Barnes*, 30 Mont. 28, 75 Pac. 524, and *Aetna Ins. Co. v. Thompson*, 34 Wash. 615, 76 Pac. 107, both following rule.

68 Cal. 11, 8 Pac. 517, BARTON v. BROWN.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 118.

68 Cal. 14-16, 8 Pac. 593, LAKE COUNTY v. SULPHUR BANK ETC. MIN. CO.

Mining Company is Estopped, in action to collect taxes, to question sufficiency of description of property furnished assessor by its superintendent.

Approved in *Inland Lumber etc. Co. v. Thompson*, 11 Idaho, 515, 114 Am. St. Rep. 274, 83 Pac. 935, holding one furnishing assessor with list of his property is thereafter estopped to deny ownership in action to collect taxes.

68 Cal. 17-18, 8 Pac. 502, JAMISON v. SIMON.

Oral Contract for Sale of Wool, no part of price having been paid, is invalid when buyer accepted no part of wool.

Approved in Tinkelpaugh-Kimmel Hardware Co. v. Minn. etc. Machine Co., 20 Okl. 191, 95 Pac. 428, holding complaint on oral contract failed to state cause of action, since no payment or acceptance of goods was alleged; Grant v. Milam, 20 Okl. 675, 95 Pac. 425, holding unenforceable contract for goods in excess of fifty dollars, for which no written memorandum was signed.

Acceptance of Goods to Satisfy statute of frauds. See note, 96 Am. St. Rep. 216.

68 Cal. 24-26, 8 Pac. 509, HALL v. SUPERIOR COURT.

Order of Service of Notice of appeal from justice's court and of filing undertaking therein is immaterial.

Approved in State v. District Court, 32 Utah, 422, 91 Pac. 135, following rule; Kraker v. Superior Court, 15 Cal. App. 653, 115 Pac. 664, *arguendo*.

Distinguished in State v. District Court, 34 Mont. 118, 115 Am. St. Rep. 522, 85 Pac. 873, holding filing notice of appeal must precede or be contemporaneous with service thereof on adverse party.

Superior Court can Neither Give to itself jurisdiction of appeal from justice's court by holding insufficient bond sufficient, nor divest itself of jurisdiction by holding sufficient bond insufficient.

Approved in dissenting opinion in People v. Latimer, 160 Cal. 722, 117 Pac. 1054, majority refusing to review superior court's order dissolving attachment against bank official for refusal to testify before board of equalization, where board had then finally adjourned; Golden Gate Tile Co. v. Superior Court, 159 Cal. 480, 114 Pac. 980, issuing writ of mandate to compel superior court to try appeal from justice court which it had improperly dismissed for want of jurisdiction; Rabin v. Pierce, 10 Cal. App. 736, 103 Pac. 772, *arguendo*.

Denied in McGowan v. Superior Court, 13 Cal. App. 154, 109 Pac. 36, holding superior court had jurisdiction to hear and determine motion to dismiss appeal from justice's court.

Miscellaneous.—Cited in Hall v. Superior Court, 71 Cal. 551, 12 Pac. 672, on another appeal.

68 Cal. 29-31, 9 Pac. 187, SHARON v. SHARON.

In Action on Note Defense that consideration was illegal must be specially pleaded if complaint does not disclose illegality.

Approved in Carver v. San Joaquin Cigar Co., 16 Cal. App. 768, 118 Pac. 95, applying rule to defense that note was given to defraud creditors and holding it proper to refuse cross-examination as to nature and amount of consideration paid; Rucker v. Bolles, 133 Fed. 861, 67 C. C. A. 30, holding defense to action on contract that it is void as against public policy could not be proven unless specially pleaded.

Miscellaneous.—Cited in Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, and Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187, both other appeals.

68 Cal. 35-37, 8 Pac. 513, HEINLEN v. FRESNO CANAL ETC. CO.

Liability of Water Companies. See note, 81 Am. St. Rep. 494.

68 Cal. 43-52, 6 Pac. 97, 8 Pac. 621, LEE DOON v. TESH.

In Action by Adverse Claimants to determine right of possession of mining claim, plaintiffs must allege they are citizens or have declared intentions to become citizens of United States.

Reaffirmed in *Allyn v. Schultz*, 5 Ariz. 159, 48 Pac. 963.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 813.

68 Cal. 52-54, 8 Pac. 627, GERMAN SAVINGS ETC. SOCIETY v. HUTCHINSON.

Written Agreement Executed After Note and mortgage are due reciting their execution and recordation and agreeing to extend time for payment is renewal under section 2922, Civil Code.

Approved in *Moore v. Gould*, 151 Cal. 727, 91 Pac. 618, written instrument executed by attorney in fact considered and held to be renewal of note and mortgage.

Authority of One of Several executors or administrators. See notes, 127 Am. St. Rep. 386; 5 Cal. Prob. 382.

68 Cal. 57-67, 8 Pac. 673, TEHAMA COUNTY v. BRYAN.

Where Complaint States Facts essential to recovery, but does so imperfectly, demurrer thereto must be specially directed against very defects.

Approved in *The Union Ice Co. v. Doyle*, 6 Cal. App. 288, 92 Pac. 114, upholding sufficiency of averment of mistake in description of deeds in absence of special demurrer.

Under Section 1241, Code of Civil Procedure, supervisors must determine necessity of use, public character, route and termini of road, land necessary therefor, and apparent ownership before taking any steps to condemn such land.

Approved in *County of Sacramento v. Glann*, 14 Cal. App. 785, 113 Pac. 362, holding determination of such board as to such matters conclusive as against collateral attack.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 20, 113.

Section 1249, Code of Civil Procedure, providing value of land sought to be condemned should be determined as of date of summons, is valid.

Reaffirmed in *Los Angeles v. Gager*, 10 Cal. App. 381, 102 Pac. 19.

Right to Set Off Benefits against damages on condemnation. See note, 9 L. R. A. (n. s.) 829.

68 Cal. 68-72, 58 Am. Rep. 1, 8 Pac. 645, PIERCE v. GUITTARD.

Use of Trade Name or Mark but slightly differing from one in use by another, and calculated to mislead purchasers, will be enjoined.

Approved in *Nesne v. Sundet*, 93 Minn. 300, 106 Am. St. Rep. 439, 101 N. W. 491, enjoining corporation from using trade name lawfully adapted prior thereto by copartnership engaged in same business; *Rickard v. Caton College Co.*, 88 Minn. 247, 92 N. W. 959, enjoining use by another private school of name imitating name of established school; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 359, 67 N. E. 728, enjoining use by another of name for proprietary remedy resembling one already in use; dissenting opinion in *Italian-Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 259, 110 Pac. 916, majority holding "Tipo," as used to designate wine, not capable of being adopted as trademark.

Distinguished in *Italian-Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 256, 110 Pac. 914, holding "Tipo," as used to describe wine, not to be capable of adoption as trademark; *Millbrae Co. v. Taylor* (Cal.), 37 Pac. 237, holding where use of trade name was fraud on public, party using it could not seek to enjoin another from using similar name; *Esselstyn v. Holmes*, 42 Mont. 518, 114 Pac. 120, holding plaintiff not entitled to exclusive use of name "Owl Creek Coal," as trade name for coal mined from district known as Owl Creek coal-field, in which there was competitive mining.

What Words or Phrases may constitute a valid trademark. See note, 85 Am. St. Rep. 84.

Infringement of Trademark by similarity of name. See note, 14 L. R. A. 245.

68 Cal. 73-78, 8 Pac. 849, CHRISTY v. SPRING VALLEY WATER-WORKS.

Judgment in Partition is conclusive upon all parties thereto as to whatever title or claim they had when judgment was rendered.

Approved in *Phillips v. Winter* (Cal.), 37 Pac. 155, party to partition suit who acquires independent title by deed pending suit and before decree, and does not assert such title in action, is concluded by judgment from setting up such title in subsequent action for partition; dissenting opinion in *Carter v. White*, 134 N. C. 480, 101 Am. St. Rep. 853, 46 S. E. 988, majority holding one to whom part of land was partitioned guilty of trespass in going upon other part although he claimed undivided interest therein by deed subsequent to partition from one not party to partition suit.

Conclusiveness of Judgment in partition suit. See note, 124 Am. St. Rep. 714.

Effect of Compulsory Partition. See note, 101 Am. St. Rep. 872, 875.

68 Cal. 78-80, 5 Pac. 623, 8 Pac. 599, WOOD v. BRADY.

Superiority of Lien of Local assessment over prior lien. See note, 35 L. R. A. 378.

68 Cal. 82-91, 8 Pac. 679, SPENCER v. HOUGHTON.

Service upon Guardian who has left state of notice in proceeding to compel accounting may be made by publication.

Distinguished in *Michigan Trust Co. v. Ferry*, 175 Fed. 674, 99 C. C. A. 221, holding court could not enter money judgment against guardian in action for accounting when guardian was served by publication while absent from state.

68 Cal. 91-95, 8 Pac. 641, MCGEE v. SAN JOSE.

One Person cannot, Without Authority, pay debt of another and charge amount so paid against party for whose benefit payment was made.

Reaffirmed in *Charnock v. Jones*, 22 S. D. 135, 115 N. W. 1073.

Effect of Payment of Debt by volunteer or stranger to original undertaking. See note, 23 L. R. A. 125, 126.

68 Cal. 95-98, 8 Pac. 650, GANAHL v. SOHER.

Action by Heirs of Deceased Intestate to recover real property sold by one acting as administrator under probate act and by order

of probate court must be brought within three years next after sale, or within three years after majority, although sale was void by reason of invalidity of appointment of administrator.

Approved in *O'Keefe v. Behrens*, 73 Kan. 478, 85 Pac. 558, 8 L. R. A. (n. s.) 354, holding action to set aside sale by administrator void for want of notice to heirs must be commenced within five years from recordation of deed.

Effect of Void Proceedings for sale of realty to start statute running in favor of purchaser in possession. See note, 8 L. R. A. (n. s.) 355.

68 Cal. 98-101, 8 Pac. 648, MYRICK v. SUPERIOR COURT.

Where Justice's Court Refused to try case on ground of lack of jurisdiction, superior court cannot try case de novo, but should determine jurisdiction and remand case for trial.

Approved in *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 480, 114 Pac. 980, writ of mandate issued to compel superior court to hear appeal from justice's court improperly dismissed; *Null v. Superior Court*, 4 Cal. App. 210, 87 Pac. 394, holding superior court could not try case appealed from justice's court where no issues of fact were there tried, but question of law on appeal should be determined and case remanded for trial; *Smith v. Superior Court*, 2 Cal. App. 530, 84 Pac. 55, when appeal is based on questions of law alone, case should be remanded for trial to justice's court; *Maxson v. Superior Court (Cal.)*, 54 Pac. 520, 521, on appeal from default judgment in justice's court, whether on questions of law or fact, there cannot be trial de novo; *Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho, 686, 95 Pac. 827, on appeal from default judgment in justice's court, defendant cannot raise issues for first time by answer in district court; *Smith v. Clyne*, 15 Idaho, 261, 262, 97 Pac. 42, where issue was tendered in probate court and appeal was taken on question of law alone, upon reversal on such question district court may order new trial.

Distinguished in *Armantage v. Superior Court*, 1 Cal. App. 131, 135, 136, 81 Pac. 1033, 1035, where appeal was taken from justice's court on questions of fact, or questions of law and fact, superior court had original jurisdiction to try case without a statement if there was any trial of issues in justice's court with or without jurisdiction.

68 Cal. 101-105, 8 Pac. 687, PEOPLE v. HAMBLIN.

Where Defendant in Murder Trial testified in his own behalf, he cannot be asked for purpose of impeachment on cross-examination whether he had been previously arrested for shooting at certain individuals.

Approved in *Tollifson v. People*, 49 Colo. 228, 112 Pac. 798, holding defendant in burglary trial should not be cross-examined as to previous arrests; *State v. La Mont*, 23 S. D. 178, 180, 120 N. W. 1106, one accused of rape cannot be cross-examined as to improper conduct with other members of households.

Distinguished in *State v. Barrett*, 117 La. 1093, 42 So. 515, defendant testifying in his own behalf may be asked, for purpose of impeachment, whether he had not been prosecuted for other offenses.

Cross-examination of Defendant in criminal cases. See note, 15 L. R. A. 674.

68 Cal. 105-109, 8 Pac. 694, BEAUDRY v. DOYLE.

In Locating Boundary Line, courses and distances will be controlled by natural objects.

Approved in *Staub v. Hampton*, 117 Tenn. 737, 101 S. W. 782, survey of land with reference to monument located by reference to erroneous survey held to control description, although land not located within calls.

Location of Boundaries. See note, 129 Am. St. Rep. 997.

68 Cal. 109-113, 8 Pac. 799, MORRIS v. LACHMAN.

Witness cannot Refresh Memory from affidavit sworn to ex parte, unless shown that it was written under his direction at time facts occurred.

Approved in *State v. Marren*, 17 Idaho, 798, 107 Pac. 1004, holding witness may refresh memory by reading testimony given by him at former trial.

Argumentative Instructions should be refused.

Reaffirmed in *State v. Buralli*, 27 Nev. 55, 71 Pac. 536.

Justification in Slander and Libel. See note, 91 Am. St. Rep. 306.

68 Cal. 113-116, 8 Pac. 712, PEOPLE v. STEVENS.

Evidence in Trial for Burglary considered and held not to show conspiracy.

Approved in *State v. Walker*, 124 Iowa, 420, 100 N. W. 357, holding evidence in murder case did not show conspiracy.

68 Cal. 116-122, 8 Pac. 804, BARROILHET v. ANSPACHER.

Where One Party Holds naked legal title and another is in possession, party in possession is not guilty of laches in asserting equitable rights until holder of title has disturbed him.

Approved in *Mallagh v. Mallagh* (Cal.), 16 Pac. 537, following rule.

In Order That Trust might result in favor of party, it is enough that consideration for transfer was paid by him.

Approved in *Breitenbucher v. Oppenheim*, 160 Cal. 103, 116 Pac. 57, reaffirming rule.

68 Cal. 123-132, 8 Pac. 818, PACKARD v. MOSS.

Sheriff's Deed to Property sold under execution upon default judgment rendered while demurrer was on file and undetermined gives color of title.

Approved in *Knight v. Cohen*, 7 Cal. App. 48, 93 Pac. 399, holding deed from one who had title, title being held by trustee, is color of title; *United States v. Casterlin*, 164 Fed. 439, and mere occupancy of public land by an Indian by permission of government does not give him color of title thereto.

Color of Title. See note, 88 Am. St. Rep. 717, 724.

Limitations cannot Run against title to state lands founded on certificate of purchase until land is certified to state.

Approved in *Hibben v. Malone*, 85 Ark. 589, 109 S. W. 1010, and *Packard v. Johnson* (Cal.), 8 Pac. 823, both following rule.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1215, 1217, 1219, 1220, 1221.

68 Cal. 133-134, 8 Pac. 691, GRAVES v. BAKER.

Trust Deed of Homestead to wife by husband is void as against declaration of homestead.

Approved in *Loomis v. Loomis*, 148 Cal. 154, 82 Pac. 681, 1 L. R. A. (n. s.) 312, holding void deed of husband to wife of homestead property with proviso that she should will it to his brother.

68 Cal. 142-146, 8 Pac. 813, MILLER v. KISTER.

Legislature has Full Control over public offices and may abolish them, or impose new duties, or reduce salaries.

Reaffirmed in *People v. Edleman*, 152 Cal. 318, 92 Pac. 847.

Section 4 of County Government Act of 1885 is local legislation and invalid.

Approved in *Johnson v. Gunn* (Cal. App.), 84 Pac. 371, 373, holding void amendment of 1901 to County Government Act regulating compensation of justices of peace in counties of twenty-seventh class as being local legislation.

Distinguished in *Crockett v. Matthews*, 157 Cal. 160, 106 Pac. 577, upholding act of March 13, 1909, relating to compensation of officers in counties of fourteenth class; *Rambo v. Larrabee*, 67 Kan. 646, 73 Pac. 919, upholding chapter 5, page 396, Laws of 1903, concerning criminal appeals, as not being local or special legislation; *Russell v. Esmeralda Co.*, 32 Nev. 314, 107 Pac. 892, upholding act of February 27, 1883, regulating fees of officers of counties whose total vote exceeds eight hundred.

A Law Speaks from Time of its going into effect.

Approved in *Harrison v. Colgan*, 148 Cal. 76, 82 Pac. 677, holding law increasing salaries of supreme court justices, being passed after beginning of terms of justices of district courts of appeal, did not affect their salaries.

68 Cal. 146-151, 8 Pac. 816, MOORE v. CLEAR LAKE WATER-WORKS.

No Allegation or Proof of Actual damage is necessary to entitle lower riparian proprietor to injunction against continuous wrongful diversion of water of stream.

Approved in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 333, 88 Pac. 981, 11 L. R. A. (n. s.) 1062, following rule; *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 531, 89 Pac. 343, holding prior appropriator of water entitled to decree quieting his title against subsequent appropriator whose rights are subordinate; *Santa Rosa etc. R. Co. v. Central St. Ry. Co.* (Cal.), 38 Pac. 991, holding street railroad could be enjoined from tearing up tracks of another company occupying same street under prior franchise.

Correlative Rights of Upper and lower proprietors as to use and flow of stream. See note, 41 L. R. A. 759.

Finding That All Allegations of complaint, with certain exception, are true, and all allegations of answer are untrue, is sufficient.

Approved in *Prince v. Kennedy*, 3 Cal. App. 407, 85 Pac. 860, refusing to reverse for failure to find upon insufficient defense which raised no material issues; *Healey v. Norton* (Cal.), 41 Pac. 1081, upholding finding that all allegations of complaint are true and all allegations of answer are untrue; *Paden v. Goldbaum* (Cal.), 37 Pac.

760, where sole issue is truth of allegations of answer, finding "that allegations of separate defense contained in answer of defendant are untrue" is sufficient; *Curtis v. Boquillas Land etc. Co.*, 9 Ariz. 65, 76 Pac. 613, upholding finding as to plaintiff's ownership in action to recover lands.

Distinguished in *Quinlan v. Calvert*, 31 Mont. 118, 77 Pac. 429, where affirmative matter is set out in answer, finding that all allegations of complaint are true and directing judgment thereon is insufficient.

68 Cal. 151-156, 8 Pac. 697, GONZALES v. COBLINER.

Malice in Fact must be Shown in order to support action for malicious prosecution.

Approved in *Davis v. Hearst*, 160 Cal. 163, 116 Pac. 539, malice in fact may be proved in civil action for damages by either direct or circumstantial evidence.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 455.

68 Cal. 156-162, 8 Pac. 824, HIBERNIA SAVINGS ETC. SOCIETY v. MOORE.

Where Motion for New Trial is heard on statement without objection, any irregularity in proceedings on motion is waived.

Approved in *Gibson v. Berryman*, 14 Cal. App. 333, 111 Pac. 927, holding notice of intention waived by stipulation for new trial; *Mendocino County v. Peters*, 2 Cal. App. 27, 82 Pac. 1123, where bill of exceptions recited that notice of intention to move for new trial was seasonably served, objection on that ground was waived.

68 Cal. 162-168, 8 Pac. 809, MYERS v. McDONALD.

Where Judgment in Favor of one defendant had been entered before signing of findings, and on appeal respondent confessed error and on his motion cause was reversed and remanded, plaintiff was entitled to new trial.

Approved in *Riley v. Loma Vista Ranch Co.*, 5 Cal. App. 27, 89 Pac. 850, reversal of order denying new trial on ground findings were not justified by evidence has effect of awarding parties new trial.

Where Judgment is Reversed and cause remanded, effect is only to set aside judgment and allow new trial, unless adjudication of appellate court was intended to be final disposition of cause.

Approved in *Steinman v. United States*, 185 Fed. 53, holding grounds of reversal as disclosed in opinion of appellate court should be considered in determining propriety of second trial.

68 Cal. 169-171, 8 Pac. 711, OLAFHEY v. HARTFORD INS. CO.

Parol Evidence is Admissible to identify property included in bill of sale.

Approved in *Spongberg v. First Nat. Bank*, 15 Idaho, 676, 99 Pac. 713, admitting oral evidence to identify room referred to in lease.

68 Cal. 171-176, 7 Pac. 447, 8 Pac. 828, BROWN v. CENTRAL PACIFIC R. R. CO.

In Action Against Railroad for negligently causing death of employee, when complaint positively alleges acts complained of were

by defendant, it cannot be presumed they were those of fellow-servant.

Approved in *Kelly v. Northern Pac. Ry. Co.*, 35 Mont. 254, 88 Pac. 1012, where allegation was that corporation negligently operated locomotive, inference could not be drawn that it was operated by engineer so as to bring case under special statute; *Hardesty v. Largey Lumber Co.*, 34 Mont. 164, 86 Pac. 33, applying rule under Civil Code, section 2660.

Vice-principalship as Determined with reference to character of act causing injury. See note, 54 L. R. A. 114.

68 Cal. 176-183, 8 Pac. 829, EX PARTE BROWN.

Admission to Bail After Conviction is not matter of right.

Approved in *Ex parte Hatch*, 15 Cal. App. 187, 114 Pac. 410, holding bail pending appeal from conviction properly refused; *In re Schriber*, 19 Idaho, 535, 114 Pac. 30, refusing bail pending appeal from jail sentence.

"Conviction" in Section 1272, Penal Code, means finding that accused is guilty, either by verdict, or some other mode, under section 689, Penal Code.

Approved in *Ex parte Tanner*, 49 Or. 86, 88 Pac. 303, reaffirming rule; *Dial v. Commonwealth*, 142 Ky. 33, 133 S. W. 976, "conviction" means determination of guilt by verdict, or final judgment in prosecution.

68 Cal. 184-188, 8 Pac. 878, SCHIEFFERY v. TAPIA.

Notice of Intention to Move for new trial may be waived.

Approved in *Gibson v. Berryman*, 14 Cal. App. 333, 111 Pac. 927, holding stipulation for new trial waived notice of intention; *Mendocino County v. Peters*, 2 Cal. App. 27, 82 Pac. 1123, holding recital in bill of exceptions that notice of intention was seasonably served waived objection thereto.

One not in Privity With State cannot attack patent from state.

Approved in *Warner Valley etc. Co. v. Morrow*, 48 Or. 265, 86 Pac. 371, following rule.

68 Cal. 189-190, 8 Pac. 835, BUTTE CO. v. BOYDSTUN.

On Appeal by One of Several Defendants in condemnation suit, notice of appeal must be served on other defendants.

Approved in *Omaha Bridge & Terminal Co. v. Reed*, 69 Neb. 516, 96 N. W. 276, appeal by mortgagee from condemnation award is of no effect as against owner, upon whom no summons was served.

68 Cal. 192-194, 8 Pac. 857, MCKINNEY v. ROBERTS.

Slander and Libel in Charging Woman with unchastity. See note, 24 L. R. A. (n. s.) 611.

68 Cal. 194-199, 8 Pac. 852, SMITH v. STROTHER.

Act of March 21, 1885, providing superior judges shall fix salaries of reporters, is void as being delegation of legislative power.

Approved in *State v. Barker*, 116 Iowa, 109, 93 Am. St. Rep. 222, 89 N. W. 209, 57 L. R. A. 244, holding void statute authorizing district court to appoint trustees of city waterworks; *In re Commissioners*

of Counties Comprising Seventh Judicial Dist., 22 Okl. 441, 98 Pac. 559, holding void as delegation of legislative power act providing governor shall appoint additional district judge for time recommended by court; dissenting opinion in *In re Appointment of Reviser*, 141 Wis. 628, 124 N. W. 676, majority upholding act providing State Library Commission should appoint and fix salary of reviser of statutes.

Distinguished in *Arnett v. State*, 168 Ind. 186, 80 N. E. 155, 8 L. R. A. (n. s.) 1192, upholding act authorizing governor within certain limits to determine salaries of police commissioners, and such commissioners to determine salaries of policemen; *In re Appointment of Reviser*, 141 Wis. 611, 612, 124 N. W. 676, upholding act providing State Library Commission should appoint and fix salary of reviser of statutes.

Distinction Between Legislative and judicial acts defined.

Cited in *San Francisco etc. Co. v. San Francisco*, 164 Fed. 888, *arguendo*.

68 Cal. 200-203, 8 Pac. 884, LEWIS v. STEIGER.

Where Witness for Plaintiff denies on cross-examination that he offered to procure testimony for defendant if paid therefor, defendant may impeach him by evidence to contrary.

Approved in *People v. Mack*, 14 Cal. App. 15, 110 Pac. 968, admitting evidence in larceny case of conversations of witness for defendant with prosecutrix, for purpose of showing interest and bias in favor of defendant; *People v. Ye Foo*, 4 Cal. App. 737, 89 Pac. 452, and *People v. Wong Chuey*, 117 Cal. 628, 49 Pac. 835, both holding witness for defendant may be asked on cross-examination if he had not attempted to bribe witnesses to give false testimony for defendant, and upon denial he may be impeached to show bias; *Finlen v. Heinze*, 32 Mont. 385, 80 Pac. 926, holding plaintiff, for purpose of affecting credibility of defendant's witness, may show he was active agent in procuring person to negotiate with judge at former trial for corrupt decision for defendant; *Cannon v. Territory*, 1 Okl. Cr. 614, 99 Pac. 627, holding witness for defense could be cross-examined as to specific acts tending to discredit her, when such facts are relevant to issue.

68 Cal. 203-204, 8 Pac. 881, ESTATE OF SMITH.

Relation of Bankrupt Law to assignments and insolvent proceedings under state laws. See note, 45 L. R. A. 187.

Binding Effect of Judgment refusing discharge in bankruptcy or insolvency. See note, 13 L. R. A. (n. s.) 631.

68 Cal. 208-209, 9 Pac. 1, GUARDIAN FIRE ETC. CO. v. THOMPSON.

Liability on Guaranty or surety obligation obtained by fraud. See note, 21 L. R. A. 413.

Duty of Obligee in Fidelity Bond to disclose prior defalcation. See note, 12 L. R. A. (n. s.) 251.

68 Cal. 210-217, 9 Pac. 129, KELLEY v. KRIESS.

When Complaint Fails to State cause of action, advantage may be taken of defect by demurrer, by motion for judgment on pleadings, or upon motion for new trial.

Approved in *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 434, 114 Pac. 1030, where answer failed to state defense, plaintiff could both demur and move for judgment on pleadings.

When Plaintiff has Good Cause of action, which by accident or mistake is not set out in complaint, court on motion for judgment on pleadings should allow him to amend.

Approved in *Bergerow v. Parker*, 4 Cal. App. 172, 87 Pac. 249, allowing unverified answer to be verified on motion for judgment on pleadings; *Fishburne v. Merchants' Bk. of Pt. Townsend*, 42 Wash. 476, 85 Pac. 39, on motion for judgment on pleadings, where no motion to amend is made, party stands on pleadings as originally filed.

Where Party Having Good Defense to action is prevented from making it by fraud of plaintiff, equity will enjoin enforcement of judgment.

Approved in *Flood v. Templeton*, 152 Cal. 158, 92 Pac. 82, 13 L. R. A. (n. s.) 579, following rule.

Injunctions Against Judgments obtained by fraud, accident, mistake, surprise and duress. See note, 30 L. R. A. 789.

Enjoining Judgments Against or in favor of sureties. See note, 31 L. R. A. 62, 64.

68 Cal. 225-231, 58 Am. Rep. 8, 9 Pac. 74, **BROWN v. SENNETT.**

Foreman of Gang to Whom Stevedore delegates entire management of unloading vessel is not fellow-servant with subordinate employees.

Distinguished in *Schwind v. Floriston Pulp & Paper Co.*, 5 Cal. App. 203, 89 Pac. 1069, holding employee of paper-mill and yard-foreman of same mill were fellow-servants.

Who are Fellow-servants Generally. See note, 18 L. R. A. 825.

Vice-principalship Considered with reference to superior rank of negligent servant. See note, 51 L. R. A. 561, 582, 592, 593.

Vice-principalship as Determined with reference to character of act causing injury. See note, 54 L. R. A. 38.

68 Cal. 236-238, 9 Pac. 108, **HAWKINS v. HARLAN.**

Doctrine of Relation is Fiction of law adopted solely for purposes of justice.

Approved in *Reese v. Bell (Cal.)*, 71 Pac. 90, holding where payee of note made mere equitable assignment of it, and after maturity indorsed same, doctrine of relation would not apply to cut off right of makers to set up any defense good against payee.

68 Cal. 241-243, 9 Pac. 103, **YOUNGER v. SANTA CRUZ COUNTY.**

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 441.

68 Cal. 246-247, 9 Pac. 92, 305, **CASEY v. JORDAN.**

Second Action on Substantially same cause filed after trial of first action should abate.

Approved in *Bell v. San Francisco Savings Union*, 153 Cal. 74, 94 Pac. 229, holding judgment in second action should not include matters being litigated in action still pending between same parties.

68 Cal. 254-261, 9 Pac. 133, CLUTE v. LOVELAND.

Corporation may be Trustee of property holding no beneficial interest therein.

Approved in *Baldwin v. Miller & Lux*, 152 Cal. 457, 92 Pac. 1034, holding corporation could be formed for purpose of holding property conveyed to it as trustee for its stockholders.

68 Cal. 262-266, 9 Pac. 149, CURNOW v. HAPPY VALLEY ETC. HYDRAULIC CO.

Action to Foreclose Mechanic's or laborer's lien is equitable.

Approved in *Becker v. Superior Court*, 151 Cal. 316, 90 Pac. 690, following rule; *Coghlan v. Quartararo*, 15 Cal. App. 666, 115 Pac. 666, in such action jury trial not matter of right.

68 Cal. 267, 9 Pac. 110, NATHAN v. SUTPHEN.

What Constitutes "Personal Service" of papers. See note, 16 L. R. A. 201.

68 Cal. 267-271, 9 Pac. 162, DILLON v. SALOUDE.

In Action to Determine Right to purchase state lands, each party must allege all facts relied on to show his right to purchase.

Approved in *Moran v. Bonyng*, 157 Cal. 297, 107 Pac. 314, holding insufficient complaint by intervener in contest of right to purchase state lands as not alleging qualifications to make purchase.

Article XVII, Section 3, Constitution, does not prevent or in any way affect sale of lands not suitable for cultivation.

Approved in *Taylor v. Weston*, 77 Cal. 535, 20 Pac. 63, holding fact that applicant for purchase of state lands was not settler thereon rendered proceedings void, whether land was suitable for cultivation or not.

Land Suitable for Cultivation cannot be sold to one not settled thereon, though his application was filed before Constitution went into effect.

Approved in *Messenger v. Kingsbury*, 158 Cal. 617, 112 Pac. 67, legislature could withdraw swamp land from sale although applicant to purchase had paid installment of purchase price.

68 Cal. 275-277, 9 Pac. 112, DOUGHERTY v. NEVADA BANK OF SAN FRANCISCO.

Negligence or Inadvertence of attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 269.

68 Cal. 281-284, 9 Pac. 315, ESTATE OF MOORE.

Insanity of Administrator does not ipso facto create vacancy, and after he is restored to sanity, person who requested his appointment is estopped to apply for letters for himself.

Approved in *Estate of King*, 4 Cof. Prob. 21, person requesting issuance of letters to one who died after appointment not estopped to apply for self; *Estate of Bedell*, 3 Cof. Prob. 82, where father of decedent requested appointment of another, who applied for letters, he was estopped to withdraw his waiver.

68 Cal. 284-290, 9 Pac. 173, COLLINS v. LEAN.

When Property is Seized under subdivision 3, section 1524, Political Code, as property held with intent to use it as means of committing public offense, magistrate is under no duty to deliver it to owner upon proof of title.

Distinguished in *Modern Loan Co. v. Police Court*, 12 Cal. App. 593, 108 Pac. 61, when personal property is stolen or embezzled, and taken upon warrant from possession of third person, who claims right of possession, return to owner cannot be adjudged without notice of hearing being given to such third person.

Right of Officer, in Executing criminal process, to take possession of evidentiary articles. See note, 18 L. R. A. (n. s.) 254.

Gambling Device as Property within constitutional protection. See note, 12 L. R. A. (n. s.) 394.

Search of Premises of private persons. See note, 101 Am. St. Rep. 334.

68 Cal. 290-293, 9 Pac. 166, WILLIAMS v. MILLER.

No Particular Words are Necessary to create a lease.

Approved in *Shenk v. Stahl*, 35 Ind. App. 498, 74 N. E. 540, contract which "granted and leased to the grantees, their heirs and assigns, certain land for purpose of gas well so long as it is used for same," is lease terminable upon ceasing to use property as gas well.

68 Cal. 294-306, 58 Am. Rep. 12, 9 Pac. 139, MATTER OF YICK WO.

Board of Supervisors may Provide that laundries shall be carried on only in brick or stone buildings.

Approved in *In re San Chung*, 11 Cal. App. 519, 105 Pac. 612, upholding ordinance regulating laundry business in city.

Municipal Power Over Buildings and other structures as nuisances. See note, 38 L. R. A. 170, 172.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 652.

In Order for a Subsequent Act to repeal a former act, it should appear that latter was intended to take place of former, or that the two are so inconsistent that effect cannot be given to both.

Approved in *Jackson County Commrs. v. Branaman*, 169 Ind. 91, 82 N. E. 69, holding court could resort to prior act on same subject to determine intention of statute.

Test of Validity of Municipal ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 39.

68 Cal. 309-316, 5 Pac. 484, 9 Pac. 159, LAWRENCE v. DOOLAN.

In Action on Bond personal representative of deceased obligor may be joined as defendant with surviving co-obligors, after claim on which action is founded has been presented to and disallowed by him.

Reaffirmed in *Spokane v. Costello*, 57 Wash. 190, 106 Pac. 767.

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 554.

68 Cal. 317-321, 9 Pac. 185, MARTIN v. WALKER.

Limitations Held not to Begin to run against claim for right in land until judgment had been rendered in partition suit pending when interest was acquired.

Approved in *Ott v. Boring*, 131 Wis. 483, 110 N. W. 828, holding limitations did not run against claimant's cause of action to recover money against estate until complete accrual of right by demand on executor.

68 Cal. 321-324, 9 Pac. 183, HARMON v. ASHMEAD.

Complaint to Foreclose Lien which alleges that other defendants have subordinate liens places burden on such defendants of showing priority of their liens.

Approved in *Wardlow v. Middleton*, 156 Cal. 586, 105 Pac. 738, in action to foreclose mortgage, allegation that defendants other than mortgagor had or claimed some interest in premises but subject to plaintiff's mortgage is sufficient to show such defendants were proper parties.

68 Cal. 324-326, 9 Pac. 171, SMITH v. LING.

Summary Proceeding Under Section 772, Penal Code, cannot be brought against public officer after he has ceased to hold office.

Approved in *Skeen v. Craig*, 31 Utah, 26, 86 Pac. 488, applying rule to action under similar Utah statute.

Accusation in Summary Proceeding under section 772, Penal Code, must allege defendant acted or omitted to act knowingly, willfully, or corruptly.

Approved in *State v. Meek*, 148 Iowa, 677, 127 N. W. 1025, 31 L. R. A. (n. s.) 566, willfulness of county official's act, if wrongful, held to be for jury.

68 Cal. 326-343, 9 Pac. 187, SHARON v. SHARON.

Where There are Several Appeals in same action, record on each may be embodied in one transcript.

Approved in *Estate of Bell*, 157 Cal. 532, 108 Pac. 498, holding separate independent appeals not required to be embodied in one transcript; *Thornburg v. Cardell*, 123 Iowa, 315, 95 N. W. 240, upholding joint notice of appeal by three parties who filed separate answers, demurrers to which were sustained by one order, and joint judgment rendered against appellants for costs.

68 Cal. 343-347, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128, LITTLE v. JACKS.

Undertaking on Appeal is not Waived by stipulation to advance appeal on calendar of supreme court.

Approved in *Newman v. Maldonado* (Cal.), 30 Pac. 835, holding waiver of appeal bond must be made within five days after notice of appeal, but need not be filed in that time; *Territory v. Cotton Bros. & Co.*, 17 Haw. 386, holding bond not waived.

68 Cal. 348-352, 9 Pac. 305, HAGELY v. HAGELY.

When Demurrer is Sustained, amended pleading subsequently filed constituted waiver of error committed in sustaining demurrer.

Approved in *Berry v. Barton*, 12 Okl. 224, 71 Pac. 1075, 66 L. R. A. 513, following rule; *Pampillion Printing Co. v. Sarpy Co.*, 86 Neb. 220, 125 N. W. 524, where demurrer to defense is sustained and defendant goes to trial on amended answer, and offers no evidence on defense to which demurrer was sustained, he waives any error in sustaining demurrer.

68 Cal. 353-358, 9 Pac. 420, GLENN v. SAXTON.

Court can Assess Stockholders on unpaid subscriptions at suit of creditors of corporation.

Approved in *Turner v. Fidelity Loan Concern*, 2 Cal. App. 135, 83 Pac. 67, following rule.

Promise of Subscriber to Stock in corporation is only to pay amount of his subscription upon assessment, and until then no cause of action against him arises.

Approved in *Turner v. Fidelity Loan Concern*, 2 Cal. App. 136, 83 Pac. 68, following rule.

Distinguished in *Miller v. Lane*, 160 Cal. 93, 116 Pac. 60, in action against resident stockholder of insolvent Colorado bank, lex fori prevails with reference to form of action essential to enforce liability, and action therefor is barred in three years.

Running of Limitations against unpaid balance of stock subscription. See note, 1 L. R. A. (n. s.) 905.

Statute of Limitations in Actions against corporate officers and stockholders. See note, 96 Am. St. Rep. 984.

Limitation of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 482.

68 Cal. 359-361, 9 Pac. 309, FRESNO COUNTY v. FOWLER SWITCH CANAL CO.

Section 551, Civil Code, Requiring canal owners to construct and repair all bridges over canals required by supervisors, is not repealed by section 2737, Political Code, authorizing road overseer to construct bridges across all ditches intersecting public roads, upon neglect of ditch owners to do so.

Approved in *Madera v. Madera Irr. Co.*, 159 Cal. 755, 115 Pac. 939, canal owner not required to pay for bridging canal when public road is laid out over canal.

68 Cal. 363-369, 9 Pac. 550, CRAIG v. FRY.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 596.

68 Cal. 369-373, 9 Pac. 313, CALIFORNIA BEET SUGAR CO. v. PORTER.

Where Defendant is Prevented from presenting good defense to action by fraud of plaintiff, execution on judgment may be enjoined.

Approved in *Flood v. Templeton*, 152 Cal. 158, 92 Pac. 82, 13 L. R. A. (n. s.) 579, setting aside judgment obtained by fraud of plaintiff; *Estudillo v. Security Loan etc. Co.*, 149 Cal. 563, 87 Pac. 22, holding judgment procured by fraud could be set aside in equity although motion to set aside under section 473, Code of Civil Procedure, had been denied; *Hanley v. Hanley*, 4 Cal. Prob. 479, probate order setting apart homestead cannot be collaterally attacked unless court acted without jurisdiction.

68 Cal. 374-381, 9 Pac. 555, GRAHAM v. STEWART.

Mortgagor in Action to Foreclose mortgage cannot complain of description of mortgaged property whatever might be effect of sale under description.

Reaffirmed in *Brenneke v. Smallman*, 2 Cal. App. 309, 83 Pac. 303.

68 Cal. 392-394, 9 Pac. 453, IN RE LA SOLIDARITE M. B. ASSN.

Nominee of Member of Benevolent Association, under terms of by-laws considered, is entitled to receive upon his death amount actually collected on assessment for his benefit, and not sum equal to one dollar per member.

Distinguished in *Reed v. Ancient Order of Red Cross*, 8 Idaho, 413, 69 Pac. 128, holding under by-laws action at law lay to collect amount of one assessment on membership not exceeding two thousand dollars.

68 Cal. 394-395, 9 Pac. 315, ESTATE OF MOORE.

Corporation can Only Act or Speak through medium prescribed by law.

Approved in *McCroskey v. Ladd* (Cal.), 28 Pac. 217, holding where recital in deed from association and absence of corporate seal failed to show authority from board of directors, deed was not good paper title.

68 Cal. 395-398, 9 Pac. 450, PAINTER v. PAINTER.

Surviving Partner is not Required to present claim against estate of deceased partner who has received money from firm, if claim can be worked out through settlement of partnership.

Approved in *Painter v. Painter* (Cal.), 36 Pac. 873, following rule.

Miscellaneous.—Cited in *Painter v. Painter*, 4 Cof. Prob. 342, 344, referring historically to principal case.

68 Cal. 398-403, 9 Pac. 646, WIGGIN v. SUPERIOR COURT.

Court may Set Aside Decree of final discharge of administrator, and error in so doing cannot be corrected by writ of prohibition.

Appeal in *Matter of Hughes*, 159 Cal. 364, 113 Pac. 686, supreme court has no power on certiorari to annul judgment of superior court or order of judge thereof, made regularly, with jurisdiction of parties, discharging prisoner lawfully committed to state prison upon conviction of crime; *Baine v. Lawlor*, 1 Cal. App. 486, 82 Pac. 689, holding court had jurisdiction to vacate appointment of special administrator inadvertently made, and prohibition did not lie to prevent erroneous order setting aside appointment; *Frost v. Idaho Irr. Co.*, 19 Idaho, 381, 382, 114 Pac. 41, district court had power to set aside order inadvertently made bringing in new defendants.

Court of Record of General Jurisdiction is master of proceedings before it except as limited by some statute.

Approved in *In re Burton*, 5 Cof. Prob. 238, holding superior court in probate has full jurisdiction to hear and determine every matter necessary or proper in proceeding.

In Direct Appeal from Judgment, order or recitals therein are not conclusive and may be contradicted by other portions of the record.

Distinguished in *Page v. Graver*, 5 Cal. App. 385, 90 Pac. 482, on collateral attack, recitals in judgment as to jurisdiction of parties are evidence of facts recited.

When Court Inadvertently Enters judgment not in consonance with law and from which rank injustice must follow, it has power, upon discovery of mistake, to correct error.

Approved in *Glass v. Glass*, 4 Cal. App. 610, 88 Pac. 735, holding court could set aside order for alimony based upon false averment of wife.

68 Cal. 403-404, 9 Pac. 426, BRECKENRIDGE v. CROOKER.

Order Granting New Trial on ground of insufficiency of evidence will not be disturbed unless discretion of court was abused.

Approved in Hammel v. Stone (Cal.), 14 Pac. 675, following rule.

68 Cal. 404-407, 9 Pac. 547, MANASSE v. DINKELSPIEL.

Where There is No Debt there can be no mortgage.

Approved in Fletcher v. Northcross (Cal.), 32 Pac. 329, deed to mortgagee on dismissal of foreclosure proceedings considered and held to be absolute, there being no subsisting promise to pay to support mortgage.

63 Cal. 407-412, 9 Pac. 720, MONTGOMERY v. SUPERIOR COURT.

Formal Entry of Judgment by justice of peace is mere clerical duty imposed by statute.

Approved in Hall v. Justice's Court, 5 Cal. App. 138, 89 Pac. 871, holding justice could enter judgment by default eight years after return of summons.

Pleadings in Justices' Courts must be construed with great liberality.

Approved in Moran v. Ebey, 39 Mont. 520, 104 Pac. 523, upholding complaint in justice's court.

Superior Court has Jurisdiction over justice court appeal, in jury case, though when appeal taken no judgment had been entered on verdict.

Distinguished in June v. Superior Court, 16 Cal. App. 129, 116 Pac. 294, appeal taken before entry of judgment by justice of peace confers no jurisdiction on superior court.

68 Cal. 414-418, 9 Pac. 674, FOWLER v. SUTHERLAND.

Specific Performance of Contract for sale of land will be denied when vendee does not offer to pay for land in reasonable time.

Approved in Eshleman v. Henrietta Vineyard Co. (Cal.), 36 Pac. 778, holding delay of vendee for four years to compel conveyance of land alleged to be wrongfully reserved to grantor in deed in absence of fraud bars relief.

68 Cal. 422-428, 9 Pac. 727, WHARTON v. HARLAN.

Section 473, Code of Civil Procedure, does not apply to setting aside judgment by default entered by clerk without authority.

Approved in Tuffree v. Stearns Ranchos Co. (Cal.), 54 Pac. 827, holding judgment regular on face could not be set aside on motion attacking validity.

68 Cal. 428-430, 9 Pac. 427, FANNING v. SCHAMMEL.

Failure to Complete Street Work in time limited by contract invalidates assessment therefor, unless time is extended before expiration of contract.

Approved in Palmer v. Burnham (Cal.), 47 Pac. 600, and Connolly v. San Francisco (Cal.), 33 Pac. 1111, both following rule.

68 Cal. 430-433, 9 Pac. 712, COMMERCIAL UNION ASSUR. CO. v. AMERICAN CENTRAL INS. CO.

Liability of Reinsurer. See note, 8 L. R. A. (n. s.) 856, 857.

68 Cal. 431-439, 9 Pac. 457, PEOPLE v. SHELDON.

Except Where Time is of Essence of offense, crime alleged to have been committed on certain day may be shown to have been committed on subsequent day prior to filing of information.

Approved in *State v. Rogers*, 31 Mont. 4, 77 Pac. 294, upholding information where proof showed crime committed at date prior to that charged in information.

68 Cal. 455-465, 9 Pac. 843, OAKLAND BANK OF SAVINGS v. MURFEY.

Where Loan is Made upon fraudulent deed, certificate of acknowledgment of which was falsely or negligently made by notary, notary is not liable for lender's loss, his act not being proximate cause of loss.

Approved in *Smith v. Maginnis*, 75 Ark. 477, 89 S. W. 92, holding notary not liable for injury to purchaser of fraudulent homestead claims by reason of purchaser's reliance upon false certificate of notary to effect that applicants for claims were soldiers.

Distinguished in *Coffin v. Bruton*, 78 Ark. 166, 95 S. W. 462, and *Homan v. Wayer*, 9 Cal. App. 127, 98 Pac. 82, both holding notary liable on bond for damages resulting from false acknowledgment by him from impersonator of owner; *County of Silver Bow v. Davies*, 40 Mont. 430, 107 Pac. 85, holding surety on bond of delinquent county officer cannot defeat liability on bond because misconduct of other officers contributed directly to loss.

Liability of Notaries. See notes, 82 Am. St. Rep. 384.

68 Cal. 466-473, 58 Am. Rep. 17, 9 Pac. 731, OSMENT v. McELRATH.

It is Duty of Each Partner to devote himself to interests of the concern and to exercise due diligence and skill for promotion of common benefit.

Approved in *Clifton v. Clark*, 83 Miss. 467, 102 Am. St. Rep. 458, 36 So. 254, 66 L. R. A. 821, holding surviving member of firm of attorneys could not refuse to carry out contract for services entered upon by partnership; *Bessie v. Northern Pac. Ry. Co.*, 14 N. D. 621, 105 N. W. 938, after dissolution of partnership between attorneys remaining members could settle partnership contracts made with dissolved firm, and thereby bind other members of firm.

Right of Partner to Compensation for services to partnership. See note, 17 L. R. A. (n.s.) 385, 393, 396, 398, 402.

Statute of Frauds—Agreements not to be performed within year. See notes, 138 Am. St. Rep. 598; 15 L. R. A. (n.s.) 326.

68 Cal. 473-477, 9 Pac. 659, CUSHING v. KESLAR.

In Contest of Right to Purchase state lands each party must allege and prove all facts relied on to show his right to purchase.

Approved in *Moran v. Bonyng*, 157 Cal. 297, 107 Pac. 314, holding defective complaint of intervener in such action as not alleging his qualifications to purchase.

68 Cal. 478-479, 9 Pac. 428, AVILA v. MEHERIN.

Motion for Change of Venue on ground of convenience of witnesses is addressed to sound discretion of court.

Approved in *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 673, 86 Pac. 509, holding court did not abuse discretion in refusing change of venue on ground of convenience of witnesses.

68 Cal. 485-490, 9 Pac. 663, BURTON v. TODD.

Court cannot Extend Time to serve notice of motion for new trial after lapse of statutory time.

Distinguished in *Sherman v. Southern Pac. Co.*, 31 Nev. 287, 102 Pac. 257, holding court could extend time to move for new trial when counsel failed to file notice through excusable neglect and mistake.

68 Cal. 491-495, 13 Pac. 587, APPLGARTH v. DEAN.

When Statute Commences to Run against action for money paid on judgment subsequently reversed. See note, 25 L. R. A. (n.s.) 32.

68 Cal. 500-504, 9 Pac. 461, PEOPLE v. MORE.

Miscellaneous.—Cited in *People v. More* (Cal.), 9 Pac. 463, historically referring to principal case.

68 Cal. 505-506, 9 Pac. 429, BERNERO v. ALLEN.

Nature and Elements of unlawful detainer. See note, 120 Am. St. Rep. 52.

68 Cal. 512-515, 9 Pac. 560, REDWOOD CITY v. GRIMMENSTEIN.

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 551.

68 Cal. 517-518, 9 Pac. 549, BROWN v. MANN.

Civil Death in United States. See note, 18 L. R. A. 83.

68 Cal. 519-521, 9 Pac. 554, ESTATE OF McCABE.

Will not Executed in Prescribed Manner is no will and cannot be admitted to probate.

Approved in *In re Tyler's Estate* (Cal.), 50 Pac. 928, where will did not on its face show compliance with statutory requirements for its execution, law will not presume statute complied with.

Distinguished in *Estate of Patterson*, 155 Cal. 635, 132 Am. St. Rep. 116, 102 Pac. 944, holding will once duly executed had recognized existence during life of testator.

68 Cal. 528-538, 9 Pac. 738, MURPHY v. BENNETT.

Judgment will not be Reversed for want of finding on material issue where omission in no way prejudiced appellant.

Approved in *Wright v. Wright* (Cal.), 41 Pac. 697, following rule; *Miller v. Bay Cities Water Co.*, 157 Cal. 272, 107 Pac. 122, holding immaterial, failure to find on allegation in answer when no evidence was introduced thereon; *Craig v. Gray*, 1 Cal. App. 601, 82 Pac. 701, holding immaterial, failure to find on issue when finding could not have affected judgment rendered; *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 571, 86 Pac. 824, holding immaterial failure to find on defensive matter in answer when finding must have been adverse to appellant; *Bradley v. Parker* (Cal.), 34 Pac. 235, where finding on one issue determined case, failure to find on plea of limitations was immaterial.

Distinguished in *Cargnani v. Cargnani*, 16 Cal. App. 100, 116 Pac. 308, failure to find upon material allegations of cross-complaint in divorce is not excusable because court found for plaintiff on the complaint.

Findings Should State Ultimate facts and not probative facts.

Approved in *Vasey v. Campbell*, 4 Cal. App. 454, 88 Pac. 509, upholding sufficiency of findings which followed pleadings; *Ybarra v. Sylvany* (Cal.), 31 Pac. 1114, holding finding in quiet title suit that plaintiff is owner in fee and entitled to possession is sufficient finding of ultimate fact; *Bryan v. Tormey* (Cal.), 21 Pac. 726, in action to quiet title, where finding was that plaintiff was owner and defendant was in possession and judgment was that plaintiff's title be quieted, such finding as to ownership is sufficient.

Finding in Action of Conversion as to ownership of property is of ultimate fact.

Approved in *Chaffee-Miller Land Co. v. Barber*, 12 N. D. 485, 97 N. W. 852, in action to determine adverse claims to realty, findings that plaintiff is owner and entitled to possession and defendant has no claim are of ultimate facts in issue and support judgment for plaintiff.

68 Cal. 539-544, 10 Pac. 193, **GILSON v. ROBINSON.**

Contest of Right to Purchase state lands may be made after certificate of purchase has been issued to one of the claimants.

Approved in *Boggs v. Ganeard*, 148 Cal. 717, 84 Pac. 198, following rule; *Blakeley v. Kingsbury*, 6 Cal. App. 710, 93 Pac. 131, holding contest could be instituted with reference to swamp lands which have been tully reclaimed at any time before patent was issued.

In Contest of Right to Purchase state lands, each party must allege and prove compliance with law, and that by such compliance he is entitled to purchase.

Reaffirmed in *Moran v. Bonyng*, 157 Cal. 297, 107 Pac. 314.

Distinguished in *Bieber v. Lambert*, 152 Cal. 564, 93 Pac. 97, holding in contest of right to purchase state lands presumptions of compliance with law are in favor of holder of certificate of purchase regular on its face.

68 Cal. 545-549, 9 Pac. 942, **CHASE v. WHITMORE.**

Stipulation in Promissory Note for payment of attorney's fee renders it non-negotiable.

Denied in *Cudahy Packing Co. v. State Nat. Bank*, 134 Fed. 542, 67 C. C. A. 662, holding stipulation for attorney's fees did not render note non-negotiable.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 754.

68 Cal. 549-551, 10 Pac. 192, **PEOPLE v. EDSON.**

Information Against Public Officer for receiving bribe, substantially in language of section 67, Penal Code, is sufficient.

Approved in *Sharp v. United States*, 13 Okl. 533, 76 Pac. 180, upholding indictment charging offense of bribery substantially in language of statute.

Distinguished in *People v. Ward*, 110 Cal. 373, 42 Pac. 895, indictment for bribery considered and held to state legal conclusion only.

68 Cal. 551-554, 10 Pac. 45, PEOPLE v. NORTH PACIFIC ETC. R. CO.

Instance of Tax Being Delinquent for some time before penalty attached.

Approved in *Ukiah Guaranty Co. v. Curry*, 148 Cal. 258, 82 Pac. 1049, holding penalty for delinquency in payment of state corporation tax did not attach until governor's proclamation declaring charter conditionally forfeited.

68 Cal. 554-559, 10 Pac. 204, BROOK v. HORTON.

Legislature has Power to Vacate Street in city, and may delegate its power to municipal authorities.

Approved in *Henry v. Seattle*, 42 Wash. 423, 424, 85 Pac. 26, and *Marietta Chair Co. v. Henderson*, 121 Ga. 403, 104 Am. St. Rep. 156, 49 S. E. 314, both following rule; *Mahoney v. Board of Education*, 12 Cal. App. 297, 107 Pac. 586, holding legislature could authorize city board of education to lease land dedicated by state to city for school purposes.

Alteration by Competent Authority of existing road is discontinuance of those portions of old road which do not come within new limits, although no special order of discontinuance was made.

Reaffirmed in *Jenkins v. Riggs*, 100 Md. 438, 59 Atl. 762.

Distinguished in *Rector v. Christy*, 114 Iowa, 474, 87 N. W. 490, where petition to vacate road along township line and across quarter section prayed for change of portion through quarter and such change was ordered, such proceeding did not operate as vacation of part along line.

Discontinuance or Vacation of Highway by acts of authorities. See note, 26 L. R. A. 821, 827.

68 Cal. 561-566, 10 Pac. 176, DILLON v. CENTER.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 570.

68 Cal. 566-568, 9 Pac. 839, MCGURREN v. GARRITY.

Mortgage on Real Estate is simply security and transfers no title to mortgaged property.

Approved in *Breedlove v. Norwich Union Fire Ins. Co. (Cal.)*, 54 Pac. 93, holding purchaser of mortgaged property under unrecorded deed could truly state in application for insurance after foreclosure and before time for redemption had expired that she was owner of building thereon.

68 Cal. 569-572, 10 Pac. 115, BARNES v. MARSHAL.

Right of Riparian Owner to protect shore. See note, 6 L. R. A. (n. s.) 162.

68 Cal. 572-574, 10 Pac. 117, PFISTER v. DASOEY.

Actual Residence is Essential to make valid declaration of homestead.

Approved in *Maloney v. Hefer (Cal.)*, 15 Pac. 764, following rule.

68 Cal. 575-576, 9 Pac. 840, GRIMLEY v. SANTA CLARA COUNTY.

Section 3804, Political Code, does not apply to action brought to recover money voluntarily paid on illegal license tax.

Approved in *Trower v. San Francisco*, 157 Cal. 769, 109 Pac. 620, holding section 3804, Political Code, did not apply to recovery of probate fees illegally exacted; *Allsman v. Oklahoma City*, 21 Okl. 149, 95 Pac. 471, 16 L. R. A. (n. s.) 511, holding pro rata for unexpired time on liquor license after adoption of prohibition could not be recovered back.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 441.

Right to Recover License Fee unlawfully exacted under color of authority. See note, 22 L. R. A. (n. s.) 866.

68 Cal. 576-584, 10 Pac. 207, **PEOPLE v. McCURDY.**

Measurements of Footprints found in vicinity of place of homicide and corresponding to footprints of defendant are admissible in evidence.

Approved in *State v. Fuller*, 34 Mont. 22, 85 Pac. 372, 8 L. R. A. (n. s.) 762, holding admissible evidence that defendant's foot exactly fitted footprints found near scene of crime; *Krens v. State*, 75 Neb. 298, 106 N. W. 29, admitting evidence of comparison of footprints in vicinity of crime with shoes of defendant.

Compelling Accused to Perform Acts and submit person to inspection and examination. See note, 94 Am. St. Rep. 342.

Misconduct of Jurors other than their separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1043.

68 Cal. 584-588, 10 Pac. 212, **PEOPLE v. DE WITT.**

When Witness Testifies That He Saw some person near place of homicide, but could not say who it was, evidence of statements of such witness to others that it was defendant is inadmissible.

Approved in *Bollinger v. Bollinger*, 154 Cal. 706, 99 Pac. 201, where witness called to prove declarations gave no affirmative testimony, evidence to show he had made statements as to such declarations to others inadmissible.

Standpoint of Determination as to Danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 543.

68 Cal. 588-590, 9 Pac. 842, **HAGLE v. HAGLE.**

Court may Require, Although Divorce is denied, that husband provide maintenance for wife living separate from him where impossible for them to live happily together.

Approved in *Olsen v. Olsen*, 3 Alaska, 625, following rule.

68 Cal. 599-604, 9 Pac. 837, **GOODNOW v. GRISWOLD.**

General Finding That Allegations of complaint not in conflict with certain foregoing findings are true is insufficient.

Distinguished in *Paden v. Goldbaum* (Cal.), 37 Pac. 760, holding where sole issue was truth of allegations of answer, finding "that allegations of separate defense contained in answer of defendant are untrue" was sufficient.

68 Cal. 604-607, 10 Pac. 119, **KIRBY v. SUPERIOR COURT.**

Prohibition Lies to Prevent trial court from vacating judgment and permitting plaintiff to amend after affirmance on appeal.

Approved in *Thomas v. Superior Court*, 6 Cal. App. 631, 92 Pac. 740, upholding prohibition to prevent court from setting aside, under section 473, Code of Civil Procedure, judgment by default which was appealed from and appeal dismissed by consent; *Hynes v. Barnes*, 30 Mont. 28, 75 Pac. 524, holding trial court could not change judgment in replevin to alternative pending appeal.

Writ of Prohibition. See note, 111 Am. St. Rep. 962.

68 Cal. 611-618, 10 Pac. 179, PEASLEY v. McFADDEN.

Effect of Possession of real property as notice. See notes, 104 Am. St. Rep. 349; 13 L. R. A. (n. s.) 91.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 812, 914.

68 Cal. 623-635, 10 Pac. 169, PEOPLE v. BUSH.

View of Place of Crime by jury can only be had in presence of defendant.

Distinguished in *People v. White*, 5 Cal. App. 337, 90 Pac. 475, holding absence of judge during first view of premises by jury not prejudicial error where he was present at second view and fully instructed jury as to first view; *Hatton v. Gregg*, 4 Cal. App. 1540, 88 Pac. 593, holding court who viewed disputed premises in quiet title suit, in absence of parties, could treat his knowledge thus gained as independent evidence; *Elias v. Territory*, 9 Ariz. 11, 76 Pac. 609, holding view of place of crime upon motion of defendant's counsel, made in his presence, could not be objected to by defendant, although he was not present at view.

View by Jury. See note, 42 L. R. A. 373, 377, 378, 379, 380.

Conduct of Jury During View of premises considered and held not to show separation.

Approved in *People v. Cord*, 157 Cal. 571, 108 Pac. 515, holding conduct of jury did not show separation during trial; *Shivers v. Territory*, 13 Okl. 477, 74 Pac. 903, holding technical separation of jury was not such as to prejudice rights of defendant; *State v. Levy*, 9 Idaho, 499, 75 Pac. 232, holding separation of jurors by sitting in two boxes at theater did not entitle defendant to new trial.

Distinguished in *State v. Sly*, 11 Idaho, 119, 80 Pac. 1128, holding showing by defendant in capital case that jury have separated after having been sworn to try case is prima facie showing to entitle him to new trial.

Effect of Separation of Jury. See note, 103 Am. St. Rep. 169, 170.

Absence of Defendant from Courtroom for inappreciable space of time during trial is not prejudicial error.

Approved in *May v. United States*, 157 Fed. 15, 86 C. C. A. 575, following rule.

Reversal of Conviction because of unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 671.

68 Cal. 635-638, 10 Pac. 113, EX PARTE LI PROTTI.

Oakland Ordinance Providing That Licenses to be paid by laundrymen shall be in proportion to number of persons employed by them, is valid.

Distinguished in *City of Los Angeles v. Lankershim*, 160 Cal. 803, 118 Pac. 217, holding void ordinance licensing occupations and tax-

ing maintenance of office buildings or storerooms at so much per room.

Limit of Amount of license fees. See note, 30 L. R. A. 422.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 652.

68 Cal. 642-644, 10 Pac. 186, HORTON v. DOMINGUEZ.

Objection That Certain Findings are not within issues will not be considered on appeal, if no objection to admission of evidence supporting findings was made at trial.

Approved in Schroeder v. Mauzy, 16 Cal. App. 447, 118 Pac. 461, Peck v. Noee, 154 Cal. 354, 97 Pac. 866, Milwaukee etc. Ins. Co. v. Warren, 150 Cal. 353, 89 Pac. 96, and Haines v. Stilwell (Cal.), 40 Pac. 333, all following rule.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 69 CALIFORNIA.

69 Cal. 1-32, 10 Pac. 69, IN RE BUCKLEY.

Proceeding to Punish for Alleged contempt, not committed in presence of court, is criminal or quasi criminal.

Approved in State v. Clancy, 30 Mont. 197, 76 Pac. 11, holding provisions of Civil Code relative to change of venue do not apply to contempt proceeding.

Mere Preponderance of Evidence is not sufficient to establish guilt in contempt proceeding.

Reaffirmed in State v. Clancy, 30 Mont. 198, 76 Pac. 12.

It is Contempt of Court to profess to litigants that one can influence court and secure favorable decision.

Approved in State v. District Court, 37 Mont. 198, 95 Pac. 596, holding attempt to influence jurors constituted contempt.

Miscellaneous.—Cited in In re Taylor (Cal.), 10 Pac. 88, companion case.

69 Cal. 32-67, 58 Am. Rep. 545, 10 Pac. 47, IN RE COWDERY.

Suspension from Practice for six months given as penalty for receiving fees for not continuing to appear for city as attorney in certain pending cases after term as city attorney had expired.

Approved in In re Humphreys, 15 Haw. 189, disbaring attorney for one year for appearing on both sides of case; Pierce v. Palmer, 31 R. I. 505, 77 Atl. 230, attorney for executor could not, after termination of such relation, appear as attorney for legatees under will where his appearance was hostile to executor; dissenting opinion in In re Humphreys, 15 Haw. 219, majority holding where attorney corruptly induced opposing attorney to betray client's interests by advising him to consent to unfair compromise, he violated trust.

69 Cal. 67-68, 10 Pac. 68, IN RE WHITTEMORE.

Attorney Who With Knowledge of relations employs another after expiration of latter's term, not to be retained by city in certain city cases pending while latter was city attorney, violates oath.

Cited in dissenting opinion in In re Humphreys, 11 Haw. 219, majority holding where attorney induced opposing attorney to betray client's interests by advising him to consent to unfair compromise, he violates trust.

69 Cal. 71-73, 10 Pac. 189, KIMPLE v. CONWAY.

No Appeal Lies from judgment of nonsuit.

Reaffirmed in Stebbins v. Larson, 4 Cal. App. 483, 88 Pac. 506.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 627.

69 Cal. 75-79, 10 Pac. 125, BAGGETT v. DUNN.

Requisites of Appropriation for official salary or expenses. See note, 16 L. R. A. (n. s.) 634.

69 Cal. 79-80, 10 Pac. 257, HALL v. SUPERIOR COURT.

Affidavit to Claim Against Estate of decedent is required only to be in substantial compliance with statute.

Approved in Empire State Min. Co. v. Mitchell, 29 Mont. 59, 74 Pac. 81, holding claim against estate made by attorney for corporation was sufficient when it stated none of its officers except attorney resided in county.

Statement of Claims against estates of decedents. See notes, 130 Am. St. Rep. 321; 5 Cof. Prob. 307.

69 Cal. 80-83, 10 Pac. 130, RANDALL v. HUNTER.

Where One of Several Defendants appeals from judgment against all, others are adverse parties and should be served with notice of appeal.

Approved in Mannix v. Tryon, 152 Cal. 34, 91 Pac. 984, holding in mechanic's lien suit where personal judgment was rendered against principal contractor, and lien decreed on property of owner, on appeal by owner from part of decree adjudging lien, principal contractor was not adverse party to be served with notice; Ford v. Cannon, 5 Cal. App. 188, 89 Pac. 1072, holding codefendant who was party to order appointing receiver should be served with notice on appeal from such order; McKeany v. Black (Cal.), 46 Pac. 381, where judgment was taken by default against one of defendants, such defendant was not adverse party to be served with notice of appeal when taken by other defendants.

69 Cal. 83-88, 10 Pac. 258, LANDIS v. MORRISSEY.

New Matter is That Which Admits that cause of action stated in complaint once existed, but at the same time avoids it.

Approved in Mott v. Minor, 11 Cal. App. 778, 106 Pac. 246, following rule; Dennie v. Clark, 3 Cal. App. 763, 87 Pac. 60, upholding admission, under general denial, of evidence as to material changes in written instrument relied on by plaintiff, such not being new matter to be pleaded.

Miscellaneous.—Cited in Landis v. Morrissey (Cal.), 10 Pac. 261, companion case.

69 Cal. 88-105, 10 Pac. 261, IN RE GUERRERO.

Constitution of 1879 Did not Abolish existing municipalities, but made them more independent of state control by inhibiting legislature from passing special laws for any municipality.

Approved in Boise City Nat. Bank v. Boise City, 15 Idaho, 802, 100 Pac. 96, holding under Constitution and charter of city, construction of sewers and levying assessments therefor were matters of local concern in which state had no interest.

Provisions of City Charter making mayor component part of council and ex officio city judge are constitutional.

Approved in Baltimore etc. R. R. Co. v. Town of Whiting, 161 Ind. 236, 68 N. E. 269, upholding law making town clerk justice of peace.

Mayor is not Disqualified to act as judge in action for enforcement of penalty for violation of city ordinance by reason of fact that penalty is paid into salary fund.

Approved in Laplant v. Marshalltown, 134 Iowa, 263, 111 N. W. 817, holding judge not disqualified to act in suit to enjoin city from condemning land for waterworks by reason of his being citizen of city and taxpayer.

Power to License Implies Power to fix amount of fee, and courts will presume fees reasonable unless contrary appears on face of law itself.

Approved in Schmidt v. Indianapolis, 168 Ind. 641, 120 Am. St. Rep. 386, 80 N. E. 635, 14 L. R. A. (n. s.) 787, holding license fee presumed not excessive.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 267.

Limit of Amount of license fees. See note, 30 L. R. A. 427, 438.

Amount of Liquor License Fee as characterizing statute or ordinance imposing it as prohibitory or regulative. See note, 14 L. R. A. (n. s.) 794.

Los Angeles, Under Charter, could provide that violation of ordinance was misdemeanor and punishable as such.

Approved in City of Chicago v. Morell, 247 Ill. 386, 139 Am. St. Rep. 340, 93 N. E. 296, upholding ordinance requiring licenses to run certain vehicles, though it imposed penalty of both fine and imprisonment for violation thereof.

Test of Validity of municipal ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 41.

Proceedings for Violations of ordinances as prosecutions for crime. See note, 33 L. R. A. 36.

Power of Municipal Corporation to make right to transact certain business dependent upon consent. See note, 9 L. R. A. (n. s.) 661.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

69 Cal. 105-112, 10 Pac. 272, **LEVY v. WILSON**.

Writ of Prohibition lies to arrest proceedings of judicial tribunal when they are without or in excess of its jurisdiction, but writ is issuable only when there is no plain, speedy, and adequate remedy at law.

Approved in Hamberger v. Police Court, 12 Cal. App. 154, 160, 106 Pac. 895, 107 Pac. 616, holding prohibition did not lie to prevent police court from trying civil action for goods sold; Western Meat Co. v. Superior Court, 9 Cal. App. 544, 99 Pac. 978, holding prohibition did not lie to prevent criminal trial of corporation for violation of anti-trust law of 1907, on ground corporation was not legally committed; In re Hatch, 9 Cal. App. 335, 99 Pac. 399, holding validity of grand jury which found indictment could not be reviewed on application for writ of prohibition; Evans v. Willis, 22 Okl. 322, 97 Pac. 1051, 19 L. R. A. (n. s.) 1050, prohibition lies to prevent court from proceed-

ing upon information not authorized by any officer, but purporting to have been presented by private person.

Writ of Prohibition. See note, 111 Am. St. Rep. 952.

Under Section 226, Code of Civil Procedure, court may at any time direct sheriff to summon jurors from body of county, although there be names of properly selected regular jurors in jury-box.

Approved in *Elias v. Territory*, 9 Ariz. 8, 76 Pac. 608, holding court could order special venire although panel was not at that time exhausted; *Territory v. Chartz*, 4 Ariz. 6, 32 Pac. 166, holding court could, on application of district attorney, summon grand jury from body of county.

Organization of Grand Jury. See note, 27 L. R. A. 785.

69 Cal. 112-119, 10 Pac. 278, **GIRDNER v. BESWICK.**

Risk of Property Sold accompanies title even if property is not delivered.

Approved in *Potts Drug Co. v. Benedict*, 156 Cal. 334, 104 Pac. 437, 25 L. R. A. (n. s.) 609, holding buyer took risk of destruction of premises after agreement for present unconditional transfer of leasehold interest.

69 Cal. 120-122, 10 Pac. 331, **BYRNES v. CLAFFEY.**

Application of Payments. See note, 96 Am. St. Rep. 47.

69 Cal. 122-128, 10 Pac. 323, **WRIGHT v. SEYMOUR.**

Patent Issued upon Confirmation of Mexican grant is the only evidence of extent of grant.

Approved in *De Guyer v. Banning*, 167 U. S. 743, 17 Sup. Ct. 937, 42 L. Ed. 340, holding presumption conclusive that uncanceled patent correctly locates lands covered by confirmed Mexican grant.

Patent from United States for land bordering tidal stream does not pass title to land below high-water mark unless intention to do so is expressed therein.

Approved in *Carver v. San Pedro etc. R. Co.*, 151 Fed. 336, holding patent did not convey title to bed of navigable stream within its limits so as to affect navigability; *Territory of Hawaii v. Liliuokalani* 14 Haw. 90, holding king had power to grant land between high and low water mark of sea.

Right of State to Grant tide lands. See note, 22 L. R. A. (n. s.) 337.

Effect of Bounding Grant on river or tide water. See note, 42 L. R. A. 511.

Title to Land Under Water. See note, 42 L. R. A. 164.

What Waters are Navigable. See notes, 126 Am. St. Rep. 711, 712; 42 L. R. A. 313.

69 Cal. 133-142, 10 Pac. 369, **PFISTER v. WADE.**

General Demurrer to Complaint stating several counts will be overruled if any one count is sufficient.

Reaffirmed in *Krieger v. Feeny*, 14 Cal. App. 544, 112 Pac. 903.

Original Complaint is Competent Evidence at suit of plaintiff to prove offer made therein and alleged in amended complaint.

Approved in *Loomis v. Norman Printers Supply Co.*, 81 Conn. 350, 71 Atl. 361, holding paragraph in answer which had been withdrawn was competent evidence in suit of plaintiff as admission of defendant.

Party is not Bound by admission in pleadings which have been superseded.

Disapproved in *Lane v. Choctaw Okl. etc. R. Co.*, 19 Okl. 328, 91 Pac. 884, holding superseded pleadings competent as evidence and admissions.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 162.

Effect of Judgment Entered against dead person. See note, 49 L. R. A. 160, 170.

69 Cal. 142-145, 10 Pac. 331, **WOODSUM v. COLE.**

Party Suing on Promissory Note must have such ownership as to protect maker from subsequent recovery against him; and in such action defendant may show plaintiff paid no consideration for and is not legal owner of note.

Approved in *Conklin v. Benson*, 159 Cal. 793, 116 Pac. 38, where owner of land voluntarily signed papers disposing thereof to her agent, with intent to be delivered ultimately to purchaser, equities of innocent purchasers directly dealing with agent are protected, even if grantor be defrauded by agent; *Simpson v. Miller*, 7 Cal. App. 255, 94 Pac. 255, holding bankrupt could not sue to recover proceeds of sale of property which had been deeded to him in escrow, but later sold by grantor to innocent purchaser; *Daneri v. Gazzola*, 2 Cal. App. 354, 83 Pac. 457, holding presumption of ownership of note arising from possession by administrator could be rebutted; dissenting opinion in *Township of Washington v. Nat. Bank*, 147 Mich. 578, 111 N. W. 351, majority holding where contractor assigned sums to become due under contract to bank, but retained contract, and later collected on warrants and transferred order for value to another bank, assignee bank was estopped to set up its assignment.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 754, 776, 783.

69 Cal. 146-149, 10 Pac. 329, **HAHN v. GARRATT.**

Liability of Owner for Trespass of cattle. See note, 22 L. R. A. 56.

69 Cal. 149-152, 10 Pac. 327, **IN RE HANG KIE.**

City has Power to Regulate laundry business.

Approved in *Commonwealth v. Maletsky*, 203 Mass. 245, 89 N. E. 246, 24 L. R. A. (n. s.) 1168, holding city could regulate storage of rags; dissenting opinion in *State v. Ray*, 131 N. C. 824, 92 Am. St. Rep. 795, 42 S. E. 963, 60 L. R. A. 634, majority holding void ordinance closing groceries and drygoods stores at 7:30 P. M.

Municipal Power Over Nuisance relating to trade or business. See note, 38 L. R. A. 653.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

69 Cal. 155-160, 58 Am. St. Rep. 556, 10 Pac. 395, **COLTON v. ONDERDONK.**

Action by Sole Devisee in possession for damages for injury to property is bar to action by same person as executor for same cause.

Approved in *Estate of Bell*, 153 Cal. 344, 95 Pac. 378, holding judgment on family allowance when widow sued individually binding on her when she later sued as executrix.

Measure of Damages for Wrongful Injury to house is cost of restoring to original condition.

Approved in *Linforth v. San Francisco Gas etc. Co.*, 156 Cal. 62, 103 Pac. 322, upholding judgment for cost of restoring and loss of rents; *Galveston etc. Co. v. Chittim*, 31 Tex. Civ. App. 45, 71 S. W. 297, measure of damages for burning fence, grass, and soil is value of grass, cost of fence, and loss of value of land.

Person Who Undertakes Blasting near another's property assumes all risk of injury thereto.

Approved in *Longtin v. Persell*, 30 Mont. 312, 104 Am. St. Rep. 323, 76 Pac. 701, 65 L. R. A. 655, and *Probst v. Hinesley*, 133 Ky. 71, 117 S. W. 392, both following rule; *Blackford v. Heman Const. Co.*, 132 Mo. App. 162, 112 S. W. 290, throwing stone and soil on land of another by blasting in quarry held to be trespass; *Fitz Simons etc. Co. v. Braun*, 199 Ill. 395, 65 N. E. 250, 59 L. R. A. 421, holding contractor excavating tunnel for city liable for injuries to buildings, however great the care exercised; *Gossett v. Southern Ry. Co.*, 115 Tenn. 386, 112 Am. St. Rep. 846, 89 S. W. 739, 1 L. R. A. (n. s.) 97, holding railroad liable for damages to adjoining property due to its blasting operations; *Hickey v. McCabe*, 30 R. I. 354, 75 Atl. 407, and *Gossett v. Southern R. Co.*, 115 Tenn. 386, 112 Am. St. Rep. 846, 89 S. W. 739, 1 L. R. A. (n. s.) 97, both holding adjoining property owner entitled to recover against railroad for noise and discomfort suffered from blasting operations in construction of road.

Distinguished in *Thurmond v. White Lime Assn.*, 125 Mo. App. 77, 102 S. W. 618, holding where house and cistern on land adjacent to quarry were injured by blasting, plaintiff could only recover upon showing of negligence in conducting the blasting.

Injuries to Land and Buildings from blasting. See note, 17 L. R. A. 221.

Liability for Concussion by blasting. See note, 12 L. R. A. (n. s.) 390.

Duty and Liability of Land Owners to adjoining proprietors. See note, 123 Am. St. Rep. 581, 582.

Ejectment by Executor or administrator. See note, 136 Am. St. Rep. 85.

69 Cal. 160-169, 10 Pac. 385, **HALE v. AKERS.**

Survey of Land, Where Claim, founded on Mexican grant, has been confirmed by United States court, must conform to decree in all respects.

Reaffirmed in *De Guyer v. Banning* (Cal.), 25 Pac. 255.

69 Cal. 169-180, 10 Pac. 378, **PEOPLE v. FRENCH.**

Where Verdict is of Murder in first degree, jury have right to fix punishment at death or life imprisonment.

Reaffirmed in *People v. Luis*, 158 Cal. 194, 110 Pac. 584.

69 Cal. 180-184, 10 Pac. 375, **PEOPLE v. WONG AH FOO.**

Cumulative Evidence as Ground for new trial. See note, 14 L. R. A. 609.

69 Cal. 184-186, 10 Pac. 392, **PEOPLE v. MOODY.**

Effect of Failure to Give Accused opportunity to plead. See note, 13 L. R. A. (n. s.) 816.

69 Cal. 188-195, 11 Pac. 219, THRIFT v. DELANEY.

Commutation of Homestead Entry for cash entry under section 2301, United States Revised Statutes, creates new title by pre-emption, and action in ejectment can be maintained thereon, notwithstanding adjudication under homestead claim prior thereto.

Approved in *McCorkell v. Herron*, 128 Iowa, 329, 111 Am. St. Rep. 201, 103 N. W. 990, when one entered land as homestead and thereafter committed homestead entry, commutation was under section 2301, Revised Statutes, and did not amount to pre-emption and abandonment of homestead right.

Judgment in Action to Recover possession of real property is conclusive between parties and privies, as to all matters put in issue.

Approved in *Remilliard v. Authier*, 20 S. D. 295, 105 N. W. 628, 4 L. R. A. (n. s.) 295, holding judgment for defendant in such action barred plaintiff from setting up title against defendant as heir which he failed to assert in former action.

69 Cal. 195-199, 10 Pac. 406, SKINNER v. HALL.

Declaration of Homestead may be made on property upon which claimant has resided but one day, even though his family reside elsewhere.

Approved in *Harlan v. Schulze*, 7 Cal. App. 292, 94 Pac. 381, holding employment of husband away from home, in absence of showing that he had taken up residence elsewhere, would not prevent wife from securing benefit of homestead act.

Fact That Homestead Property is partly rented to others or used for other purposes than residence does not invalidate homestead.

Approved in *Hohn v. Pauly*, 11 Cal. App. 729, 106 Pac. 268, use of home for keeping boarders does not invalidate homestead; *In re Allen* (Cal.), 16 Pac. 319, 320, holding homestead extended over lot adjacent to residence, on which was situated building used as shop, and for sleeping purposes of family.

69 Cal. 199-202, 10 Pac. 479, CHENEY v. O'BRIEN.

Right of Way of Necessity may be acquired over lands of another where there is no other access to public road.

Approved in *Fairchild v. Stewart*, 117 Iowa, 737, 89 N. W. 1076, holding right of way of necessity existed in favor of grantee of lands partially surrounded by lands of grantor, and not to be affected by prior contract of sale of such surrounding lands.

Creation and Conveyance of easements appurtenant. See note, 136 Am. St. Rep. 697.

Application to Amend Pleading is addressed to sound discretion of court.

Approved in *Cain v. Cody* (Cal.), 29 Pac. 779, holding in action for replevin of coal, complaint was properly amended to claim larger amount and greater damages.

69 Cal. 202-207, 10 Pac. 510, WEYL v. SONOMA VALLEY R. R. CO.

Notice of Appeal Which Incorrectly States date of entry of judgment appealed from is not ineffectual where record shows there was but one such judgment of kind appealed from.

Approved in *Foss v. Johnstone*, 158 Cal. 123, 110 Pac. 296, and *Price v. Western Loan & Savings Co.*, 35 Utah, 385, 100 Pac. 679, both fol-

lowing rule; *Larson v. Larson*, 15 Cal. App. 536, 115 Pac. 342, notice of appeal from order of nonsuit held to identify order appealed from.

Distinguished in *Kingsbury v. Pacific Coal etc. Co.*, 3 Alaska, 48, dismissing appeal for failure to sufficiently identify judgment in notice of appeal.

Owner of Fee of Land, subject to easement for public road, may maintain ejectment against intruder.

Approved in *Hall v. Hobart*, 186 Fed. 434, ejectment by riparian owner on navigable stream lies to recover possession from adverse claimant of island formed by accretion in front of his shore line, though title to bed of stream was in state.

Distinguished in *Bonetti v. Ruiz*, 15 Cal. App. 10, 113 Pac. 118, where supervisors granted defendant right to sink well on road and develop water, which subtracted water from plaintiff's well, injunction was proper remedy.

Miscellaneous.—Cited in *Porter etc. v. Pacific Coast Ry. Co.* (Cal.), 18 Pac. 429, companion case.

69 Cal. 207-215, 7 Pac. 437, SAYRE v. CITIZENS' GAS LIGHT ETC. CO.

Assessment and Sale of Corporate Stock considered, and, though invalid, held that owner had lost equitable right by acquiescence in sale.

Approved in *Joseph v. Davenport*, 116 Iowa, 274, 89 N. W. 1083, holding stockholder who acquiesced in sale of delinquent stock lost right by laches, although both his purchase of stock and the delinquent sale were irregular.

Distinguished in *New York & Eastern Tel. etc. Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 232, 69 Atl. 532, attempted forfeiture of stock for nonpayment of assessments and issue of new certificates in payment of debt held not to affect rights of original holder.

Forfeiture of Corporate Stock. See note, 27 L. R. A. 313.

Relief in Equity from forfeitures. See note, 86 Am. St. Rep. 60.

Assessments on Paid-up Stock. See note, 45 L. R. A. 649.

69 Cal. 215-217, 10 Pac. 393, PEOPLE ex rel. HASTINGS v. KEWEN.

Nature of Incorporated Institutions belonging to state: See note, 29 L. R. A. 382.

69 Cal. 217-222, 58 Am. Rep. 558, 10 Pac. 409, CROSS v. KITTS.

Where Percolating Waters Collect or are gathered in stream running in defined channel, no distinction exists between waters so running under surface or upon surface of land.

Approved in *De Wolfskill v. Smith*, 5 Cal. App. 181, 89 Pac. 1003, holding water flowing in natural stream, but originating from abandoned oil well and percolating through soil, subject to appropriation.

Rights in Subterranean Waters. See note, 19 L. R. A. 93.

Appropriation of Percolating Waters on public lands. See notes, 30 L. R. A. 187.

Water Right Appurtenant to land passes by deed to the land.

Approved in *Stanislaus Water Co. v. Bachman*, 152 Cal. 724, 93 Pac. 862, 15 L. R. A. (n. s.) 359, holding water right acquired by mortgagor after giving mortgage passed on foreclosure as appurtenant to land.

Creation and Conveyance of easements appurtenant. See note, 136 Am. St. Rep. 693.

Easements Created by Severance of tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 319.

69 Cal. 223-225, 10 Pac. 399, **MARSHAL v. DUNN.**

What Claims Constitute Valid demands against a state. See note, 42 L. R. A. 37, 49.

69 Cal. 226-239, 10 Pac. 502, **PEOPLE v. TREADWELL.**

Attorney Who Collects Money for client and appropriates it to his own use is guilty of embezzlement.

Approved in *People v. Robertson*, 6 Cal. App. 517, 92 Pac. 499, holding deputy assessor who received taxes irregularly and appropriated same was estopped to deny his agency as to county and was guilty of embezzlement; *State v. Gebhardt*, 87 Mo. App. 550, suspending attorney under indictment for embezzlement until facts in regard to alleged crimes were determined.

Embezzlement as Affected by Want of authority to receive money or property in first instance. See note, 17 L. R. A. (n. s.) 534.

Reading Law Books to Jury by prosecuting attorney is immaterial error when court instructs jury to disregard it.

Approved in *People v. Denomme* (Cal.), 56 Pac. 99, holding use of instructions in argument to jury within discretion of court.

Scientific Books and Treatises as evidence. See note, 40 L. R. A. 573.

Witness False in One Part of his testimony is to be distrusted in others.

Approved in *State v. Connors*, 37 Mont. 18, 94 Pac. 200, approving instruction to same effect.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 681, 682.

69 Cal. 239-241, 10 Pac. 335, **ESTATE OF ARMSTRONG.**

Liability for Debt of executor or administrator owing to the estate. See note, 112 Am. St. Rep. 407.

Effect on Debt of Appointment of debtor as executor or administrator. See note, 26 L. R. A. (n. s.) 414.

69 Cal. 241-243, 10 Pac. 334, **ESTATE OF SCHEDEL.**

In Cases not Provided for in sections 942-945, Code of Civil Procedure, perfecting appeal by giving undertaking under section 941 stays proceedings in court below upon order appealed from.

Approved in *Estate of McGinn*, 3 Cof. Prob. 128, following rule.

69 Cal. 244, 10 Pac. 336, **SANKEY v. LEVY.**

Mandamus Does not Lie to compel superior court to restore to its calendar case tried by it on appeal from justice's court in which judgment was rendered without filing findings of fact.

Approved in *Kerr v. Superior Court*, 130 Cal. 186, 62 Pac. 480, mandamus does not lie to compel superior court to issue citation and proceed with hearing of cause, when, if issued, court could dismiss proceeding.

69 Cal. 244-246, 10 Pac. 412, **IN RE BOWMAN.**

Court may Set Aside Premises as homestead of insolvent which had never constituted his residence.

Approved in *Estate of Green*, 1 Cal. Prob. 453, applying rule to probate homestead; *Estate of Hissler*, 2 Cal. Prob. 359, probate court should set aside homestead for widow though it takes three-fourths of estate.

69 Cal. 247-251, 10 Pac. 400, ROSS v. SEDGWICK.

Sale of Personal Property in payment of antecedent debt is not void although vendee knew it would hinder other creditors in collecting their debts.

Approved in *Kennedy v. Conroy* (Cal.), 44 Pac. 796, upholding preference of creditors by insolvent.

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 339.

Participation in Fraudulent Intent of debtor which will invalidate transfer to pay or secure debt as to other creditors. See note, 31 L. R. A. 618.

69 Cal. 255-454, 4 Pac. 919, 10 Pac. 674, LUX v. HAGGIN.

Where Express Statute of Limitations applies to suit in equity, mere delay in commencing suit for less than statutory time is not ground for dismissal.

Approved in *Meigs v. Pinkham*, 159 Cal. 111, 112 Pac. 886, and *Finnell v. Finnell*, 156 Cal. 600, 134 Am. St. Rep. 143, 105 Pac. 744, both following rule.

Distinguished in *Marsh v. Lott*, 156 Cal. 647, 105 Pac. 969, refusing specific performance of option to sell land after three years' delay; *Stevenson v. Boyd*, 153 Cal. 636, 96 Pac. 287, 19 L. R. A. (n. s.) 525, refusing to entertain suit to enforce trust against cotenant for laches of plaintiff regardless of limitations.

Section 343, Code of Civil Procedure, applies to suits in equity as well as to actions at law.

Approved in *Williams v. Southern Pacific R. R. Co.*, 150 Cal. 628, 89 Pac. 600, holding right to equitable relief from trespass barred in same time as right of action for damages.

Limitations must be Pleaded in equity.

Reaffirmed in *Strayhorn v. McCall*, 78 Ark. 211, 95 S. W. 456.

Mere Passive Acquiescence, where one is under no duty to speak, does not constitute estoppel.

Approved in *Verdugo Canyon Water Co. v. Verdugo*, 152 Cal. 674, 675, 93 Pac. 1029, 1030, holding acquiescence in putting down wells on defendant's own land by which underground water was taken from plaintiff did not estop plaintiff; *Spring Valley Water Co. v. San Francisco*, 165 Fed. 706, holding water company not estopped by acquiescence in water rate fixed by supervisors from seeking injunction restraining its enforcement as unreasonable; *Morris v. Bean*, 146 Fed. 433, 435, holding later appropriator could not plead prior appropriator was estopped by reason of his acquiescence in making extensive irrigation improvements; *St. Louis Safe Deposit Bank v. Kemette Estate*, 101 Mo. App. 398, 403, 74 S. W. 483, 485, holding delay in bringing suit did not estop owner from seeking to enjoin maintenance of smokestack projecting into private alley jointly owned by plaintiff and defendant; *Burr v. Maclay Rancho Water Co.*, 160 Cal. 280, 116 Pac. 721, *arguendo*.

Riparian Rights are Subject to condemnation for public use.

Approved in *Northern Light etc. Co. v. Stacher*, 13 Cal. App. 421, 423, 109 Pac. 900, 901, following rule; *Crawford Co. v. Hathaway*, 67 Neb. 335, 108 Am. St. Rep. 647, 93 N. W. 784, 60 L. R. A. 889, right of riparian proprietor can be impaired only in interest of public upon full compensation.

Power to Condemn Riparian Rights apart from land to which appurtenant. See note, 17 L. R. A. (n. s.) 1007.

Legislative Determination as to Whether Use for which property is to be taken is private or public is final.

Approved in *Walker v. Shasta Power Co.*, 160 Fed. 859, 19 L. R. A. (n. s.) 725, 87 C. C. A. 66, holding legislative determination final when character of use was uncertain; *Shasta Power Co. v. Walker*, 149 Fed. 570, holding legislature could determine necessity for taking property for public use, instrumentalities and mode of procedure for taking; *Oury v. Goodwin*, 3 Ariz. 270, 26 Pac. 381, holding taking of land for irrigation ditch for use of thirteen farmers was taking for public use.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 22, 30, 48, 50, 51, 57, 86, 89, 162.

By Law of Mexico Running Waters of California were not dedicated to common use of all inhabitants in such sense that they could not be deprived of common use.

Approved in *Boquillas Land etc. Co. v. St. David Co-operative Commercial etc. Co.*, 11 Ariz. 138, 139, 89 Pac. 507, 508, holding legislature could establish right of prior appropriation and grant this right to other than riparian owners.

Pueblo had Right to Water which had been appropriated to use of inhabitants similar to that which it had in pueblo lands, and right of its successor, the city, is superior to rights of riparian owner.

Approved in *Los Angeles Farming etc. Co. v. Los Angeles*, 217 U. S. 226, 30 Sup. Ct. 456, 54 L. Ed. 744, *Los Angeles v. Hunter*, 156 Cal. 608, 105 Pac. 757, and *Los Angeles v. Los Angeles Farming etc. Co.*, 152 Cal. 651, 652, 654, 93 Pac. 1135, all holding city of Los Angeles has right as successor of old pueblo, to waters of Los Angeles river, paramount to all riparian owners.

Distinguished in *Fellows v. Los Angeles*, 151 Cal. 62, 90 Pac. 140, holding water obtained from territory within limits of Los Angeles, and sought to be used outside Los Angeles, came from "fuentes" which were subject to sale by pueblo to private parties.

In Absence of Proof, law of foreign state is presumed to be same as in this state.

Reaffirmed in *O'Sullivan v. Griffith*, 153 Cal. 507, 95 Pac. 875.

Upon Admission of California as State, it became vested with all rights, sovereignty, and jurisdiction over navigable waters, and soils under them, which were possessed by original states after adoption of constitution.

Approved in *United Land Assn. v. Knight (Cal.)*, 23 Pac. 268, and *People v. San Francisco (Cal.)*, 15 Pac. 749, both holding claim of state to tide lands by virtue of sovereignty subordinate to prior grants of Mexican government confirmed by United States.

Title to Land Under Water. See note, 42 L. R. A. 171.

Sacramento River Being Navigable in fact, title of plaintiff extends no farther than edge of stream.

Approved in *Packer v. Bird*, 137 U. S. 669, 11 Sup. Ct. 210, 34 L. Ed. 819, following rule.

Right to Flow of Water is inseparably annexed to soil, and passes with it, not as an easement or appurtenant, but as a parcel.

Approved in *Stenger v. Tharp*, 17 S. D. 24, 94 N. W. 404, and *Madigan v. Kaougarok Mining Co.*, 3 Alaska, 70, both following rule; *Brandon v. West*, 28 Nev. 508, 83 Pac. 329, holding sand upon land was part of realty before removal.

Distinguished in *Miller & Lux v. Madera Canal etc. Co.*, 155 Cal. 73, 99 Pac. 507, 22 L. R. A. (n. s.) 391, holding action for damages for diversion of water from real property not an action to quiet title to such flow, and need not be brought in county where land is situated.

Riparian Proprietor has Right that flow of stream by his land shall not be diminished by diversion to nonriparian lands.

Approved in *Turner v. James Canal Co.*, 155 Cal. 94, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, reaffirming rule.

Distinguished in *San Joaquin etc. Irr. Co. v. Fresno Flume etc. Co.*, 158 Cal. 629, 112 Pac. 183, upper proprietor may dam water to float logs when no injury resulted to lower owner.

Correlative Rights of Upper and lower proprietors as to use and flow of stream. See note, 41 L. R. A. 742.

"Person" Includes Corporation as well as natural person.

Approved in *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 695, 115 Pac. 1098, following rule.

Common-law Rule of Riparian Rights and not that of prior appropriation is law of California.

Approved in *Crawford Co. v. Hathaway*, 67 Neb. 339, 341, 350, 108 Am. St. Rep. 647, 93 N. W. 785, 786, 789, 60 L. R. A. 889, reaffirming rule; *Anderson v. Bassman*, 140 Fed. 22, holding where stream flows from California, which has common-law rule, to Nevada, which has rule of prior appropriation, riparian owners in California and appropriators in Nevada were equally protected by laws of respective states, subject to limitations as to reasonable use; *Boquillas Land etc. Co. v. St. David Co-operative Commercial etc. Assn.*, 11 Ariz. 135, 89 Pac. 506, holding common-law doctrine of riparian rights not adopted in Arizona; *Sternberger v. Seaton Mining Co.*, 45 Colo. 403, 102 Pac. 169, holding common-law doctrine of riparian rights does not apply in Colorado; *Hutchinson v. Watson etc. Ditch Co.*, 16 Idaho, 491, 133 Am. St. Rep. 125, 101 Pac. 1062, holding common-law doctrine of riparian rights does not apply in Idaho.

Common-law Right of Each Riparian Owner to have stream flow by his land without diminution is subject to common right of all to reasonable share of water.

Approved in *Turner v. James Canal Co.*, 155 Cal. 95, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, following rule; *Morris v. Bean*, 146 Fed. 431, holding right of riparian owner to reasonable use of water would not permit him to deprive co-owner of right to exercise same privilege; *Lansdale Co. v. City of Woonsocket*, 25 R. I. 431, 56 Atl. 449, city which is riparian proprietor has no right, as against lower owner, to diminish flow by taking water for municipal use.

What is Reasonable Use of Water by riparian proprietor is question of fact depending upon circumstances appearing in each particular case.

Approved in *Meong v. Coffee*, 67 Neb. 514, 515, 516, 108 Am. St. Rep. 697, 93 N. W. 718, 60 L. R. A. 910, holding use of water unreasonable.

Public Policy of State can be ascertained only by reference to Constitution and laws passed under it.

Approved in *Langdon v. Conlin*, 67 Neb. 245, 108 Am. St. Rep. 643, 93 N. W. 390, 60 L. R. A. 429, following rule.

Rebutting Testimony is Addressed to evidence introduced by opposite party and not to his pleading.

Approved in *Potter v. Sims*, 135 Iowa, 742, 111 N. W. 30, holding evidence admissible as proper rebuttal; *Seibel Copper & Iron Mfg. Co. v. Mfgs. Ry. Co.*, 230 Mo. 78, 130 S. W. 293, holding plaintiff in suit to enjoin construction of railroad tracks in street could not introduce evidence to show invalidity of ordinance pleaded by defendant, when defendant had not offered ordinance in evidence.

Court has Discretion to Admit additional evidence in plaintiff's case after defense has rested.

Approved in *Matts v. Borba* (Cal.), 37 Pac. 160, following rule.

What may Constitute Watercourse discussed.

Approved in *Miller & Lux v. Madera Canal etc. Co.*, 155 Cal. 77, 99 Pac. 509, 22 L. R. A. (n. s.) 391, holding regularly recurring flood waters when flowing in accustomed extended channel to be part of ordinary flow subject to riparian rights; *Huffner v. Sawday*, 153 Cal. 91, 94 Pac. 426, holding stream to be such watercourse as to be subject of riparian rights although flow was not continuous at all seasons; *State v. Pulp Co.*, 119 Tenn. 71, 104 S. W. 443, channel of river means same thing as bed of river, and is used to describe depression in which waters flow at ordinary stages.

Riparian Land Includes All Sections or fractions mentioned in any one certificate, bordering on natural water channel and through which it had its course.

Approved in *Crawford Co. v. Hathaway*, 67 Neb. 354, 108 Am. St. Rep. 647, 93 N. W. 790, 60 L. R. A. 889, discussing but not deciding whether or not only forty-acre tracts bordering on stream should be considered riparian; *Watkins Land Co. v. Clements*, 98 Tex. 585, 107 Am. St. Rep. 653, 86 S. W. 735, 70 L. R. A. 964, affirming *Clements v. Watkins Land etc. Co.*, 36 Tex. Civ. App. 345, 82 S. W. 668, holding lands not within watershed of stream are not entitled to be irrigated therefrom.

What is Riparian Land. See note, 11 L. R. A. (n. s.) 1064.

If Owner of Riparian Lands conveys portion thereof not adjacent to stream, such land loses its riparian character.

Approved in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 331, 88 Pac. 980, 11 L. R. A. (n. s.) 1062, holding land thus severed could not regain riparian character upon reunion with original tract under same ownership.

Right to Appropriate Public Waters of state is established by usage.

Approved in *Crawford Co. v. Hathaway*, 67 Neb. 361, 108 Am. St. Rep. 647, 93 N. W. 793, 60 L. R. A. 889, following rule.

Right of Prior Appropriator of water. See note, 30 L. R. A. 677.

State and Federal Ownership of waters. See note, 50 L. R. A. 738, 743, 747.

Uses for Which Power of eminent domain cannot be exercised. See note, 102 Am. St. Rep. 814.

Establishment and Regulation of municipal water supply. See note, 61 L. R. A. 107.

Exemption from Taxation or assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 296.

Disqualification of Judge by prior connection with case. See note, 25 L. R. A. 115.

Miscellaneous.—Cited in *Lux v. Haggin* (Cal.), 4 Pac. 938, companion case; *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 218, 110 Pac. 932, holding plaintiff estopped by deed of predecessor in interest, conveying all water for irrigation of his land to defendant's grantors, from asserting any interest antagonistic to such deed; *St. Louis Safe Deposit Bank v. Kennett Estate*, 101 Mo. App. 394, 74 S. W. 481, holding injunction lay to prevent continuing breach of covenant which would cause irreparable injury.

69 Cal. 454-456, 10 Pac. 672, DOUGHERTY v. COFFIN.

Board of Supervisors cannot Extend Time for completion of street improvement after expiration of contract time.

Approved in *Brock v. Luning*, 89 Cal. 319, 26 Pac. 972, *Dougherty v. Nevada Bank*, 81 Cal. 163, 22 Pac. 514, and *Palmer v. Burnham* (Cal.), 47 Pac. 600, all following rule; *Heft v. Payne*, 97 Cal. 111, 31 Pac. 845, holding direction of further work on appeal from lot owners, after time for performance had expired, did not operate as extension of time for completion of street contract.

Judgment will not be Reversed for harmless and immaterial errors.

Approved in *Collins v. Gray*, 154 Cal. 135, 97 Pac. 144, refusing to reverse judgment for error is immaterial finding.

Miscellaneous.—Cited in *Dougherty v. Fair* (Cal.), 10 Pac. 674, companion case.

69 Cal. 456-458, 10 Pac. 785, FEDER v. EPSTEIN.

Where Partners are Sued in individual names on partnership liability, judgment cannot be rendered against the firm.

Approved in *Maclay Co. v. Meads*, 14 Cal. App. 371, 373, 112 Pac. 199, holding judgment against partnership could be vacated when complaint was sufficient only as against members; *Guthiel v. Gilmer*, 27 Utah, 509, 76 Pac. 632, holding complaint stated cause of action against partners individually and not against partnership.

69 Cal. 458-460, 10 Pac. 671, ESTATE OF DAVIS.

Although Real Property be Disposed of by will, court can set it aside for homestead.

Approved in *Estate of Green*, 1 Cal. Prob. 453, and *Estate of Kennedy*, 157 Cal. 522, 108 Pac. 282, both following rule; *Matter of Silliman*, 159 Cal. 161, 112 Pac. 891, will bequeathing legacy to surviving husband and devising land to testatrix's sister did not put him to election so as to preclude receipt of legacy after having homestead granted on such land; *Estate of Bump*, 152 Cal. 278, 92 Pac. 644, holding husband could not by will limit discretion of court in setting apart homestead for widow; *Estate of Pohlmann*, 2 Cal. App. 362, 84 Pac. 355, holding court could set apart as homestead property upon which decedent had never resided and on which he could not have filed declaration of homestead; *Estate of Hayes*, 1 Cal. Prob. 552, court

must set aside homestead for minor child although widow had died and other children had attained majority without applying for homestead.

Rights of Children in homestead of parent. See note, 56 L. R. A. 38.

69 Cal. 460-464, 11 Pac. 1, KELLY v. EDWARDS.

Mandamus Does not Lie to try title to public office.

Approved in *City Council v. People*, 19 Colo. App. 403, 75 Pac. 604, holding mandamus did not lie to reseal contestee to office who had received certificate of election and qualified and had been unseated.

Distinguished in *Potomac Oil Co. v. Dye*, 10 Cal. App. 539, 102 Pac. 679, holding mandamus lay to compel delivery of office in private corporation.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 885.

Mandamus to Compel Surrender of office. See note, 31 L. R. A. 356.

De Facto Officers. See note, 140 Am. St. Rep. 196, 198.

69 Cal. 465-479, 11 Pac. 20, THOMASON v. RUGGLES.

Act of March 15, 1885, Providing for street work in municipalities, was a general law and applied to San Francisco.

Approved in *Heyler v. Watertown*, 16 S. D. 29, 91 N. W. 335, chapter 150, Laws of 1893, providing that any city shall have power to construct sewerage system, applies to all cities of state alike.

Act of March 18, 1885, Relating to street work in municipalities, is void.

Approved in *Hilton v. Heverin* (Cal.), 11 Pac. 27, following rule.

Miscellaneous.—Cited in *Southern Pac. Co. v. Bartine*, 170 Fed. 773, to point that legislature having provided method for regulation of railway rates, all other methods are excluded.

69 Cal. 479-515, 11 Pac. 3, OAKLAND PAVING CO. v. HILTON.

Instance of Validity of Adoption of constitutional amendment being considered by court.

Approved in *Rice v. Palmer*, 78 Ark. 443, 96 S. W. 398, holding adoption of constitutional amendment reviewable by court; *McConaughy v. Secretary of State*, 106 Minn. 402, 405, 119 N. W. 411, 412, holding court had jurisdiction to determine whether constitutional amendment had been legally submitted to and adopted by people.

Power Given to Legislature to propose constitutional amendments is grant of power and mode provided is measure of power.

Approved in *Chicago v. Reeves*, 220 Ill. 288, 77 N. E. 240, holding General Assembly had power to propose amendments that modified other sections of Constitution by implication, although limited to proposing amendment to single section.

Effect of Noncompliance with prescribed method of amending Constitution. See note, 10 L. R. A. (n. s.) 152.

Failure of Legislature to Enter proposed constitutional amendment in full upon its journals renders it void.

Approved in *McBee v. Brady*, 15 Idaho, 772, 100 Pac. 100, reaffirming rule; *McBee v. Brady*, 15 Idaho, 776, 100 Pac. 102, holding void amendments on which people were not given opportunity to vote separately; *People v. Loomis*, 135 Mich. 562, 98 N. W. 264, holding entry

in journal of House of proposed amendment in original form, and on senate journals as finally adopted, was sufficient entry on journals; *Kadderly v. Portland*, 44 Or. 135, 74 Pac. 716, holding initiative and referendum amendment legally adopted.

Prohibiting Clause in Constitution is self-executing.

Approved in *Katz v. Herrick*, 12 Idaho, 25, 86 Pac. 878, holding constitutional provision that foreign corporation file copy of articles with Secretary of State as condition for doing business to be self-executing; *State v. Winnett*, 78 Neb. 389, 110 N. W. 1117, 10 L. R. A. (n. s.) 149, self-imposed limitations on power of people to amend Constitution not construed so as to defeat will of people on account of unimportant failure to comply literally with such limitations; *Ex parte McNaught*, 23 Okl. 291, 1 Okl. Cr. 265, 274, 100 Pac. 29, 32, holding constitutional provision that prosecution for felony may not be had without preliminary examination was, when supplemented by common law in force, self-executing; *Ex parte Cain*, 20 Okl. 127, 1 Okl. Cr. 8, 93 Pac. 975, holding constitutional prohibition of liquor traffic to be self-executing; *Ex parte Show*, 4 Okl. Cr. 429, 113 Pac. 1068, holding election law of 1910 to be self-executing; *Swift & Co. v. Newport News*, 105 Va. 115, 52 S. E. 824, 3 L. R. A. (n. s.) 404, constitutional provision that property shall not be damaged for public use is self-executing, and remedy lies at common law when legislature has provided none.

Self-executing Constitutional Provisions. See note, 16 L. R. A. 282.

Act of 1885 Providing for Work on streets and sewers within municipalities is void.

Approved in *Hilton v. Heverin* (Cal.), 11 Pac. 27, following rule.

69 Cal. 521-523, 11 Pac. 29, NISSEN v. BENDIXSEN.

Complaint Against Husband for Necessaries furnished wife must allege sale to husband or his neglect to provide for her support.

Reaffirmed in *Hoey v. Hechtman*, 2 Cal. App. 121, 83 Pac. 85.

Wife's Implied Authority to Act for husband and charge him for necessaries. See note, 98 Am. St. Rep. 640.

69 Cal. 523-525, 11 Pac. 57, RHODA v. ALAMEDA CO.

Liabilities of Counties for Torts and negligence. See note, 39 L. R. A. 65, 73, 81.

69 Cal. 527-530, 11 Pac. 179, DIXON v. ALLEN.

In Action for Libel, Failure of plaintiff to file undertaking for costs does not deprive court of jurisdiction.

Approved in *Becker v. Schmidlin*, 153 Cal. 671, 672, 96 Pac. 280, 281, holding in action for slander, court could permit undertaking in lieu of defective one to be filed after action was commenced; *Fowler v. Fowler*, 15 Okl. 534, 82 Pac. 925, holding court had discretion to permit plaintiff to file bond for costs in action in district court, after defendant's motion to quash summons.

Slander and Libel in Charging Woman with unchastity. See note, 24 L. R. A. (n. s.) 617.

Admissibility of Evidence of family relations of plaintiff on question of damages in defamation action. See note, 23 L. R. A. (n. s.) 362.

69 Cal. 531-532, 11 Pac. 178, COUNTY OF SAN LUIS OBISPO v. KING.

Fees Collected by County Recorder are held in trust for county, and limitations do not run against right of county to recover until demand is made.

Distinguished in *Bannock County v. Bell*, 8 Idaho, 11, 101 Am. St. Rep. 140, 65 Pac. 714, holding limitations run against right of county to recover alleged illegal fees paid to clerk of district court who was ex officio auditor and recorder.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 156.

Applicability of Statute of Limitations to action by agencies of state. See note, 3 L. R. A. (n. s.) 747.

Limitation of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 484.

69 Cal. 533-536, 58 Am. Rep. 562, 11 Pac. 130, DURKEE v. CENTRAL PACIFIC R. R. CO.

Declarations of Engineer in Explanation of accident made five minutes thereafter are not admissible as part of res gestae.

Approved in *Waldeck & Co. v. Pac. Coast S. S. Co.*, 2 Cal. App. 170, 83 Pac. 159, holding declarations of agent not connected with transaction to which they referred could not bind principal, although made in explanation of act done by him in course of agency; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 530, 99 Pac. 96, holding statements of engineer as to injury of child struck by engine, made within two or three minutes of accident, admissible as res gestae; *Alsever v. Minneapolis etc. R. R. Co.*, 115 Iowa, 343, 88 N. W. 842, holding admissible, declaration of engineer made immediately after blowing whistle as to his motive, in action against railroad for injury to child resulting from such act; *Poindexter & Orr etc. Co. v. Oregon Short Line R. R. Co.*, 33 Mont. 340, 83 Pac. 887, holding inadmissible in action against railroad for injury to animals, testimony of witness that section boss showed him where animal was when struck; *Balding v. Andrews*, 12 N. D. 273, 96 N. W. 307, statement of elevator agent when elevator was burning as to cause of fire not admissible as res gestae; dissenting opinion in *Dunn v. Chicago, Rock Island etc. Ry. Co.*, 130 Iowa, 596, 107 N. W. 621, 6 L. R. A. (n. s.) 452, majority holding inadmissible, statement of deceased as to cause of accident, although part of res gestae, as being conclusion as to negligence of coemployee.

. Declarations as Part of Res Gestae. See note, 19 L. R. A. 747.

69 Cal. 536-538, 11 Pac. 132, ESTEP v. ARMSTRONG.

One Claiming That His Conduct has been influenced by false statements of another must allege he believed such statements and acted upon them to his injury.

Reaffirmed in *Burke v. Maguire*, 154 Cal. 467, 98 Pac. 25.

In Pleading Fraud, Facts must be clearly stated.

Approved in *Estate of Harris*, 3 Cal. Prob. 10, holding fraud in will contest insufficiently pleaded.

69 Cal. 538-539, 11 Pac. 56, PEARSON v. CREED.

Assessment of Tax on Property of decedent's estate. See note, 56 L. R. A. 635.

69 Cal. 540-541, 11 Pac. 128, PEOPLE v. CAMILO.

Failure to Bring Person charged with crime to trial within sixty days does not warrant dismissal if delay is caused by illness of trial judge, or his engagement on trial of other causes.

Distinguished in *State v. Dewey*, 73 Kan. 743, 88 Pac. 882, holding delay ordered by court cannot be regarded as happening on application of prisoner, merely because he fails to object.

Right to Speedy Trial. See note, 85 Am. St. Rep. 192, 194, 202.

Delay of Prosecution as ground for discharge. See note, 56 L. R. A. 531, 543.

69 Cal. 541-549, 11 Pac. 240, IN RE GANNON.

Validity of Grand Jury cannot be questioned in proceeding to punish for contempt for refusing to testify before it.

Approved in *In re Hatch*, 9 Cal. App. 335, 99 Pac. 399, holding validity of grand jury could not be questioned on application for writ of prohibition to prevent proceedings upon indictment found by it; *In re Davis*, 68 Kan. 794, 75 Pac. 1048, holding legality of grand jury could not be attacked on habeas corpus.

Grand Jury Legally Constituted may continue to act until dissolved by operation of law or order of court.

Approved in *Halsey v. Superior Court*, 152 Cal. 75, 91 Pac. 989, holding grand jury did not become discharged by operation of law by mere selection, listing and returning of grand jurors for succeeding year; *Jones v. United States*, 162 Fed. 421, 89 C. C. A. 303, holding grand jury can be discharged only by direct order of court, or by final adjournment for terms for which jury was impaneled; *State v. District Court*, 31 Mont. 437, 78 Pac. 772, upholding indictment returned by grand jury after list for succeeding year had been selected.

Grand Jury Organized in July was valid body in March of next year, although names of grand jurors were selected and returned in January of that year.

Criticised in dissenting opinion in *Halsey v. Superior Court*, 152 Cal. 85, 91 Pac. 993, majority holding Civil Code, section 210, does not limit life of grand jury once organized to one year, but only provides that panel from which jurors are drawn exist but one year.

Courts, Tribunals and Persons authorized to punish contempts. See note, 117 Am. St. Rep. 958.

Miscellaneous.—Cited in *Kelly v. Wilson* (Cal.), 11 Pac. 244, companion case.

69 Cal. 550-552, 11 Pac. 244, COLLINS v. DRISCOLL.

Limitations Run Against Promissory Note from date of its actual delivery.

Approved in *Bither v. Christensen*, 1 Cal. App. 92, 81 Pac. 671, sustaining finding that note was due according to date on face although not delivered at that date; *Johnson v. Franklin Bank*, 173 Mo. 181, 73 S. W. 194, holding note delivered when upon face it is overdue is payable on demand; *Weber, v. Weber*, 146 Mich. 34, 35, 109 N. W. 51, 52, holding time of making and delivery of antedated note payable "on demand after date" is time from which limitations run to right of action thereon.

69 Cal. 552-556, 11 Pac. 183, PEOPLE v. LEE GAM.

In Murder Case Court may Refuse to instruct jury they may return verdict of manslaughter, if evidence clearly shows crime was not manslaughter.

Distinguished in *People v. Stofer*, 3 Cal. App. 418, 86 Pac. 735, holding under the evidence court erred in taking question of petit larceny from jury by instruction that only verdict must be guilty of grand larceny or not guilty.

69 Cal. 556-559, 11 Pac. 186, WILLIAMS v. MCCARTNEY.

Where Question of Legality of Ordinance is raised in justice's court in action to enforce penalty, it must be by verified answer, and unless so raised, no evidence as to such legality can be received either in justice's court or in superior court on appeal.

Reaffirmed in *Santa Monica v. Eckert* (Cal.), 33 Pac. 881.

69 Cal. 559-562, 11 Pac. 215, MULLALLY v. IRISH-AMERICAN BENEVOLENT SOCIETY.

Notice of Decision is not Essential to start time for filing cost bill when party had actual knowledge of decision.

Approved in *Estate of Keating*, 158 Cal. 114, 115, 110 Pac. 111, time to file notice with clerk when record on appeal is presented other than printed runs from actual notice of entry of order appealed from; *Bell v. Thompson*, 8 Cal. App. 486, 97 Pac. 159, holding actual knowledge or filing of cost bill waived written notice.

69 Cal. 562-569, 11 Pac. 339, CASTRO v. TEWKSBURY.

To Maintain Action of Forcible Entry, plaintiff must show peaceable possession at time of entry, and that defendant by force or terror entered, took and held possession.

Approved in *Bell v. Haun*, 9 Cal. App. 44, 97 Pac. 1127, holding complaint in forcible entry and detainer did not sufficiently allege detention of premises.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 371, 383, 392.

69 Cal. 572-586, 11 Pac. 463, REAY v. BUTLER.

Bill of Exceptions Need not Contain any assignments of errors of law.

Approved in *Nord v. Boston etc. Min. Co.*, 30 Mont. 56, 75 Pac. 683, following rule; *Smith Table Co. v. Madsen*, 30 Utah, 300, 84 Pac. 886, holding assignment of errors need not be filed in lower court.

Delay in Filing Bill of Exceptions for six months after allowance does not authorize supreme court to disregard it, if properly certified.

Reaffirmed in *Van Camp v. Emery*, 13 Idaho, 206, 89 Pac. 753.

Fraud Without Damage cannot be made basis of any action.

Approved in *United Real Estate etc. Co. v. Barnes*, 159 Cal. 246, 113 Pac. 169, following rule.

Where Appeal Lies from Judgment, appellate court will not consider appeal from order refusing to vacate judgment.

Approved in *Title Ins. etc. Co. v. California Dev. Co.*, 159 Cal. 487, 489, 114 Pac. 839, 840, and *People v. Walker* (Cal.), 61 Pac. 800, both following rule; *Olson v. Mattison*, 16 N. D. 233, 112 N. W. 995, order

refusing to set aside judgment after trial and verdict not appealable when order was based on motion to set aside judgment on ground special verdict did not warrant entry of judgment.

Miscellaneous.—Cited in *Reay v. Heazelton*, 128 Cal. 336, 60 Pac. 977, referring historically to principal case.

69 Cal. 586-593, 11 Pac. 343, ROMAN CATHOLIC ARCHBISHOP v. SHIPMAN.

Sale Under Judgment not Against Party owning fee will not be enjoined as casting cloud on owner's title.

Approved in *Brum v. Ivins*, 154 Cal. 21, 129 Am. St. Rep. 137, 96 Pac. 878, refusing to enjoin execution on default judgment at instance of party of same name as defendant who was served with summons and allowed default.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 107, 108, 136.

69 Cal. 593-600, 11 Pac. 346, KALIS v. SHATTUOK.

Landlord of Building Exclusively Controlled by tenant is not liable for injuries to third person caused by fall of awning, negligently allowed by tenant to be used as standing place of crowd of people.

Approved in *Higgins v. Los Angeles Gas etc. Co.*, 159 Cal. 661, 115 Pac. 317, tenant liable to landlord for damages to leased building caused by defendant's negligence; *Lewy Art Co. v. Agricola*, 169 Ala. 68, 53 So. 148, holding tenant of store liable for injury caused by fall of decayed awning.

Liability to Third Persons of lessors of personal property. See notes, 92 Am. St. Rep. 503, 525, 526, 536; 26 L. R. A. 200.

Individual Liability for Falling Walls or buildings. See note, 34 L. R. A. 558.

69 Cal. 601-606, 11 Pac. 481, PEOPLE v. RODRIGO.

Jury are Judges as to Whether Weapon with which assault was committed is deadly weapon.

Approved in *Stone v. Heggie*, 82 Miss. 415, 34 So. 147, holding erroneous instruction to find whether weapon was deadly which ignored manner of its use.

What Weapons may be Considered deadly under law of homicide and assault. See note, 21 L. R. A. (n. s.) 498.

Witness cannot Testify as to General Reputation where he has not stated that he lived in county of defendant's residence.

Approved in *People v. McSweeney* (Cal.), 38 Pac. 744, holding where witness did not testify on direct examination that he knew defendant's reputation at any time, and showed insufficient knowledge of it on cross-examination, he could not testify further on same subject on redirect examination.

Evidence and Instructions as to character of accused. See note, 20 L. R. A. 614.

Plea of Self-defense Does not Place upon accused burden of proving it nor does it change duty of state to prove guilt beyond reasonable doubt.

Reaffirmed in *State v. Ardoin*, 128 La. 18, 54 So. 408.

"Conviction" is Legal Proceeding of record which ascertains guilt of party.

Approved in *Dial v. Commonwealth*, 142 Ky. 33, 133 S. W. 976, "conviction," used with reference to state of infamy, means final judgment in prosecution.

69 Cal. 606-608, 11 Pac. 218, HASTINGS v. KELLER.

Order Refusing to Change Place of trial to county of defendant's residence will not be reversed on appeal, if evidence as to place of defendant's residence is conflicting.

Approved in *Nicholson v. Nicholson*, 16 Cal. App. 755, 117 Pac. 1039, *Bradley v. Davis*, 156 Cal. 268, 104 Pac. 303, *Doak v. Bruson*, 152 Cal. 19, 91 Pac. 1002, and *Conlon v. Gardner* (Cal.), 32 Pac. 565, all applying rule to change of venue.

69 Cal. 608-611, 11 Pac. 217, IN RE LAWRENCE.

County Ordinance is "Law of This State" under section 435, Penal Code.

Approved in *County of Plumas v. Wheeler*, 149 Cal. 768, 87 Pac. 913, *Ex parte Bagshaw*, 152 Cal. 703, 93 Pac. 865, *Dunn v. Stegemann*, 10 Cal. App. 39, 101 Pac. 26, and *Ex parte Sweetman*, 5 Cal. App. 579, 90 Pac. 1070, all following rule.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

69 Cal. 611-616, 11 Pac. 484, MARTIN v. SPLIVALO.

Pendency of Action of unlawful detainer is not bar to action of ejectment between same parties.

Reaffirmed in *Williams v. Gaston*, 148 Ala. 217, 42 So. 553.

What Words Create Condition Subsequent. See note, 79 Am. St. Rep. 766.

69 Cal. 616-621, 11 Pac. 456, HARRISON v. McCORMICK.

Cross-complaint must State Cause of action in favor of defendant and against plaintiff in original complaint.

Approved in *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 432, 114 Pac. 1029, in action by receiver of insolvent bank upon note, defendant cannot set up unrepresented check as counterclaim.

Use of Cross-bill or Cross-complaint to bring in new parties. See note, 26 L. R. A. (n. s.) 130.

Parties to Joint Contract must all be made defendants in suit upon the contract.

Approved in *Clements v. Miller*, 13 N. D. 180, 100 N. W. 240, following rule; *Redwood City Salt Co. v. Whitney*, 153 Cal. 423, 95 Pac. 886, holding action to recover price of goods sold to partnership and a member individually properly brought against all members of firm as partners and such member as individual.

Where Several Persons Contract together with same party for one and the same act, they are jointly and not individually liable thereon.

Approved in *Cole v. Roebling Construction Co.*, 156 Cal. 450, 105 Pac. 258, holding in action for damages against two joint tortfeasors, court could render several judgment against one on his default, and proceed to trial against the other; *Miner v. Rickey*, 5 Cal. App. 453, 90 Pac. 720, approving instruction in suit against individual that if plaintiff knew defendant incurred liability as

member of partnership, where evidence showed liability was that of partnership, verdict should be for defendant.

In Suit on Partnership Obligation, court may order copartner joined as defendant to avoid mistrial.

Distinguished in *Kern County Brick etc. Co. v. English*, 10 Cal. App. 640, 102 Pac. 961, where plaintiff's agent wrongfully charged to defendant individually on plaintiff's books goods delivered and used in partnership between such agent and defendant, and caused plaintiff to sue thereon, rule as to joining copartner as defendant to avoid mistrial did not apply.

69 Cal. 622-624, 11 Pac. 251, O'DONNELL v. JACKSON.

Delay for Three Years held to be such laches as to bar suit for specific performance of contract to purchase land.

Approved in *Eshleman v. Henrietta Vineyard Co.* (Cal.), 36 Pac. 778, holding delay for thirty-five months after discovery of mistake in suing for recovery of land wrongfully withheld by grantor barred recovery.

69 Cal. 625-631, 58 Am. Rep. 574, 11 Pac. 248, HOLLIS v. MEUX.

Specifications of Opposition to insolvents' discharge are privileged publication.

Approved in *Myers v. Hodges*, 53 Fla. 209, 44 So. 361, holding allegations in bill in equity as to character of defendant to be privileged.

What Libelous Statements are privileged. See note, 104 Am. St. Rep. 126.

Liability for Libel or Slander in course of judicial proceedings. See note, 123 Am. St. Rep. 633, 635.

Libel by Defamatory Words in pleading. See note, 22 L. R. A. 650.

69 Cal. 631-633, 11 Pac. 219, TRIPP v. SANTA ROSA STREET R. R. CO.

Appeal Does not Lie from Order refusing to set aside former order refusing to transfer cause to federal courts.

Approved in *Estate of Byrne*, 3 Cof. Prob. 70, order settling final account is subject to appeal, and cannot again be placed in position for appeal by motion to set aside.

69 Cal. 633-634, 11 Pac. 252, REMINGTON v. SUPERIOR COURT.

Right of Wife to Relief against transfer made or contemplated by husband in fraud of her support. See note, 18 L. R. A. (n. s.) 1157.

69 Cal. 634-636, 11 Pac. 487, HITCHCOCK v. McELRATH.

Court has Large Discretion to set aside default inadvertently permitted by party having substantial defense.

Approved in *Pittock v. Buck*, 15 Idaho, 53, 96 Pac. 214, holding court abused discretion in refusing to set aside default inadvertently entered.

69 Cal. 637-642, 11 Pac. 327, DYER v. SCALMANINI.

Estopped in Pais Relied on as defense should be pleaded.

Approved in *Seebach v. Kuhn*, 9 Cal. App. 490, 99 Pac. 725, prevention or waiver of performance of contract relied on as defense must be pleaded.

Action will not be Dismissed on ground that prior action was pending when before trial of second, prior action is dismissed.

Approved in *Manufacturers' Bottle Co. v. Taylor-Stites Glass Co.*, 208 Mass. 596, 95 N. E. 105, reaffirming rule.

69 Cal. 643-646, 11 Pac. 581, **HARTMAN v. ROGERS.**

Where Employee is Discharged without cause during term of employment, he may recover for services rendered on quantum meruit.

Approved in *Brown v. Crown Gold Milling Co.*, 150 Cal. 384, 89 Pac. 90, following rule.

Remedy of Wrongfully Discharged Servant with respect to services actually rendered. See note, 5 L. R. A. (n. s.) 582.

Rights and Remedies of Servant discharged for cause. See note, 5 L. R. A. (n. s.) 526.

Effect of Part Performance of contract for services. See note, 24 L. R. A. 231.

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NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 70 CALIFORNIA.

70 Cal. 1-3, 11 Pac. 488, EX PARTE MITCHELL.

Punishment for Assault with deadly weapon under section 425, Penal Code, is not excessive, cruel, or unusual.

Approved in dissenting opinion in *Weems v. United States*, 217 U. S. 407, 30 Sup. Ct. 565, 54 L. Ed. 815, note, holding punishment for falsifying public document under Philippine Code to be excessive.

Cruel and Unusual Punishments. See note, 35 L. R. A. 568, 570.

Where Prisoner is Sentenced to imprisonment, and to pay fine, and in lieu of fine, imprisonment, sentence of fine is valid and can be enforced even though sentence of imprisonment is void.

Approved in *In re Johnson*, 6 Cal. App. 738, 93 Pac. 200, following rule; *In re Sullivan*, 3 Cal. App. 195, 84 Pac. 781, upholding judgment of fine for assault with deadly weapon although alternative of state prison sentence was void.

Effect of Excessive Sentence. See note, 45 L. R. A. 148, 149.

70 Cal. 3-6, 11 Pac. 320, McNALLY v. CONNOLLY.

Machinery Sold and Securely Fastened in mill by vendee is fixtures as between vendee and attaching creditors, although by contract of sale vendor retained title until purchase price should be paid.

Approved in *McCrillis v. Cole*, 25 R. I. 161, 105 Am. St. Rep. 875, 55 Atl. 198, following rule.

Fixtures Retaining by Agreement the character of personal property. See note, 84 Am. St. Rep. 896.

70 Cal. 8-14, 11 Pac. 323, PEOPLE v. FONG AH SING.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 647; 56 L. R. A. 369.

70 Cal. 14-17, 11 Pac. 500, BROWN v. GRIFFITH.

Record of Unacknowledged Private Writing is not evidence of truth of its recitals.

Approved in *People v. Le Doux*, 155 Cal. 550, 102 Pac. 523, holding marriage certificate did not prove itself.

70 Cal. 17-19, 11 Pac. 470, PEOPLE v. HORN.

Consent of Defendant to Discharge of jury without verdict is bar to plea of once in jeopardy.

Reaffirmed in *People v. Nash*, 15 Cal. App. 325, 114 Pac. 786.

Where Court Instructs Jury to acquit and jury brings in verdict of not guilty, order directing acquittal will not be disturbed although court is only authorized to "advise" jury to acquit.

Approved in *Schrieber v. Clapp*, 13 Okl. 218, 219, 74 Pac. 317, holding where judge after evidence was in discharged jury and dismissed case, though not authorized to do so, such judgment barred another prosecution for same offense.

Right of State to Appeal in a criminal case. See note, 19 L. R. A. 344.

70 Cal. 19-21, 11 Pac. 350, LOW v. WARDEN.

Sufficiency of Answers denying ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 527.

70 Cal. 23-27, 11 Pac. 391, IRVING v. CARPENTER.

In Quiet Title Suit plaintiff may join defendant by fictitious name when he is ignorant of true name, and upon discovery true name may be substituted, though he could easily have discovered true name before suit was filed.

Approved in *Blackburn v. Bucksport etc. R. R. Co.*, 7 Cal. App. 654, 95 Pac. 670, holding in such suit plaintiff not bound to search records and join all who may have adverse claim.

70 Cal. 28-31, 11 Pac. 389, TURNER v. STENZEL.

Materialman Who has Furnished Materials to original contractor is only entitled to be paid by owner from portion of contract price due and not paid to contractor when lien was filed.

Reaffirmed in *McCue v. Jackman*, 7 Cal. App. 705, 95 Pac. 674, and *Nason v. John*, 1 Cal. App. 540, 82 Pac. 566.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

70 Cal. 32-33, 11 Pac. 350, MORGAN v. McDONALD.

On Motion to Set Aside Default, affidavit of merits must state defendant has fully and fairly stated facts of case to counsel.

Approved in *Cass v. Hutton*, 155 Cal. 105, 99 Pac. 494, refusing to set aside judgment on ground of administrator's negligence in defending when affidavit of merits failed to state defendant had fully and fairly stated facts of case to counsel; *Cooper-Power v. Hanlon*, 7 Cal. App. 725, 95 Pac. 679, holding affidavit insufficient.

70 Cal. 33-34, 11 Pac. 327, PEOPLE v. BELL.

Transcript in Criminal Appeal must show transcript was served on attorney for adverse party.

Approved in *People v. Swearinger* (Cal.), 38 Pac. 973, following rule; *People v. Brown*, 148 Cal. 744, 84 Pac. 205, and *People v. Finerty*, 8 Cal. App. 467, 97 Pac. 73, both dismissing appeal when record failed to show service of transcript; *State v. Preston*, 30 Nev. 305, 95 Pac. 919, dismissing appeal, notice of which was not served on clerk of court.

70 Cal. 35-40, 11 Pac. 393, IN RE BICKERSTAFF.

Ordinance Providing That Liquor License will be issued only when application is accompanied by certificate of five respectable citizens vouching for good character of applicant, and upon favorable report of officers to which it is referred, is reasonable and valid.

Approved in *Denton v. Vann*, 8 Cal. App. 682, 97 Pac. 677, upholding ordinance prohibiting granting of liquor license in any precinct in which majority of electors voted against granting licenses; *Davis v. Board of Education*, 7 Cal. App. 574, 575, 95 Pac. 172, upholding ordinance providing that liquor license should not be granted when majority of electors residing within one mile of proposed site protest against granting license.

Delegation of Municipal Power as to license, franchise, and buildings. See note, 20 L. R. A. 722.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

Power to Make Particular Use of property conditional upon consent of neighbors. See note, 8 L. R. A. (n. s.) 979.

70 Cal. 42-51, 11 Pac. 489, GATES v. McLEAN.

Failure to Find on Material Issue is not ground for new trial when finding on such issue could not have changed result.

Approved in *Hoover v. Wasson*, 11 Cal. App. 596, 105 Pac. 948, holding failure to find on issue immaterial when finding must have been adverse to appellant.

Vendee Under Contract of Sale can retain possession only on condition of payment of purchase price, even though vendor's title fails.

Approved in *Garvey v. Lashells*, 151 Cal. 531, 532, 91 Pac. 501, *Gervaise v. Brookins*, 156 Cal. 108, 103 Pac. 331, and *Livesly v. Muckle*, 46 Or. 424, 80 Pac. 903, all following rule; *Spies v. Butts*, 59 W. Va. 399, 400, 53 S. E. 903, upholding appointment of receiver on application of vendor in contract to sell timber land when vendee cut and manufactured the timber but failed to pay installments on purchase price.

• **When Vendee in Possession** under contract of sale is entitled to rescind, he may recover value of improvements placed on land.

Approved in *Owen v. Pomona Land & Water Co. (Cal.)*, 61 Pac. 475, following rule.

Right of Grantee in Possession to question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 383, 397.

70 Cal. 51-58, 11 Pac. 459, EX PARTE STICE.

It Seems That Defendant may be Called to testify for or against codefendant joined in same indictment.

Approved in *People v. Ye Foo*, 4 Cal. App. 743, 89 Pac. 454, holding it no error for district attorney in addressing jury to refer to failure of codefendant to testify.

Conclusiveness of Witness' Statement that his answer would tend to criminate him. See note, 24 L. R. A. (n. s.) 165, 169.

70 Cal. 61-69, 11 Pac. 493, PEOPLE v. PHILLIPS.

Where Variance Between Forged Instrument as recited and as proved is immaterial, defendant is not prejudiced thereby.

Approved in *People v. Crane*, 4 Cal. App. 145, 146, 87 Pac. 240, 241, holding omission of word "signed" in forged check to be immaterial variance from copy set forth in information which contains such word before signature; *People v. Monroe* (Cal.), 33 Pac. 780, where information for forgery sets out forged instrument as order on city, fact that it was order on auditor of city is no variance.

Instruction Assuming Fact as Proved does not warrant reversal, if fact is admitted or there is no conflict of evidence over it.

Approved in *Jones v. State*, 130 Ga. 287, 60 S. E. 846, and *Bartell v. State*, 4 Okl. Cr. 142, 111 Pac. 672, both following rule; *State v. McKnight*, 119 Iowa, 83, 93 N. W. 65, holding court could charge jury in murder trial that it was conceded fact deceased came to death through blood poisoning when it was admitted by both parties; *State v. Belknap*, 44 Wash. 612, 87 Pac. 936, where defendant testified to fact, he could not complain if court assumed it to be true in charge to jury.

70 Cal. 69-72, 11 Pac. 471, ESTATE OF RICAUD.

Value of Estate Taken into Possession and accounted for by executor is basis for allowance of commissions.

Approved in *Estate of Davis*, 8 Cal. 360, 97 Pac. 88, following rule; *Estate of Pease*, 149 Cal. 171, 85 Pac. 151, holding executor entitled to commissions upon whole purchase price of property of estate sold to satisfy mortgage when mortgage was presented as claim against estate. See note, 1 Cal. Prob. 214.

70 Cal. 79-84, 11 Pac. 505, McALESTER v. LANDERS.

Covenant in Lease for Quiet Enjoyment is broken by any interference with lessee's possession, actual or constructive, and right of action thereon accrues at once.

Reaffirmed in *Agoure v. Lewis*, 15 Cal. App. 76, 113 Pac. 884.

70 Cal. 89-97, 11 Pac. 583, McBROWN v. DALTON.

Conclusiveness of Judgment in partition suit. See note, 124 Am. St. Rep. 714.

70 Cal. 98-102, 11 Pac. 503, PEOPLE v. MARSEILER.

Party cannot be Injured by Admission of objectionable evidence when he afterward himself introduces it.

Approved in *Short v. Frink*, 151 Cal. 87, 90 Pac. 202, and *State v. Johnny*, 29 Nev. 220, 87 Pac. 8, both following rule.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 469.

70 Cal. 103-107, 11 Pac. 561, SWIFT v. GOODRICH.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 106.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 574.

70 Cal. 108-115, 9 Pac. 180, 11 Pac. 599, ROBERTS v. DONOVAN.

Sureties on Agent's Bond are Released if principal continues agent in his employ after knowledge that he has misappropriated money coming into his hands as agent.

Approved in *Herbert v. Lee*, 118 Tenn. 140, 121 Am. St. Rep. 989, 101 S. W. 177, 12 L. R. A. (n. s.) 247, and *Indiana & Ohio etc. Ins. Co. v. Bender*, 32 Ind. App. 295, 69 N. E. 694, both following rule.

A Contract is a Transaction, but a transaction is not necessarily a contract.

Approved in *Excelsior Clay Wks. v. De Camp*, 40 Ind. App. 32, 80 N. E. 983, in action by assignee of lessee entitled to remove coal from land, for coal inadvertently removed by adjacent owner, latter could counterclaim claim arising from plaintiff's assignor inadvertently removing coal from his land, as arising from same transaction.

In Action Against Joint Debtors, cause of action in favor of one alone cannot be set up as counterclaim.

Approved in *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 376, 105 Pac. 131, following rule; *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 432, 114 Pac. 1029, holding unassigned check upon bank could not be set off against claims made by it.

Release of Joint Debtor does not discharge others.

Approved in *Enscoe v. Fletcher*, 1 Cal. App. 665, 82 Pac. 1078, holding distribution of note by administrator to one joint maker extinguished his liability thereon but not that of other makers.

70 Cal. 116-119, 11 Pac. 681, PEOPLE v. DONALDSON.

Under Charge of Obtaining Property by means of false token in writing, proof that defendant knew he had no funds to cover check given in payment for property is sufficient.

Approved in *State v. Hammelsy*, 52 Or. 159, 132 Am. St. Rep. 686, 96 Pac. 866, 17 L. R. A. (n. s.) 244, following rule; *Maxey v. State*, 85 Ark. 503, 108 S. W. 1136, holding guilty knowledge of lack of funds to check not proven.

Bank Check Given for Property purchased when drawer knew he had no funds to cover it is a false token under section 1110, Penal Code.

Approved in *Williams v. Territory*, 13 Ariz. 33, 108 Pac. 245, check given by person upon bank in which he has no funds and which he has no reason to suppose will be honored is a "bogus check," within Penal Code, section 489.

Distinguished in *People v. Gibbs (Cal.)*, 33 Pac. 631, holding promissory note could not be false token.

Mere Drawing and Passing of Check without funds to meet it as false pretense. See note, 17 L. R. A. (n. s.) 244.

70 Cal. 121-125, 12 Pac. 120, PAGE v. SUMMERS.

Cotenants in Mines. See note, 91 Am. St. Rep. 656.

Right of Cotenant, Agent, or other fiduciary to relocate mining claim for own benefit. See note, 50 L. R. A. 185.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 819.

70 Cal. 125-126, 11 Pac. 601, McCANTS v. BUSH.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 562.

70 Cal. 127-128, 11 Pac. 602, HAYS v. EWING.

Running of Limitations Against Action for negligence or misconduct of attorney in performing professional duties. See note, 12 L. R. A. (n. s.) 1006.

70 Cal. 136-140, 11 Pac. 589, DYER v. BROGAN.

What is or is not a Record is matter of evidence and may be proved by other facts.

Approved in *Holmberg v. News-Times Publishing Co.*, 31 Colo. 460, 73 Pac. 866, reaffirming rule.

Where Finding Made is Conclusive upon right of plaintiff to recover, findings upon other issues are unnecessary to support judgment.

Approved in *Trope v. Kerns* (Cal.), 20 Pac. 84, and *Bradley v. Parker* (Cal.), 34 Pac. 235, both following rule; *Later v. Haywood*, 14 Idaho, 55, 93 Pac. 377, holding findings made were not conclusive on plaintiff's right to recover and findings must be made upon other issues to support judgment.

70 Cal. 144-147, 11 Pac. 590, **SCHALLARD v. EEL RIVER NAV. CO.**

Plaintiff in Mortgage Foreclosure against corporation cannot recover counsel fees unless resolution authorizing execution of mortgage provided that counsel fees should be secured by it.

Approved in *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 414, 117 Pac. 1045, reaffirming rule.

70 Cal. 150-153, 11 Pac. 685, **LOBREE v. MULLAN.**

Miscellaneous.—Cited in *Miller v. Engle*, 3 Cal. App. 330, 85 Pac. 160, to point that contests arising under section 3414, Political Code, are based on assumption that title to contested land still remains in state.

70 Cal. 153-157, 12 Pac. 121, **STATE v. SMITH.**

Legislature may Confer upon Nonresident foreigners same rights with respect to acquisition, possession, enjoyment, transmission, and inheritance of property as are guaranteed to resident foreigners.

Approved in *Pittsburgh etc. Ry. Co. v. Naylor*, 73 Ohio St. 123, 112 Am. St. Rep. 701, 76 N. E. 506, 3 L. R. A. (n. s.) 473, holding administrator of estate of nonresident alien could bring action for wrongful death for benefit of next of kin in same manner as if by citizen of state.

Effect of State Constitutions and statutes upon inheritance by or from alien. See note, 31 L. R. A. 148.

Proceeding Brought by Attorney General to vest title in state as to property alleged to have escheated is premature if commenced within five years of death of ancestor.

Reaffirmed in *State v. Miller*, 149 Cal. 207, 210, 85 Pac. 610.

70 Cal. 158-160, 11 Pac. 592, **GRAND LODGE OF I. O. G. T. v. FARNHAM.**

Gratuitous Subscription is Mere Offer and may be revoked at any time before acceptance.

Approved in *McClanahan v. Payne*, 86 Mo. App. 291, following rule; *People's Bank & Trust Co. v. Weidinger*, 73 N. J. L. 438, 64 Atl. 181. agreement by father to pay weekly sum to mother to support illegitimate children does not support action by mother until she has performed services under it.

Where Subscribers to Charitable Object agree together to make up certain sum, liability is mutual, and cosubscribers can enforce obligation of one who refuses to pay.

Approved in *Los Angeles National Bank v. Vance*, 9 Cal. App. 60, 98 Pac. 60, where joint subscription exceeded amount required, each subscriber was entitled to pro rata reduction.

Effect on Contract of Death of Party. See note, 23 L. R. A. 707.

70 Cal. 161-163, 11 Pac. 623, **GRANDONA v. LOVDAL**.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 583.

Duty and Liability of Land Owners to adjoining proprietors. See note, 123 Am. Rep. 573.

Liability of Owner or Occupant of land for spread of weeds or noxious vegetation. See note, 52 L. R. A. 295.

Property Rights in Trees on boundary line. See note, 21 L. R. A. 731.

70 Cal. 169-184, 59 Am. Rep. 404, 11 Pac. 686, **PFISTER v. CENTRAL PACIFIC R. R. CO.**

Common Carrier of Goods is under no obligation to accept and carry all personal property that may be offered.

Approved in *Chesapeake & Ohio Ry. Co. v. Hall*, 136 Ky. 388, 124 S. W. 375, holding carrier of goods, wares, and merchandise not bound to carry money.

Right of Railroad to Give Exclusive or preferential facilities to express company. See note, 5 L. R. A. (n. s.) 784.

Liability for Loss of Baggage. See note, 99 Am. St. Rep. 348.

Miscellaneous.—Cited in *Commonwealth v. People's Express Co.*, 201 Mass. 579, 131 Am. St. Rep. 410, 88 N. E. 425, in discussing definition of term "express business."

70 Cal. 184-186, 11 Pac. 624, **ESTATE OF OLVERA**.

Claim Against Estate of Decedent bears interest after settlement of administrator's account.

Approved in *Estate of Mallon*, 3 Cof. Prob. 126, where judgment recovered against decedent in his lifetime is allowed as claim against estate with interest, preference given by Code of Civil Procedure, section 1643, extends to interest.

Allowance to Administrator for Interest on disbursements. See note, 5 Cof. Prob. 395.

70 Cal. 186-187, 11 Pac. 606, **JOHNSON v. KLEIN**.

Finding That All Allegations of complaint are true is sufficient when answer consists of denials only.

Approved in *McKelvey v. Wagg*, 157 Cal. 409, 108 Pac. 269, and *Chatfield v. Continental Bldg. etc. Assn.*, 6 Cal. App. 668, 92 Pac. 1042, *Boyd v. Boyd* (Cal.), 31 Pac. 1109, and *Wolfskill v. Douglas* (Cal.), 59 Pac. 988, all following rule; *Paden v. Goldbaum* (Cal.), 37 Pac. 760, upholding finding that allegations of answer are untrue.

70 Cal. 193-194, 11 Pac. 605, **PEOPLE v. LOWREY**.

Possession of Stolen Property as evidence of guilt. See notes, 101 Am. St. Rep. 497; 12 L. R. A. (n. s.) 211.

View by Jury. See note, 42 L. R. A. 379.

70 Cal. 194-196, 11 Pac. 565, **WING HO v. BALDWIN**.

Provisions of Civil Code Providing for publication of certificate of partnership, construed.

Cited in *In re Farmers' Supply Co.*, 170 Fed. 504, considering purpose of act requiring firms doing business under fictitious name to record certificate showing names of members.

70 Cal. 196-197, 11 Pac. 608, WILSON v. PROUTY.

Mortgagee may Maintain Action for conversion against one removing mortgaged crop during life of lien.

Approved in *Hammels v. Sentous*, 151 Cal. 522, 91 Pac. 328, holding one who purchased mortgaged property in county to which it was removed while lien continued is liable for conversion.

Distinguished in *Gates v. Tom Quong*, 3 Cal. App. 447, 85 Pac. 663, holding lien of mortgage on crop ceased upon rightful removal and sale thereof by lessee.

Mortgagees' Right of Action against third persons for invasion of their rights. See note, 109 Am. St. Rep. 447.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 473.

70 Cal. 198-201, 11 Pac. 627, ADAMS v. SOUTH BRITISH ETC. INS. CO.

Action cannot be Brought on fire insurance policy which stipulates for arbitration to determine loss in case of disagreement until fair effort has been made to so adjust loss.

Approved in *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 395, 65 Atl. 137, holding insured could sue, notwithstanding stipulation for arbitration when arbitrators failed to agree; *Gray v. Reliable Ins. Co.*, 20 Okl. 598, 110 Pac. 730, holding complaint on fire policy defective in failing to allege certain conditions as to adjustment, stipulated in policy as condition to liability, had been complied with.

Distinguished in *Winchester v. North British etc. Co.*, 160 Cal. 6, 7, 116 Pac. 65, fire policy requiring written notice for appointment of appraisers by either party and providing for payment sixty days after proof of damage and award by appraisers when required, requires insurer desiring appraisers to serve written notice within sixty days after proof of loss.

Arbitration as Condition Precedent to action on insurance policy. See note, 15 L. R. A. (n. s.) 1069.

Agreements to Arbitrate. See note, 15 L. R. A. 143.

70 Cal. 201-204, 11 Pac. 628, PHELPS v. COGSWELL.

Power of Appellate Court over verdict for excessive damages. See note, 26 L. R. A. 388.

70 Cal. 204-206, 11 Pac. 593, PEOPLE v. LAMPSON.

Continuance of Criminal Trial for Absence of witness may be refused when affidavits do not show service of subpoena.

Approved in *Melbourne v. State*, 51 Fla. 72, 40 So. 190, holding diligence not shown to procure witness.

70 Cal. 206-209, 11 Pac. 695, LONG BEACH LAND ETC. CO. v. RICHARDSON.

Title to Land Between High and Low water mark. See note, 45 L. R. A. 238.

Right of State to Grant tide lands. See note, 22 L. R. A. (n. s.) 340.

70 Cal. 210, 11 Pac. 645, SANCHEZ v. NEWMAN.

No Appeal Lies from Order dismissing proceeding for alleged contempt.

Approved in *Estate of Wittmeier*, 118 Cal. 256, 50 Pac. 394, no appeal lies from order adjudging executrix guilty of contempt in disobeying decree of distribution; *Natoma Water etc. Co. v. Hancock* (Cal.), 36 Pac. 100, no appeal lies from order adjudging one guilty of contempt in violating restraining order.

70 Cal. 211-212, 11 Pac. 699, TEMPLE v. SUPERIOR COURT.

Mandamus Lies to Compel superior court to hear and determine proceeding for contempt under section 1210, Code of Civil Procedure, when court refused to hear proceeding for want of jurisdiction.

Approved in *Inglin v. Hoppin*, 156 Cal. 489, 105 Pac. 585, mandamus lies to compel supervisors to set off independent reclamation district; *Hill v. Superior Court*, 15 Cal. App. 314, 114 Pac. 808, mandamus lies to compel trial of election contest which court refused to hear on ground of lack of jurisdiction; *California etc. Lumber Co. v. Superior Court*, 13 Cal. App. 70, 108 Pac. 894, mandamus lies to compel court to enter default, refused under misconception of law; *Scott v. Shields*, 8 Cal. App. 18, 96 Pac. 388, mandamus lies to compel superior judge to compel attendance of witness at taking of deposition for use in another county; *State v. McGovern*, 136 Wis. 8, 116 N. W. 227, 20 L. R. A. (n. s.) 941, mandamus lies to compel court to proceed with criminal cause dismissed on ground of lack of jurisdiction; *Gilbert v. Shaver*, 91 Ark. 239, 120 S. W. 836, mandamus lies to compel chancery court to hear cause referred by it to circuit court where hearing was refused on ground of lack of jurisdiction.

Remedies of Plaintiff Dispossessed after being put in possession under judgment in ejectment. See note, 135 Am. St. Rep. 649.

70 Cal. 212-215, 11 Pac. 703, PEOPLE v. BUNKER.

State may Recover Fees paid immigration commissioner although such fees were exacted under void act.

Approved in *Board of Commrs. v. Dickey*, 86 Minn. 339, 90 N. W. 779, holding county could recover from county clerk fees paid for abstracts furnished by him from office records.

Distinguished in *Chicago etc. R. R. Co. v. Douglas Co.*, 134 Wis. 206, 114 N. W. 514, 14 L. R. A. (n. s.) 1074, holding state not estopped to tax lands granted it by Congress and by state to railroad merely because it claims part of the lands under prior federal swamp land grant.

70 Cal. 216-220, 11 Pac. 641, KEDROLWANSKY v. NIEBAUM.

Slander and Libel in Charging Woman with unchastity. See note, 24 L. R. A. (n. s.) 606, 624.

70 Cal. 226-231, 11 Pac. 700, ANDERSON v. BLACK.

Objection to Validity of Mining Location on ground of excessiveness of extent cannot be first raised on appeal.

Approved in *Cargnani v. Cargnani*, 16 Cal. App. 101, 116 Pac. 308, in divorce objection to evidence of other acts of cruelty than those alleged cannot be first urged on appeal.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 860.

70 Cal. 236-242, 11 Pac. 656, KING v. GOTZ.

Homestead Declared Subsequent to Deed of trust on premises is subject to such deed.

Approved in *Roberts v. True*, 7 Cal. App. 381, 94 Pac. 393, following rule; *MacLeod v. Moran*, 153 Cal. 100, 94 Pac. 605, clause in trust deed to secure debt purporting to abandon all homestead right is an abandonment to trustees for purposes of trust only.

Trustor Under Trust Deed holds legal title to property except as to trustees.

Approved in *Hollywood Lumber Co. v. Love*, 155 Cal. 273, 100 Pac. 700, holding trustee under trust deed had not such interest in land as to require him to post notice of nonliability under mechanic's lien law.

70 Cal. 242-247, 11 Pac. 648, TIBBETTS v. FORE.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 107, 112.

70 Cal. 250-254, 11 Pac. 643, BURKLE v. LEVY.

Married Woman has Same Rights in respect to separate property as if she were unmarried.

Approved in *Phillips v. Piney Coal Co.*, 53 W. Va. 550, 97 Am. St. Rep. 1040, 44 S. E. 777, holding married woman subject to imputation of laches as if unmarried.

Contract Obtained Through Fraud must be rescinded promptly upon discovery of fraud.

Approved in *McDonald v. Markesan Canning Co.*, 142 Wis. 259, 125 N. W. 447, holding where stock subscription was repudiated before organization, subscriber could not demand stock after several years when corporation became prosperous.

70 Cal. 254-261, 11 Pac. 706, FLANNAGAN v. BROWN.

Delivery of Note Indorsed in Blank to another for collection, with agreement to divide proceeds, makes transferee mere agent for collection.

Distinguished in *Thomas v. Lamb*, 11 Cal. App. 723, 106 Pac. 256, holding delivery of money to be used for certain purposes after death of donor to create a trust therein.

Power of Agent to Collect Note indorsed to him in blank with agreement to divide proceeds may be revoked at any time before performance.

Approved in *Blumenthall v. Goodall* (Cal.), 25 Pac. 132, holding power of agent to sell land could be revoked when buyer was procured but not on terms of contract.

70 Cal. 261-269, 11 Pac. 710, SANBORN v. MADERA FLUME ETC. CO.

Knowledge of One Injured of defect or danger by which he is injured is one of the probative facts and is for jury.

Approved in *Wyckoff v. Pajaro Valley etc. R. R. Co.*, 11 Cal. App. 115, 103 Pac. 1104, holding plaintiff's decedent assumed risk in loading freight; *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 683, 84 Pac. 260, holding question whether plaintiff had knowledge of defective roof in mine causing his injury was for jury.

Duty of Master to Furnish safe appliances as affected by fact that defective appliances are prepared by fellow-servants. See note, 4 L. R. A. (n. s.) 222.

Vice-principalship as Determined with reference to character of act causing injury. See note, 54 L. R. A. 38, 72.

70 Cal. 270-275, 11 Pac. 713, BETTNER v. HOLT.

Alleged Libelous Language is to be Regarded not only with reference to actual words used, but according to sense and meaning under all circumstances attending publication.

Approved in *Morse v. Times-Republican Printing Co.*, 124 Iowa, 715, 100 N. W. 870, holding where alleged libelous words were fairly capable of defamatory meaning alleged, they were actionable per se, but defendant could go to jury on issue whether they were used in sense not libelous under the circumstances.

70 Cal. 282-286, 11 Pac. 719, SCHUYLER v. BROUGHTON.

Community Property may be Sold on execution for debt of husband.

Approved in *Bekins v. Dieterle*, 5 Cal. App. 692, 91 Pac. 174, following rule.

Realty Purchased by Married Woman in her own name and partly paid for with community money is held in common with husband in proportion to separate funds of wife paid therefor to community funds.

Approved in *Estate of Leahy*, 3 Cof. Prob. 372, reaffirming rule; *Heintz v. Brown*, 46 Wash. 389, 123 Am. St. Rep. 937, 90 Pac. 212, holding realty so purchased to be liable for community debts to extent of community interest.

Money Borrowed by Married Woman to invest in realty during marriage is community property, unless borrowed on faith of her existing separate property.

Cited in *Estate of Hale*, 2 Cof. Prob. 202, discussing character of real property purchased in Mexico.

What is Community Property. See notes, 126 Am. St. Rep. 103, 109, 110; 4 Cof. Prob. 45, 51, 52.

70 Cal. 286-291, 11 Pac. 704, EDGAR v. STEVENSON.

Diversion of Water During extraordinary floods which does not appreciably diminish stream below will not be enjoined.

Approved in *Huffner v. Sawday*, 153 Cal. 93, 94 Pac. 427, *Anaheim Union Water Co. v. Fuller*, 150 Cal. 334, 88 Pac. 981, 11 L. R. A. (n. s.) 1062, and *Crawford Co. v. Hathaway*, 67 Neb. 374, 108 Am. St. Rep. 647, 93 N. W. 798, 60 L. R. A. 889, all following rule; dissenting opinion in *Lonoaea v. Wailuku Sugar Co.*, 9 Haw. 669, arguendo.

Right of Riparian Owner to Prevent diversion of flood water. See note, 22 L. R. A. (n. s.) 391.

Change of Use or Channel of water appropriated. See note, 30 L. R. A. 387.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 725.

70 Cal. 291-294, 11 Pac. 630, EX PARTE WINTER.

In Action by Wife for Maintenance, trial court may, after appeal, order payment of counsel fees for appeal.

Approved in *Bruce v. Bruce*, 160 Cal. 30, 116 Pac. 67, reaffirming rule; *Roby v. Roby*, 9 Idaho, 375, 74 Pac. 958, holding superior court had jurisdiction to order payment of costs and expenses necessary to

perfect appeal in divorce; *Bordeaux v. Bordeaux*, 29 Mont. 482, 75 Pac. 360, holding court could, on proper showing, although judgment had passed against wife in divorce, order payment of counsel fees and costs for motion for new trial.

Disapproved in *State v. Superior Court*, 55 Wash. 348, 349, 104 Pac. 772, 25 L. R. A. (n. s.) 387, holding in such action court could not award suit money and alimony pending final hearing.

Jurisdiction to Award Temporary Alimony, suit money, and counsel fees pending appeal. See note, 27 L. R. A. (n. s.) 713.

70 Cal. 295-296, 11 Pac. 633, **WINTER v. SUPERIOR COURT.**

Contempt Proceedings to Enforce payment of alimony. See note, 137 Am. St. Rep. 876.

70 Cal. 296-320, 11 Pac. 820, **FRINK v. ROE.**

In Ejectment Where Both Parties claim under common source, plaintiff need not show origin of title of common source.

Approved in *Dondero v. O'Hara*, 3 Cal. App. 640, 86 Pac. 988, holding where both claimed under common source prior possession of plaintiff showed better title than that of subsequent possession of defendant from same source.

Failure to Give Proper Notice of execution sale does not invalidate sale.

Reaffirmed in *Burton v. Kipp*, 30 Mont. 287, 76 Pac. 566.

Power of Attorney, Though Expressly stipulated to be irrevocable, may be revoked at will of principal, unless coupled with an interest.

Approved in *Weaver v. Richards*, 144 Mich. 406, 411, 415, 108 N. W. 386, 388, 390, 6 L. R. A. (n. s.) 855, and *First Nat. Bank v. Miller*, 48 Or. 591, 87 Pac. 894, both following rule; *King v. Miller*, 53 Or. 64, 97 Pac. 546, holding where owner of judgment assigned it to bank for collection and as security for debt due from owner to third person, revocation of assignment is no defense in action by bank for proceeds against party by it authorized to collect, who had paid proceeds to stranger, who was assignee of debt on which judgment was based.

Revocation of Power of Attorney. See note, 110 Am. St. Rep. 855, 856, 857, 858, 859, 860.

Fraud When Relied on as Defense must be specially pleaded.

Reaffirmed in *Hammond v. McCollough*, 159 Cal. 649, 115 Pac. 219.

Any Declarations, Acts, or Omissions of grantor while holding title in relation to property, and which could have been introduced against him while an owner, are admissible against his grantee.

Approved in *Washoe Copper Co. v. Junila*, 43 Mont. 185, 115 Pac. 919, declaration is inadmissible as one against interest unless it was made while declarant was holding title to property and was grantor against whom declaration was offered.

Liability of Principal for Unauthorized acts of agent. See note, 88 Am. St. Rep. 782.

Miscellaneous.—Cited in *Davis v. Pacific Improvement Co.*, 118 Cal. 50, 50 Pac. 9, referring historically to principal case.

70 Cal. 320-325, 12 Pac. 125, **HOADLEY v. SAN FRANCISCO.**

Ruling on Former Appeal becomes law of case for subsequent appeals.

Reaffirmed in *Hubbard v. Lee*, 10 Cal. App. 480, 102 Pac. 529.

Right to Acquire Title by adverse possession to lands devoted to public use. See note, 87 Am. St. Rep. 779.

Miscellaneous.—Cited in *Bowden v. San Francisco*, 199 U. S. 601, 26 Sup. Ct. 748, 50 L. Ed. 328.

70 Cal. 326-334, 11 Pac. 728, **SCHLESSINGER v. MALLARD.**

Error in Refusing Nonsuit may be cured by testimony subsequently introduced by defendant.

Approved in *Bowley v. Mangrum & Otter*, 3 Cal. App. 232, 84 Pac. 997, *Lowe v. San Francisco etc. Ry. Co.*, 154 Cal. 576, 98 Pac. 679, and *Lyon v. United Moderns*, 148 Cal. 472, 113 Am. St. Rep. 291, 83 Pac. 805, 4 L. R. A. (n. s.) 247, all following rule.

Power of Municipality to Regulate, prohibit, or discontinue cemeteries. See note, 87 Am. St. Rep. 684.

70 Cal. 337-339, 11 Pac. 631, **BROWN v. PLUMMER.**

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 325.

70 Cal. 339-342, 11 Pac. 650, **LUCO v. COMMERCIAL BANK.**

Order of Probate Court Accepting Resignation of executor and discharging him is presumed to be regular and cannot be collaterally attacked.

Approved in *Del Campo v. Camarillo*, 154 Cal. 654, 98 Pac. 1053, applying rule to decree of distribution; *Goldtree v. McAlister* (Cal.), 23 Pac. 209, holding order admitting to probate will probated in another state not open to collateral attack; *Estate of King*, 4 Cof. Prob. 18, where executors named in will request appointment of another, who is appointed and dies, they are preferred to public administrator on further application where they are next of kin.

Conclusiveness of Probate as res judicata. See note, 21 L. R. A. 681.

Miscellaneous.—Cited in *Luco v. Toro* (Cal.), 18 Pac. 868, referring historically to principal case.

70 Cal. 343-345, 11 Pac. 651, **SCHROEDER v. SUPERIOR COURT.**

Appointment of Special Administrator without removal of regular administrator is void.

Approved in *Freeman v. Spencer*, 128 Cal. 397, 60 Pac. 980, holding presumption on collateral attack is that first assignee in partition was removed before appointment of second.

Grounds for Removal of Executors and administrators. See note, 138 Am. St. Rep. 530.

70 Cal. 345-350, 11 Pac. 732, **COX v. CLOUGH.**

Continuous Adverse User of Water, with knowledge of owner, for five years bars right of owner thereto.

Approved in *Jobling v. Tuttle*, 75 Kan. 364, 89 Pac. 704, holding use for fifteen years of mineral springs on land of another to be easement only, being consistent with owner's title; *Talbott v. Butte City Water Co.*, 29 Mont. 26, 73 Pac. 1113, holding adverse user for five years not established.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 712, 730.

Liability of Water Companies. See note, 81 Am. St. Rep. 486, 495.

70 Cal. 350-361, 11 Pac. 724, BATH v. VALDEZ.

Decree of Distribution Does not Affect Title of one claiming by adverse possession against heirs.

Approved in *Cooley v. Miller & Lux*, 156 Cal. 515, 105 Pac. 983, such decree does not affect title of successor of grantee of distributee.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 570.

70 Cal. 361-374, 11 Pac. 734, BURROUGHS v. DE COUTS.

Notice to Relatives is Necessary to appointment of guardian for minor.

Cited in *Guardianship of Treadwell*, 3 Cal. Prob. 316, arguendo.

Appointment of Guardian for Minor cannot be collaterally attacked for insufficiency of notice to relatives, where record recites that all near relatives of minor in county consented to appointment.

Approved in *Guardianship of Treadwell*, 3 Cal. Prob. 316, 317, where application for guardianship is granted by court of one county and application to vacate order on ground that minors are nonresidents of county is denied, order denying application is conclusive on application for letters in another county.

Power of Local Church Society to withdraw from general church body. See note, 32 L. R. A. 96.

When Beneficiary Deemed to have Elected to take under will assuming to dispose of his property. See note, 4 L. R. A. (n. s.) 1065.

70 Cal. 374-380, 11 Pac. 634, COUBROUGH v. ADAMS.

Pendency of Action for Accounting may be pleaded in abatement of subsequent action between same parties founded on one or more items involved in prior action.

Distinguished in *Helfrich v. Romer*, 16 Cal. App. 436, 118 Pac. 459, plea in abatement alleging commencement of action against present plaintiff, and another for accounting of alleged partnership for purposes of which note in suit was given, but which does not allege plaintiff was member of firm, is insufficient.

70 Cal. 390-391, 11 Pac. 652, CURTIS v. SUPERIOR COURT.

Where Time for Preparation of Statement on motion for new trial has been extended by stipulation, court may grant further extension, not exceeding thirty days.

Approved in *Nord v. Boston etc. Min. Co.*, 33 Mont. 470, 84 Pac. 1118, following rule.

70 Cal. 392-395, 11 Pac. 740, KEVERN v. PROVIDENCE GOLD ETC. MIN. CO.

Proximate Cause of Injury is the Object of inquiry, and must be relied on in determining negligence.

Approved in *McVay v. Central Cal. Inv. Co.*, 6 Cal. App. 189, 91 Pac. 747, holding defendant's negligence in starting fire in dry season on windy day was proximate cause of injury to adjacent land.

Employer is not Bound to Indemnify employer for losses suffered by latter in consequence of ordinary risks of employment, or negligence of fellow-employee.

Approved in *Fogarty v. Southern Pacific Co.*, 151 Cal. 787, 91 Pac. 654, following rule; *Hardesty v. Largey Lumber Co.*, 34 Mont. 164,

86 Pac. 33, holding employer liable for injury to employee through falling of pile of carelessly piled lumber.

Vice-principalship as Determined with reference to character of act causing injury. See note, 54 L. R. A. 177.

70 Cal. 395-397, 11 Pac. 742, McNOBLE v. JUSTINIANO.

Payment of Taxes is Essential to right of one claiming by adverse possession.

Approved in *Crane v. Judge*, 30 Utah, 55, 83 Pac. 567, and *Rio Grande etc. Ry. Co. v. Salt Lake Investment Co.*, 35 Utah, 538, 101 Pac. 590, both following rule; *Glowner v. de Alvarez*, 10 Cal. App. 196, 101 Pac. 433, *arguendo*.

70 Cal. 398-399, 11 Pac. 745, LEE v. ORR.

In Action by Junior Judgment Creditor to set aside fraudulent judgment, complaint need not aver execution was issued and returned unsatisfied, where it is averred judgment debtor had no other property than that sold under fraudulent judgment.

Approved in *Ziska v. Ziska*, 20 Okl. 651, 95 Pac. 260, 23 L. R. A. (n. s.) 1, applying rule to suit in nature of creditor's bill.

70 Cal. 399-402, 11 Pac. 743, TERNEY v. DOTEN.

Verbal Agreement for Sale of Horses considered and held void on ground that no part thereof was performed.

Distinguished in *Driggs v. Bush*, 152 Mich. 56, 125 Am. St. Rep. 389, 115 N. W. 986, 15 L. R. A. (n. s.) 654, upholding oral contract for sale of hay when cost of baling same was paid for by purchaser.

70 Cal. 403-412, 59 Am. Rep. 423, 11 Pac. 833, LEWIS v. ADAMS.

Foreign Executor may Maintain Action in this state in his own name on judgment recovered as executor in another state.

Approved in *Arizona Cattle Co. v. Huber*, 4 Ariz. 72, 33 Pac. 555, and *Low v. Horner*, 10 Haw. 538, both reaffirming rule; *Moore v. Petty*, 135 Fed. 674, 68 C. C. A. 306, holding foreign executor could sue in own name without taking out letters of administration to recover from agents employed by executors proceeds of sale of land of estate.

Distinguished in *Iowa etc. Land Co. v. Hoag (Cal.)*, 62 Pac. 190, holding trustee appointed by court has no authority to maintain action outside jurisdiction of his appointment.

Finding That All Allegations of complaint are true is sufficient finding on plea of limitations when complaint contains averments showing statute had not run.

Reaffirmed in *Bell v. Adams*, 150 Cal. 774, 90 Pac. 119.

Miscellaneous.—Cited in *Lewis v. Adams (Cal.)*, 11 Pac. 837, companion case.

70 Cal. 412-417, 11 Pac. 748, CURTIS v. SACRAMENTO.

In Action Brought on One Promise plaintiff cannot recover on proof of another.

Approved in *Visser v. Wilbur*, 5 Cal. App. 572, 90 Pac. 1069, following rule; *Rossiter v. Colby*, 71 N. H. 387, 52 Atl. 928, holding offer to arbitrate claim of debt not a new promise.

Acknowledgment or New Promise to suspend running or remove bar of statute of limitations. See note, 102 Am. St. Rep. 777.

70 Cal. 417-423, 59 Am. Rep. 428, 11 Pac. 750, **LAWRENCE v. GREEN.**

Passenger Ought not to be Deemed Guilty of contributory negligence when he takes such risks as under the same circumstances a prudent man would take.

Approved in *Brady v. Fresno City Ry. Co.*, 9 Cal. App. 431, 99 Pac. 407, holding passenger not contributorily negligent in manner of resisting attack by conductor for nonpayment of fare; *Noyes v. Southern Pac. R. Co. (Cal.)*, 24 Pac. 928, holding track-hand guilty of contributory negligence in walking between tracks, on which trains were approaching, between bluff and sea.

Presumption of Negligence from happening of accident causing personal injuries. See notes, 113 Am. St. Rep. 1031; 15 L. R. A. 36.

70 Cal. 424-428, 12 Pac. 392, **SMITH v. FURNISH.**

Claim for Services of Married Woman is community property.

Approved in *Bekins v. Dieterle*, 5 Cal. App. 693, 91 Pac. 175, where wife managed business of husband, earnings therein were community property.

What is Community Property. See notes, 126 Am. St. Rep. 115; 4 Cal. Prob. 57.

Where One Who Cared for Deceased during last sickness presents bill for services to administrator, he thereby renounces right to bequest for such care.

Distinguished in *Estate of Barclay*, 152 Cal. 758, 93 Pac. 1014, holding presentation of full amount of claim against estate for advances made to testatrix and allowance of part not barred by limitations does not estop claimant from receiving legacy in satisfaction of part barred.

Statement of Claims Against Estates of decedents. See notes, 130 Am. St. Rep. 314; 5 Cal. Prob. 300.

70 Cal. 431-437, 11 Pac. 662, **COUNTY OF YOLO v. KNIGHT.**

Affidavit for Publication of Summons on nonresident defendant, when complaint is not verified, must set out facts constituting cause of action.

Approved in *People v. Mulcahy*, 159 Cal. 36, 112 Pac. 854, applying rule in action by state to foreclose interest of purchaser of school lands and to cancel certificate of purchase; *Estate of Hancock*, 156 Cal. 810, 811, 134 Am. St. Rep. 177, 106 Pac. 61, holding affidavits of attorney merely to effect that he is informed and believes plaintiff has good cause of action insufficient to support publication.

70 Cal. 437-439, 11 Pac. 754, **WIGGINS v. BRIDGE.**

Where Owner Completes Building after abandonment by contractor, materialman has no lien for materials furnished contractor unless owner completes building for less than balance of contract price.

Approved in *O'Brien v. Garibaldi*, 15 Cal. App. 523, 115 Pac. 251, where owner completes work after a contractor has abandoned it, such completion is done under contract, and contractor is entitled to surplus of contract price over actual cost of completion to owner.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 561.

70 Cal. 440-444, 11 Pac. 697, AMER v. HIGHTOWER.

Where Sale of Personal Property is procured by fraud, title does not pass, unless after discovery of fraud seller satisfies sale.

Approved in Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 414, 95 Pac. 1030, holding fraudulent sale passes title sufficiently to protect bona fide purchaser when vendor had so long delayed to assert fraud as to suggest consent by inference.

70 Cal. 445-447, 11 Pac. 763, JOY v. McKAY.

Liability of Community Property for debts. See note, 19 L. R. A. 235.

70 Cal. 447-449, 11 Pac. 831, BIGGS v. LLOYD.

Right of Trial by Jury cannot be waived except in manner provided by law.

Approved in Chessman v. Hale, 31 Mont. 592, 79 Pac. 259, 68 L. R. A. 410, following rule.

70 Cal. 449-454, 11 Pac. 659, HELLMAN v. McWILLIAMS.

Parol Trust in Personalty is valid.

Reaffirmed in Noble v. Learned, 153 Cal. 250, 94 Pac. 1049.

Parol Transfer of Money in Trust for use and benefit of children of trustor, reserving to trustor right to withdraw from fund for his own needs, is valid.

Approved in Carr v. Carr, 15 Cal. App. 488, 493, 115 Pac. 264, 266, upholding parol trust of bank deposit with right of withdrawal reserved to trustor; Treadway v. Veterans' Home of Calif., 14 Cal. App. 86, 111 Pac. 115, upholding trust in money reserving right to trustor to withdraw sums for his own needs; Thomas v. Lamb, 11 Cal. App. 721, 106 Pac. 255, where prior to death sister gave brother key to safe deposit vault, with directions to take money and pay doctor's and funeral bills and send residue to another, brother was trustee; Cahlan v. Bank of Lassen County, 11 Cal. App. 540, 105 Pac. 767, upholding trust in personal property created by parol; dissenting opinion in Noble v. Learned, 153 Cal. 253, 94 Pac. 1051, majority holding where woman bought stock shares and indorsed same to different parties, giving them to plaintiff to keep for her with instructions to deliver to indorsees on her death, reserving right to use of income and principal, no trust created.

Distinguished in Noble v. Learned, 153 Cal. 251, 252, 94 Pac. 1050, holding where woman bought building and loan shares and indorsed same to different parties, giving them to plaintiff to keep for her, with instruction to deliver to indorsees on her death, reserving right to use of income and principal, no trust created.

Trustor may Reserve Power of revocation in declaration of trust.

Approved in In re Estate of Podhajsky, 137 Iowa, 746, 115 N. W. 592, holding trust in money could not be revoked when power was not reserved in declaration of trust; Anderson v. Kemper, 116 Ky. 348, 76 S. W. 124, holding void attempted change in beneficiaries when no power to change was reserved.

Power to Revoke or Set Aside voluntary trust or settlement. See note, 15 L. R. A. 77.

Termination of Trusts and of trustee's title. See note, 100 Am. St. Rep. 104.

70 Cal. 454-457, 11 Pac. 746, QUINN v. ANDERSON.

Failure to Find on Immaterial Issue is not reversible error.

Approved in *Lewis v. First Nat. Bank*, 46 Or. 188, 78 Pac. 992, holding in action on assigned claim when court found for defendant, no finding need be made on assignment.

Dedication is Never to be Presumed without evidence of unequivocal intention of owner.

Approved in *Cordano v. Wright*, 159 Cal. 620, 115 Pac. 231, deed, for road, of property covered by homestead, in which husband is sole grantor, though signed by wife, is not good dedication by her; *Hibberd v. Mellville* (Cal.), 33 Pac. 202, holding evidence did not show intention to dedicate road.

Erection and Maintenance of Gates over road is strong evidence in support of mere license to public to pass over it.

Reaffirmed in *De La Guerra v. Striedel*, 159 Cal. 89, 112 Pac. 858.

Injunctive Relief as to Fences or gates. See note, 7 L. R. A. (n. s.) 81.

70 Cal. 458-460, 11 Pac. 757, COUNTY OF AMADOR v. KENNEDY.

Ordinance is not Invalid which fixes less rate for liquor license at wayside tavern than in village or city.

Approved in *County of Amador v. Isaacs* (Cal.), 11 Pac. 759, and *Servonitz v. State*, 133 Wis. 240, 126 Am. St. Rep. 955, 113 N. W. 280, bill upholding law classifying persons engaged in peddling and hawking as to method pursued.

Test of Validity of Municipal Ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 48.

Limit of Amount of License Fees. See note, 30 L. R. A. 426.

70 Cal. 461-464, 11 Pac. 759, PEOPLE ex rel. BETTNER v. RIVERSIDE.

"About" Three Thousand Inhabitants in notice of election held to mean no excess over three thousand.

Approved in *Featherman v. Hennessy*, 43 Mont. 314, 115 Pac. 985, construing word "about" in finding as to time of appropriation of water; *James Higgins Co. v. Torvick*, 55 Or. 278, 106 Pac. 23, construing word "about" in contract for delivery of goods as meaning not more than time specified.

Physical Characteristics Necessary to municipal organization. See note, 25 L. R. A. 755.

70 Cal. 465-467, 11 Pac. 760, ROSS v. BRUSIE.

Admissibility in Evidence of books of account. See note, 138 Am. St. Rep. 474.

What Provable by Books of account. See note, 52 L. R. A. 714.

70 Cal. 467-469, 11 Pac. 762, PEOPLE v. GORDON.

Conviction for Assault With Intent to commit rape on girl under ten may be had without showing her want of consent.

Approved in *Liebscher v. State*, 69 Neb. 399, 95 N. W. 872, following rule; *People v. Babcock*, 160 Cal. 540, 117 Pac. 550, statutory rape includes offense of assault with intent to commit rape on child under age of consent.

70 Cal. 476-481, 13 Pac. 141, HAYWARD v. MANZER.

Filing and Recording Map of tract of land delineating thereon certain portions as streets is mere offer of dedication.

Approved in *Myers v. City of Oceanside*, 7 Cal. App. 92, 93 Pac. 688, holding reference in deeds to land to proposed park adjacent thereto to be only implied offer of dedication and to be revoked by subsequent acts of grantor.

Distinguished in *Eureka v. Croghan* (Cal.), 19 Pac. 485, conveyance of land within town limits by deed, describing it as bounded by certain streets if projected, together with five years' use of projected streets by public, constitutes dedication of street without formal acceptance by town.

Miscellaneous.—Cited in *People v. Reed* (Cal.), 20 Pac. 709, companion case.

70 Cal. 482-483, 12 Pac. 385, HEILBRON v. HEINLEN.

Liability of Owner for trespass of cattle. See note, 22 L. R. A. 56.

70 Cal. 487-496, 11 Pac. 764, CHAPMAN v. POLACK.

Plat of Official Survey is admissible with patent to establish title and boundary to land in patent.

Approved in *Foss v. Johnstone*, 158 Cal. 128, 110 Pac. 298, following rule; *Kimball v. McKee*, 149 Cal. 458, 86 Pac. 1098, holding surveyor's notes admissible to establish boundaries of land in patent.

Distinguished in *Propper v. Wohwend*, 16 N. D. 114, 112 N. W. 969, holding in case of disputed boundary evidence of location of original monuments prevails over plats and field-notes.

70 Cal. 497-502, 11 Pac. 772, CENTRAL PACIFIC R. R. CO. v. CREED.

Mere Inadequacy of Price is not ground for setting aside foreclosure sale.

Approved in *Burton v. Kipp*, 30 Mont. 286, 76 Pac. 565, following rule; *Odell v. Cox*, 151 Cal. 74, 90 Pac. 196, setting aside execution sale of corporate stock for grossly inadequate sum when owner had no actual knowledge of levy, and was not guilty of laches, and execution debtor was himself purchaser.

70 Cal. 502-503, 11 Pac. 780, HARRIS v. MORE.

Validity of Contracts to furnish evidence. See notes, 97 Am. St. Rep. 148; 19 L. R. A. 373.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 522.

70 Cal. 504-507, 11 Pac. 775, PEOPLE v. CLUNIE.

Revenue Act in Force Becomes Part of city charter on its adoption so far as it relates to municipal revenue.

Approved in *Dexter v. Olsen*, 40 Wash. 201, 82 Pac. 287, holding law controlling liens on farm products included by reference such parts of logger's lien law then in force as were applicable.

70 Cal. 507-511, 11 Pac. 777, LOUVALL v. GRIDLEY.

Under General Leave to Amend, plaintiff may join other parties.

Approved in *Hamburg v. Liverpool etc. Ins. Co.*, 42 Fla. 94, 27 So. 874, holding under such leave name of one plaintiff could be omitted.

Failure to Find on Immaterial Issue is not error.

Approved in *Rogers v. Overcracker*, 4 Cal. App. 338, 87 Pac. 1109, following rule.

What Special Verdict must Contain. See note, 24 L. R. A. (n. s.) 37.

70 Cal. 511-513, 11 Pac. 778, **GARABALDI v. SHATTUCK.**

Adverse Possession of Land for Statutory Period vests perfect title in adverse holder.

Reaffirmed in *Goldman v. Sotelo*, 8 Ariz. 91, 68 Pac. 560.

Effect of Bar of Statute of limitations. See note, 95 Am. St. Rep. 674.

Effect of Warranty Deed to prevent assertion of title by adverse possession subsequently initiated. See note, 25 L. R. A. (n. s.) 129.

70 Cal. 514-515, 11 Pac. 779, **RENDELL v. SCOTT.**

Sale of Land will not be Set Aside on ground of fraudulent representation as to mere matters of opinion as to its value and productiveness.

Approved in *Johnson v. Withers*, 9 Cal. App. 55, 98 Pac. 43, granting relief where sale of mineral land was induced by mistaken representation as to amount of mineral thereon, which had been determined by expert; *Krasilnikoff v. Dundon*, 8 Cal. App. 412, 97 Pac. 174, allegations that boiler sold was great improvement upon and superior to all other boilers are mere matters of opinion.

Expression of Opinion as Fraud. See note, 35 L. R. A. 434.

70 Cal. 515-518, 11 Pac. 673, **PEOPLE v. SAM LUNG.**

Section 330, Penal Code, relating to playing certain games for money or representatives thereof, construed.

Approved in *Proctor v. Territory*, 18 Okl. 382, 92 Pac. 391, construing similar statute.

Recital in Judgment That Defendant was found guilty of gaming at tan as charged in information is equivalent to recital that he was found guilty of carrying on and conducting same for money or equivalent.

Approved in *People v. Barnnovich*, 16 Cal. App. 433, 117 Pac. 575, applying rule to judgment under Penal Code, section 601, for exploding dynamite under human habitation; *People v. Gregory*, 8 Cal. App. 746, 97 Pac. 916, upholding judgment of guilty which failed to declare intent with which act was done.

Exclusion of Witnesses from Courtroom in criminal case is in sound discretion of court.

Approved in *People v. Oliver*, 7 Cal. App. 604, 95 Pac. 174, holding court properly refused to exclude defendant's witnesses.

70 Cal. 519-521, 11 Pac. 664, **DAVIDSON v. DEVINE.**

Judgment for One Cent is too trifling to be set aside.

Approved in *Ciapusci v. Clark*, 12 Cal. App. 53, 106 Pac. 440, where price of standing timber fully paid and contract contemplated right of removal might last ten years and provided for yearly rental of five dollars after four years, mere neglect to pay rent without demand did not work loss of right to timber.

70 Cal. 521-523, 11 Pac. 655, PEOPLE v. DANIELS.

Error in Improper Admission of evidence against defendant is cured when defendant himself testifies to same effect.

Reaffirmed in State v. Johnny, 29 Nev. 219, 87 Pac. 8.

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 707.

70 Cal. 527-528, 11 Pac. 665, MATTHEWS v. SUPERIOR COURT.

On Appeal from Justice Court, voluntary appearance of respondent is waiver of notice of appeal.

Reaffirmed in Davidson v. O'Donnell, 41 Mont. 312, 110 Pac. 646.

70 Cal. 529-533, 11 Pac. 676, PEOPLE v. REED.

Promissory Note is Personal Property and may be subject of offense of obtaining property under false pretenses.

Approved in People v. Skidmore (Cal.), 55 Pac. 985, following rule.

70 Cal. 544-548, 12 Pac. 464, PLUMMER v. BROWN.

Where Claimant to Right to Patent secures decree in his favor through fraud and secures patent, he will be deemed to hold same in trust for party defrauded.

Approved in Estes v. Timmons, 12 Okl. 540, 78 Pac. 304, holding equity will grant relief from fraud in procuring patent to land.

Distinguished in Jameson v. James, 155 Cal. 279, 100 Pac. 702, holding claimant under mineral location subsequently patented to homestead claimant as agricultural land under entry antedating mineral location had no action to cancel patent for fraud in procurement.

To Obtain Equitable Relief against patent, alleged owner must show that he occupies such status as entitles him to control legal title.

Approved in Ewbank v. Mikel, 6 Cal. App. 142, 91 Pac. 673, holding contestee of right to issue patent who failed to commence action within sixty days after reference of contest thereupon ceased to be in privity with state and could not attack patent.

70 Cal. 548-549, 11 Pac. 780, WILLS v. RHEN KONG.

Engrossed Statement on Motion for new trial presented after time for service of statement considered to be new statement and settlement refused.

Approved in Coast Lumber Co. v. Wood, 18 Idaho, 39, 40, 108 Pac. 342, holding under facts of case court had lost jurisdiction to settle statement; Hoehnan v. New York Drygoods Co., 8 Idaho, 73, 67 Pac. 798, holding party may have statement on motion for new trial settled after time has expired by showing excusable neglect.

70 Cal. 550-552, 11 Pac. 838, FREY v. LOWDEN.

Court of Equity can Entertain Suit to determine rights of several appropriators of water of stream, to regulate use thereof, and enjoin subsequent appropriator from interfering with prior rights established by court.

Approved in Barrows v. Fox (Cal.), 30 Pac. 770, Frost v. Alturas Water Co., 11 Idaho, 299, 81 Pac. 997, and Crawford Co. v. Hath-

away, 67 Neb. 369, 108 Am. St. Rep. 647, 93 N. W. 796, 60 L. R. A. 889, all holding equity had jurisdiction of similar action.

Right of Prior Appropriator of water. See note, 30 L. R. A. 669.

70 Cal. 553-560, 12 Pac. 451, **MAGEE v. McMANUS.**

Specific Performance of Contract to give security. See note, 6 L. R. A. (n. s.) 591, 596.

70 Cal. 560-564, 12 Pac. 467, **KELLY v. MURPHY.**

In Action for Damages to personal property, objection to insufficient description of property must be taken by demurrer or it is waived.

Approved in *Mini v. Mini* (Cal.), 45 Pac. 1044, following rule.

70 Cal. 564-565, 11 Pac. 653, **SHEALOR v. SUPERIOR COURT.**

Justice's Court has No Jurisdiction of suit to recover property alleged to exceed three hundred dollars in value, though judgment in less amount is prayed in case delivery cannot be had.

Approved in *Oppenheimer v. Regan*, 32 Mont. 119, 79 Pac. 698, holding justice's court had no jurisdiction of claim to recover from sheriff. a sum which with penalty and interest allowed by statute exceeded three hundred dollars.

Voluntary Credits to Bring Debt within jurisdiction of court. See note, 28 L. R. A. 224.

70 Cal. 566-571, 12 Pac. 462, **SWAMP LAND DISTRICT v. GWYNN.**

Assessment-roll of Swamp Land District signed by commissioner is prima facie evidence of facts therein stated.

Cited in *Westerman v. Cleland*, 12 Cal. App. 70, 106 Pac. 609, arguendo.

70 Cal. 581-582, 11 Pac. 832, **McKAY v. JOY.**

Surviving Partner cannot Maintain action against representative of deceased partner for accounting.

Distinguished in *Franklin v. Trickey*, 9 Ariz. 286, 80 Pac. 353, 354, holding administrator of partner first deceased could maintain suit for accounting against administrator of other partner without having presented demand.

70 Cal. 582-584, 12 Pac. 719, **PEOPLE v. MYERS.**

Treating Jurors as Ground for new trial or reversal. See note, 19 L. R. A. (n. s.) 736.

70 Cal. 591-596, 12 Pac. 475, **WARE v. WALKER.**

Right of Prior Appropriator of water. See note, 30 L. R. A. 674.

Rights in Stream as Affected by act of God or natural change of course. See note, 30 L. R. A. 820.

70 Cal. 597-604, 12 Pac. 469, **TURNER v. DONNELLY.**

Agreement Between Settlers on Unsurveyed public lands that after title acquired each would convey to other such land embraced in patent to him as was in possession of other at time of agreement is void.

Approved in *Armstrong v. Henderson*, 16 Idaho, 577, 102 Pac. 365, contract by trespassers on lands within Indian reservation before

same opened that such persons will make homestead entry and after acquiring title will make conveyances to adjust title to lands occupied before entry, is void.

70 Cal. 604-607, 12 Pac. 427, IN RE CAHALAN.

After Expiration of Time Limited by Code of Civil Procedure, probate court cannot set aside decree settling executor's final account; remedy is in equity.

Approved in Estate of Byrne, 3 Cal. Prob. 70, reaffirming rule.

70 Cal. 608-611, 12 Pac. 778, NICHOLSON v. TARPEY.

In Action for Specific Performance of contract for sale of land, it must be alleged and proved that consideration is adequate.

Approved in Kaiser v. Barron, 153 Cal. 790, 96 Pac. 807, in absence of allegation and proof that consideration was just and fair, findings that contract was fair would not sustain judgment decreeing specific performance; Martin v. Condrey, 13 Cal. App. 620, 110 Pac. 458, and Herzog v. Atchison, Topeka etc. R. R. Co., 153 Cal. 501, 95 Pac. 900, 17 L. R. A. (n. s.) 428, refusing to enforce specific performance of contract for location of railroad station when complaint failed to allege consideration; White v. Sage, 149 Cal. 615, 616, 87 Pac. 194, both holding complaint for specific performance did not allege consideration was adequate; Porter v. Anderson, 14 Cal. App. 721, 113 Pac. 347, holding complaint did not sufficiently aver consideration was just and fair; Kiger v. The McCarthy Co., 10 Cal. App. 310, 101 Pac. 929, refusing specific performance when complaint was silent as to consideration.

In Action for Specific Performance, party accepting and retaining agreed consideration cannot question sufficiency thereof.

Approved in Meridian Oil Co. v. Dunham, 5 Cal. App. 369, 90 Pac. 469, following rule.

Declaration of Vendee in Possession of land to assessor that he was owner is inadmissible in support of claim to adverse possession.

Approved in Batcheller v. Whittier, 12 Cal. App. 267, 107 Pac. 143, holding statement that he owned land, made by claimant in attempt to secure loan thereon inadmissible to support title when no part of res gestae.

Miscellaneous.—Cited in Cassin v. Nicholson, 154 Cal. 499, 500, 501, 98 Pac. 191, 192, referring historically to principal case.

70 Cal. 614-616, 11 Pac. 666, PALMER v. UNCAS MINING CO.

Mining Superintendent Who Performs manual labor in and upon mine is entitled to lien.

Approved in Kritzer v. Tracy Engineering Co., 16 Cal. App. 293, 116 Pac. 702, foreman is entitled to mechanic's lien.

70 Cal. 616-619, 11 Pac. 678, TABLE MOUNTAIN ETC. WATER CO. v. CHAVANNE.

Grant of Water Power. See note, 67 L. R. A. 401.

70 Cal. 619-628, 11 Pac. 782, SENTER v. SENTER.

Vendee of Land Where Transfer is induced by false representation as to lands included is entitled to relief although he could have determined falsely from recorded maps.

Approved in *Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 638, 100 Pac. 121, following rule.

Issue Raised by Defense upon which no evidence is offered is immaterial, and finding thereon is not essential.

Approved in *Miller v. Bay Cities Water Co.*, 157 Cal. 272, 107 Pac. 122, following rule; *Los Angeles etc. R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 25, 26, 87 Pac. 1030, holding carelessness in reading deed did not deprive party executing it of relief from mistake as to land included therein.

70 Cal. 628-631, 11 Pac. 788, CARLSON v. SUPERIOR COURT.

Dismissal by Superior Court of Appeal from justice's court, taken on questions of law alone, on ground appeal should be on questions of fact also, will be reviewed by supreme court on certiorari.

Approved in *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 480, 481, 114 Pac. 980, 981, mandamus lies to compel superior court to proceed with trial of justice court appeal which has been properly taken and which superior court has erroneously dismissed on ground that it had not acquired jurisdiction; *Kraker v. Superior Court*, 15 Cal. App. 653, 115 Pac. 664, reviewing action of superior court in dismissing appeal from justice's court on questions of law and fact for failure of appellant to prosecute, and then rendering judgment appealed from without trial; dissenting opinion in *People v. Latimer*, 160 Cal. 722, 117 Pac. 1054, majority holding order of superior court dissolving attachment against bank official, on refusal to answer proper question before board of equalization where board had then finally adjourned.

Distinguished in *Rabin v. Pierce*, 10 Cal. App. 736, 103 Pac. 772, when appeal from justice's court was improperly dismissed, appellants cannot invoke certiorari to supreme court to annul execution issued thereafter by justice.

70 Cal. 635-638, 11 Pac. 789, HOWELL v. THOMPSON.

Reversal of Judgments. See note, 96 Am. St. Rep. 130.

70 Cal. 638-639, 12 Pac. 117, EX PARTE JAYNES.

Telegraph Company Employee, Having Charge of messages transmitted by it, is not guilty of contempt in refusing to obey subpoena commanding him to produce all messages passing between large number of persons named between specified dates.

Approved in *Ex parte Jaynes* (Cal.), 12 Pac. 117, following rule; *Ex parte Gould*, 60 Tex. Cr. 450, 132 S. W. 368, holding subpoena duces tecum for production of all telegrams sent from telegraph office ordering liquor without specifying whether liquors ordered were unlawfully sent, is void.

Subpoena Duces Tecum. See note, 128 Am. St. Rep. 767, 771.

70 Cal. 641-643, 11 Pac. 797, PEOPLE v. FRANKLIN.

Where Jury has Power to Convict for lesser crime necessarily included in charge, failure to instruct on such crime is not error, if not requested by defendant.

Approved in *Ward v. Territory*, 7 Ariz. 245, 64 Pac. 442, following rule; *People v. Bruggy* (Cal.), 26 Pac. 757, upholding instruction as to degrees of murder in absence of request for further instruction by defendant.

70 Cal. 646-647, 11 Pac. 798, KERN VALLEY WATER CO. v. McCORD.

Change in Place of Trial may be had on ground judge of court in which action was brought had received general retainer from one party.

Approved in State v. Dick, 125 Wis. 59, 103 N. W. 232, holding judge disqualified to act in partition suit where he had been attorney for certain parties in previous partition suit concerning same property.

Disqualification of Judge by Prior connection with case. See note, 25 L. R. A. 114, 115.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 71 CALIFORNIA.

71 Cal. 1-11, 11 Pac. 793, PEOPLE v. KNAPP.

Proof of Express Malice is Essential to conviction of murder in first degree.

Approved in dissenting opinion in *People v. Mahatch*, 148 Cal. 204, 82 Pac. 781, majority holding malice might be inferred from facts and circumstances.

When Defendant Testifies in own behalf, jury may consider, in weighing his testimony, his position and interest in result, and whether this might affect credibility.

Approved in *Lang v. State*, 42 Fla. 601, 28 So. 857, reaffirming rule; *Kavanaugh v. Wausau*, 120 Wis. 620, 98 N. W. 554, approving instruction to same effect.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 818, 822.

Rule as to Express and Implied Malice with reference to degrees of murder, stated.

Cited in *People v. Jones*, 160 Cal. 370, 117 Pac. 181, *arguendo*.

Where Prosecution Proves Killing by accused and its evidence does not tend to prove manslaughter, or excusable or justifiable homicide, accused must show such defense by preponderance of evidence.

Distinguished in *Anderson v. Territory*, 9 Ariz. 54, 76 Pac. 637, Penal Code, section 933, only requires accused, to be entitled to acquittal, to produce such proof as will raise reasonable doubt in minds of jury as to whether killing was justifiable or excusable.

71 Cal. 17-21, 11 Pac. 799, PEOPLE v. BOLANGER.

Whether Witness in Criminal Case is accomplice is question for jury.

Approved in *People v. Bunkers*, 2 Cal. App. 203, 84 Pac. 367, following rule; *Holmgren v. United States*, 156 Fed. 444, 84 C. C. A. 301, holding in trial for perjury of witness in naturalization proceeding, applicant for citizenship was not accomplice of defendant when false testimony was not given at his request.

Who is an Accomplice. See note, 138 Am. St. Rep. 276.

Unrecorded Mark on Livestock is some evidence of ownership.

Approved in *People v. Romero*, 12 Cal. App. 468, 107 Pac. 710, following rule; *State v. Wolfley*, 75 Kan. 409, 89 Pac. 1047, and

Hurst v. Territory, 16 Okl. 604, 86 Pac. 281, both holding unrecorded brand not incompetent as evidence of ownership; **Fleishman v. Polar Wave Ice & Fuel Co.**, 148 Mo. App. 132, 127 S. W. 664, in action for personal injuries to one who while walking on sidewalk was struck by tongue of wagon, which was struck by another wagon, evidence that defendant's name was on latter wagon is competent to show wagon was in charge of defendant's servant.

Brand as Evidence of Ownership of cattle. See note, 11 L. R. A. (n. s.) 88.

Evidence of Ownership. See note, 83 Am. St. Rep. 265.

Conversations of Accomplice in Larceny admitted in evidence.

Reaffirmed in **People v. Bunkers**, 2 Cal. App. 207, 84 Pac. 369.

Testimony of Feigned Accomplice need not be corroborated.

Approved in **People v. Bunkers**, 2 Cal. App. 209, 84 Pac. 370, admitting testimony of those who engaged in plan to entrap defendant; **State v. Rachman**, 68 N. J. L. 122, 53 Atl. 1046, and **State v. Phillips**, 18 S. D. 6, 98 N. W. 173, both holding testimony of accessory after fact need not be corroborated.

Conviction on Testimony of accomplice. See note, 98 Am. St. Rep. 160.

71 Cal. 21-27, 11 Pac. 808, **WATKINS v. LYNCH**.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 467.

71 Cal. 28-29, 11 Pac. 807, **SOHENCK v. HARTFORD FIRE INS. CO.**

Where Complaint on Insurance Policy omits to set out application and answer sets out such part as is necessary for defense, and avers plaintiff's breach thereof, defect in complaint is cured and question of breach is put in issue.

Approved in **Catlin v. Jones**, 48 Or. 163, 85 Pac. 516, holding complaint on contract which failed to allege plaintiff's willingness to perform cured by answer setting up nonperformance, and plaintiff's taking issue thereon; **Maftzger v. Gregg (Cal.)**, 31 Pac. 614, holding defective complaint on notes, where it set up contract as part of same transaction and as consideration for notes, under which deed had not been tendered by plaintiff; **Cross v. Home Ins. Co.**, 154 Fed. 680, holding defective complaint on insurance policy which failed to set out contract and allege compliance therewith.

71 Cal. 30-34, 11 Pac. 811, **WATROUS v. CUNNINGHAM**.

Witness may Refresh Memory by reading testimony given at former trial.

Reaffirmed in **State v. Marren**, 17 Idaho, 783, 107 Pac. 998.

Admissibility in Evidence of Books of account. See note, 138 Am. St. Rep. 447.

Party's Books of Account as evidence in own favor. See note, 52 L. R. A. 548, 571, 576, 583.

What Provable by Books of Account. See note, 52 L. R. A. 716.

71 Cal. 34-38, 11 Pac. 804, **BAILEY v. DALE**.

Power to Grant Mandatory Injunctions. See note, 20 L. R. A. 165.

71 Cal. 38-43, 11 Pac. 802, **BERNIAUD v. BEECHER**.

Use of Pronouns "He" and "His" in written instrument may be shown to refer to female when name is designated by mere initial.

Approved in *Haerther v. Mohr*, 114 Iowa, 637, 87 N. W. 692, holding "his" referred to female when such construction made contract clear.

Miscellaneous.—Cited in *Berniaud v. Beecher* (Cal.), 22 Pac. 1151, on another appeal.

71 Cal. 43-45, 11 Pac. 814, COLNON v. ORR.

Mandamus Does not Lie to Compel custodian of public record to allow it to be inspected by citizen unless applicant is beneficially interested.

Approved in *People v. Budd* (Cal.), 47 Pac. 594, holding citizen not "beneficially interested" so as to entitle him to sue for mandamus to compel governor to appoint police commissioner of city; *State v. Grimes*, 29 Nev. 81, 124 Am. St. Rep. 883, 84 Pac. 1072, 5 L. R. A. (n. s.) 545, refusing mandamus to compel recorder to allow relator right to copy records for purpose of compiling abstract books for use in equipping office in opposition to recorder; *In re Freeman*, 75 N. J. L. 333, 68 Atl. 224, refusing mandamus to compel clerk to allow citizen to inspect and copy certain ex parte affidavits on ground applicant had no special interest or sound public motive in making request.

Right to Inspect Public Records. See note, 27 L. R. A. 83.

Right of Abstracters to have Access to public records. See note, 124 Am. St. Rep. 912.

71 Cal. 46-48, 11 Pac. 813, TAYLOR v. TERRY.

Nature and Elements of unlawful detainer. See note, 120 Am. St. Rep. 36.

71 Cal. 48-49, 12 Pac. 302, PEOPLE v. GIACAMELLA.

What Constitutes Attempted Arson. See note, 4 L. R. A. (n. s.) 417.

71 Cal. 62-67, 11 Pac. 879, KRIPP v. CURTIS.

Conveyance of Land Entirely Inclosed by other lands of grantor carries with it right of way of necessity.

Approved in *Bully Hill Min. etc. Co. v. Bruson*, 4 Cal. App. 183, 84 Pac. 238, following rule; *Corea v. Higuera*, 153 Cal. 454, 95 Pac. 884, 17 L. R. A. (n. s.) 1018, holding difficulties of existing road could not compel way of necessity over other lands of grantor; *Cassin v. Cole*, 153 Cal. 679, 96 Pac. 278, holding way of necessity terminated upon construction of new road for grantee's use.

Grant of Easements by Implication. See note, 122 Am. St. Rep. 212.

Way of Necessity Where Other Means of access exist. See note, 17 L. R. A. (n. s.) 1021, 1024.

Easements Created by Severance of tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 351, 352.

Where Grantor Reserves Unlocated Right of way in deed he has right to designate it, but upon his failure grantee may designate it.

Approved in *Ballard v. Titus*, 157 Cal. 683, 110 Pac. 122, holding grantor's failure to designate location of reserved right of way not shown; *Bunch v. Wheeler*, 210 Mo. 629, 109 S. W. 655, holding reservation in deed of right of way "near original road" was not void for uncertainty, but reserved only right of way to be selected by grantee near original road.

Right of Way is Privilege which one person or particular description of persons may have of passing over land of another in some particular line.

Reaffirmed in *Ballard v. Titus*, 157 Cal. 681, 110 Pac. 121.

Continuous Uninterrupted User of right of way over land of another for five years under claim of right, with knowledge and acquiescence of owner, creates right of way by prescription.

Approved in *Yuba Cons. Goldfields v. Hilton*, 16 Cal. App. 231, 116 Pac. 713, reaffirming rule; *Barnes v. Davech*, 7 Cal. App. 492, 94 Pac. 781, holding right of public to road established by prescription.

Creation and Conveyance of easements appurtenant. See note, 136 Am. St. Rep. 699.

Physical Conditions Charging Purchaser of servient estate with notice of easement. See note, 8 L. R. A. (n. s.) 418.

71 Cal. 72-74, 12 Pac. 43, **PEOPLE v. HULBERT.**

Right to Enforce Swamp Land assessment, being based on statute, is barred in three years.

Approved in *Harby v. Board of Education*, 2 Cal. App. 420, 83 Pac. 1082, holding right to writ of mandate to compel restoration of teacher improperly dismissed from San Francisco schools to be based on statute and barred in three years.

71 Cal. 74-80, 12 Pac. 44, **IN RE BALDWIN.**

Exemption of Tools and Implements. See note, 123 Am. St. Rep. 142.

71 Cal. 80-82, 11 Pac. 851, **PEOPLE v. LEE WAH.**

Case of Emergency Under Medical Act of April 3, 1876, is one in which ordinary and qualified medical practitioners are not readily obtainable.

Approved in *Semon Bache & Co. v. Coppes, Zook etc. Co.*, 35 Ind. App. 356, 111 Am. St. Rep. 171, 74 N. E. 43, holding "emergency," as used in contract, to be such unforeseen event or unexpected combination of circumstances, in view of business to which contract related, as would furnish reasonable ground for cancellation.

Administering Domestic Remedy for pay as practicing medicine. See note, 12 L. R. A. (n. s.) 1094.

71 Cal. 83-87, 11 Pac. 876, **HOGAN v. CENTRAL PACIFIC R. R. CO.**

Special Damage must be shown to maintain action by abutting property owner to enjoin construction of railway in street as nuisance.

Approved in *Brown v. Rea*, 150 Cal. 174, 88 Pac. 714, following rule; *Reynolds v. Presidio etc. R. R. Co.*, 1 Cal. App. 233, 81 Pac. 1119, holding abutting owner had no action against street railway company on ground track was not laid in center of street as required by franchise.

What Use of Street or Highway constitutes additional burden. See note, 17 L. R. A. 476.

71 Cal. 89-94, 11 Pac. 817, **JONES v. JONES.**

Want of Probable Cause is Essential to maintain action for malicious prosecution.

Approved in *Hurgren v. Mutual Life Ins. Co. (Cal.)* 69 Pac. 615, when civil action was commenced three times and dismissed without

trial, malicious prosecution would not lie, since judgment on merits for defendant is element of want of probable cause.

Advice of Counsel as Defense to action for malicious prosecution. See note, 18 L. R. A. (n. s.) 54.

71 Cal. 98-100, 16 Pac. 546, AUSTIN v. ANDREWS.

Exception to Admission of Evidence will not be considered on appeal unless taken at trial.

Approved in *Randall v. Freed*, 154 Cal. 301, 97 Pac. 670, and *Annans v. Sewell*, 47 Or. 373, 84 Pac. 395, both following rule.

71 Cal. 100-104, 11 Pac. 815, CORCORAN v. DESMOND.

Undertaking on Appeal which does not identify appeal is void.

Reaffirmed in *Estate of Sutro*, 152 Cal. 252, 92 Pac. 488.

Distinguished in *Pacific Paving Co. v. Verso*, 11 Cal. App. 385, 105 Pac. 137, holding bond on appeal which refers to judgment was not void because it recited appeal was taken to supreme court instead of district court of appeals.

71 Cal. 105-112, 11 Pac. 853, WINGERTER v. WINGERTER.

Decree of Distribution of Estate is subject to review in equity upon showing of fraud.

Reaffirmed in *Bacon v. Bacon*, 150 Cal. 481, 89 Pac. 319.

Administrator Who Induces Heir by representations false in fact, though made without fraudulent intent, to convey to heir his interest in estate and afterward procures distribution of interest to himself, is voluntary trustee for heir.

Approved in *Estate of Walker*, 160 Cal. 549, 117 Pac. 511, will discovered after decree of distribution of estate of intestate may be admitted to probate.

Heir may, on Application to Sell Realty, dispute validity of claims on which application is based, though they have been allowed and approved.

Approved in *Haub v. Leggett*, 160 Cal. 494, 117 Pac. 557, claimant may sue on whole claim where administrator and probate judge have allowed it in part.

71 Cal. 115-122, 11 Pac. 860, WHITE v. DOUGLASS.

Erroneous Finding Which is Immaterial cannot be basis for reversal of judgment.

Approved in *De Gottardi v. Donati*, 155 Cal. 111, 99 Pac. 493, and *Great Western Gold Co. v. Chambers*, 153 Cal. 311, 95 Pac. 153, both following rule.

71 Cal. 123-124, 11 Pac. 882, SCROUFE v. CLAY.

Complaint on Promissory Note must allege nonpayment.

Approved in *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 278, holding insufficient allegation that defendant refused to pay.

Allegation in Action on Note that defendant has refused and still refuses to pay principal or interest, or any part thereof, is insufficient allegation of nonpayment.

Overruled in *Irwin v. Insurance Co. of N. A.*, 16 Cal. App. 145, 116 Pac. 295, upholding sufficiency of allegation of neglect and refusal to pay fire policy.

71 Cal. 126-129, 11 Pac. 871, **WHEELER v. WEST.**

Where Amended Complaint is Filed, allegations of original complaint are not admissible in evidence.

Distinguished in *Pollitz v. Wickersham*, 150 Cal. 248, 88 Pac. 915, holding statements in first verified claim against estate to be admissions relating to second claim filed after first was rejected.

Pleading of Contract by Way of Confession and avoidance considered and held to allege merely conclusions of law, and evidence in support of it inadmissible.

Distinguished in *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 306, 90 Pac. 205, holding where cause was tried on theory complaint was sufficient, technical objection could not be raised for first time on appeal.

Distinction Between Lease of Mine and license to work mine, stated.

Approved in *Shaw v. Caldwell*, 16 Cal. App. 7, 115 Pac. 943, where deed to interest in mine contained provision that grantees might work mine on shares, agreement was mere personal privilege revocable at pleasure of grantor.

Distinction Between a Lease and a license. See note, 18 L. R. A. 493.

Verbal Contract to Work Mine considered and held not to be lease, but mere license revocable at will of licensor.

Reaffirmed in *Clark v. Wall*, 32 Mont. 224, 79 Pac. 1053.

71 Cal. 130-134, 11 Pac. 868, **ELY v. YORE.**

It is Sufficient to Constitute forcible entry that entry is made with such display of force as to intimidate possessor, or excite him to repel invasion.

Approved in *Knowles v. Crocker Estate Co.*, 149 Cal. 285, 86 Pac. 718, holding entry with a number of men and removal of fences during possessor's temporary absence amounts to forcible entry; *McIntyre v. Murphy*, 153 Mich. 346, 116 N. W. 1004, holding facts constituted forcible entry.

Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 398.

71 Cal. 134-135, 11 Pac. 873, **PACKER v. BIRD.**

Where Land is Bounded by River navigable in fact, owner takes title only to edge of stream.

Approved in *Kinhead v. Turgeon*, 74 Neb. 576, 104 N. W. 1062, 1 L. R. A. (n. s.) 762, following rule.

Title to Land Under Water. See note, 42 L. R. A. 171.

Title to Islands. See note, 58 L. R. A. 677.

71 Cal. 149-153, 12 Pac. 391, **TAIT v. HALL.**

Declarations of Party Made during performance of act are admissible to show intention.

Approved in *Smith v. Glenn (Cal.)*, 62 Pac. 183, admitting declarations of owner of land made during survey of road as to his purpose.

Witness cannot Testify as to impressions.

Approved in *Cross v. Aby*, 55 Fla. 318, 45 So. 822, holding inadmissible opinion of witness as to meaning of last instrument.

71 Cal. 153-155, 11 Pac. 870, **SAN FRANCISCO v. HEYNEMAN.**

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 527.

71 Cal. 155-159, 11 Pac. 888, **HARNISH v. BRAMER.**

Where Correctness of Transcript on Appeal is stipulated to by respondent, he cannot afterward impeach it by showing that judgment was entered at later date than is shown on record.

Distinguished in California Wine Assn. v. Commercial etc. Ins. Co., 159 Cal. 53, 112 Pac. 860, though respondent has stipulated to correctness of transcript, if appellant seeks to overthrow general verdict, and judgment based thereon, by showing error as to one of issues, respondent may, by diminution of record, add special verdicts to judgment-roll which were omitted from transcript; Wood, Curtis & Co. v. Missouri etc. Ry. Co., 152 Cal. 346, 92 Pac. 869, holding stipulation as to record on appeal did not estop respondent from showing true date of entry of judgment.

Injunctions Against Judgments for want of jurisdiction or invalidity. See note, 31 L. R. A. 209.

71 Cal. 159-162, 60 Am. Rep. 527, 11 Pac. 890, **PIKE v. BRITTAN.**

Liability of Landlord as to Condition of part of premises not controlled by tenant. See note, 23 L. R. A. 159.

Civil Responsibility for Wrongful or negligent act of servant or agent toward one not sustaining contractual relation. See note, 27 L. R. A. 168.

71 Cal. 163-169, 60 Am. Rep. 529, 11 Pac. 882, **MITCHELL v. CLARKE.**

In Action for Damages for Breach of contract evidence of special circumstances affecting contract of which defendant had knowledge upon making of contract is admissible without special averment in the complaint.

Approved in Hale Bros. v. Milliken, 5 Cal. App. 352, 90 Pac. 369, following rule; Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 56, 87 Pac. 1095, 7 L. R. A. (n. s.) 913, holding special damages alleged to result from breach of contract to supply water to be too remote; Harron, Ricard & McCone v. Wilson etc. Co., 4 Cal. App. 497, 500, 88 Pac. 515, 516, holding special damages arising from breach of contract must be pleaded; Sherlag v. Kelley, 200 Mass. 236, 128 Am. St. Rep. 414, 86 N. E. 294, 19 L. R. A. (n. s.) 633, holding general averment in ad damnum clause sufficient when no special damages are asked from breach of contract.

71 Cal. 169-182, 9 Pac. 670, 11 Pac. 885, **BREEZE v. BROOKS.**

Estoppel of Land Owner permitting title to remain in another to assert it as against latter's creditors. See note, 30 L. R. A. (n. s.) 13.

Miscellaneous.—Cited in Breeze v. Brooks, 97 Cal. 74, 31 Pac. 743, 22 L. R. A. 256, on another appeal.

71 Cal. 185-191, 9 Pac. 176, 12 Pac. 449, **REYNOLDS v. LINCOLN.**

Error in Overruling Demurrer on ground of misjoinder of causes does not warrant reversal when substantial rights are not affected.

Approved in *Hentig v. Johnson*, 8 Cal. App. 224, 96 Pac. 391, and *Woollacott v. Meekin*, 151 Cal. 706, 91 Pac. 614, both applying rule to misjoinder of parties; *Bollinger v. Bollinger*, 154 Cal. 699, 707, 99 Pac. 198, 201, holding erroneous overruling of demurrer to cross-complaint did not affect substantial rights of parties.

Where on Issuance of Execution, judgment was satisfied and as so satisfied was assigned to one of defendants, sale under subsequent execution is void.

Approved in *National Bank v. Los Angeles etc. Co.*, 2 Cal. App. 660, 84 Pac. 467, payment of judgment by one codefendant, who has not taken equitable assignment thereof and who has not taken steps to enforce contribution under Code of Civil Procedure, section 709, extinguishes judgment.

71 Cal. 194-195, 11 Pac. 868, PEOPLE v. McDOWELL.

In Libel Case, Question as to Whom alleged libelous publication referred is for jury, and witness cannot testify thereto.

Approved in dissenting opinion in *Julian v. Kansas City Star Co.*, 209 Mo. 124, 107 S. E. 518, majority holding admissible evidence of what witnesses understood from reading alleged libelous article.

71 Cal. 195-196, 12 Pac. 52, PEOPLE v. CAROLAN.

Indictment for Presenting Fraudulent Claim to supervisors is sufficient if substantially in language of statute.

Approved in *State v. Brown*, 143 Wis. 412, 127 N. W. 959, and *State v. Swan*, 31 Utah, 342, 88 Pac. 14, both following rule.

Witness cannot be Impeached by showing conviction of misdemeanor.

Approved in *Clements v. McGinn* (Cal.) 33 Pac. 922, following rule.

Cross-examination as Proper Mode of proving conviction of crime for purposes of impeachment. See note, 30 L. R. A. 847.

71 Cal. 197-203, 60 Am. Rep. 534, 12 Pac. 46, WALLACE v. AH SAM.

Loss of Profits as Element of damages for breach of contract. See note, 53 L. R. A. 50.

71 Cal. 204-205, 12 Pac. 53, IN RE THOMAS.

Taxation of Corporate Franchises. See note, 57 L. R. A. 58.

Corporate Taxation and the Commerce Clause. See note, 60 L. R. A. 692.

Peddlers and Drummers as related to interstate commerce. See note, 14 L. R. A. 98.

License or Occupation Tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause. See note, 19 L. R. A. (n. s.) 299.

71 Cal. 205-209, 12 Pac. 53, SAN MATEO COUNTY v. MALONEY.

Courts cannot Review Acts of public officers done within discretion reposed in them by legislature.

Approved in *De Merritt v. Weldon*, 154 Cal. 551, 98 Pac. 539, refusing to review act of city council in fixing salary of city officer.

71 Cal. 209-212, 12 Pac. 428, McKENZIE v. BRANDON.

Affidavit of Applicant to Purchase state lands must truthfully state all facts required by law to be there stated.

Approved in *Waters v. Pool*, 149 Cal. 800, 87 Pac. 620, following rule; *Kleinsorge v. Burgbacher*, 6 Cal. App. 352, 92 Pac. 201, holding void certificate of purchase issued on false affidavit.

71 Cal. 212-213, 12 Pac. 55, EX PARTE SCHMIDT.

Grand Juror may be Committed for contempt for refusal to answer as to what persons were examined before grand jury.

Reaffirmed in *Wisdom v. State*, 42 Tex. Cr. 582, 61 S. W. 927.

71 Cal. 223-226, 16 Pac. 711, SHEPHERD v. JONES.

Finding of Court on Certain Issues upon agreement after jury had found on special issues is proper where no objection is offered.

Approved in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1018, holding when privilege of submitting certain issues to jury was waived, it became duty of court to find upon them.

71 Cal. 226-230, 16 Pac. 772, WILSON v. STURGIS.

Broker Who Negotiates Sale of Land is entitled to commission although sale is not completed in time limited in contract, when delay is due to acts of vendor.

Approved in *Brown v. Mason*, 155 Cal. 159, 160, 99 Pac. 868, 21 L. R. A. (n. s.) 328, holding contract of broker not performed according to terms; *Loxley v. Studebaker*, 75 N. J. L. 606, 68 Atl. 100, holding, when owner sold to purchaser introduced by broker, broker is not entitled to commissions when sale was made after agency had terminated.

When Broker Earns Commission. See notes, 139 Am. St. Rep. 241; 44 L. R. A. 596, 609.

When Real Estate Broker is considered as procuring cause of sale or exchange. See note, 44 L. R. A. 351.

Real Estate Broker's Commissions as affected by negligence, fraud or default of principal, and defective title. See note, 43 L. R. A. 604, 606.

Purchase Price Paid must be Returned to rescind contract of sale of realty.

Approved in *Maionchi v. Nicholini*, 1 Cal. App. 694, 82 Pac. 1054, holding judgment for rescission could not be supported in absence of findings or facts essential thereto.

71 Cal. 230-236, 16 Pac. 881, McLAUGHLIN v. DEL RE.

Pollution of Stream by Mining. See note, 24 L. R. A. 65.

71 Cal. 236-238, 16 Pac. 783, ASHE v. COLUSA COUNTY.

Affidavit of Person Applying for writ of review of order of board of supervisors must show beneficial interest.

Approved in *State v. Drake*, 130 Wis. 153, 109 N. W. 983, applying rule when applicant was not party to civil action on which writ was sought.

In Application for Writ of Review by private person to annul order of supervisors granting railroad right to use highway, interest of applicant must be of nature distinguished from that of public.

Approved in *People v. Budd* (Cal.), 47 Pac. 594, holding citizen not so "beneficially interested" as to be entitled to sue out mandamus to compel governor to appoint city police commissioners.

Who may Prosecute Writ of Certiorari. See note, 103 Am. St. Rep. 114.

71 Cal. 238-242, 12 Pac. 259, EX PARTE ZEEHANDELAAR.

Refusal of Witness to Answer Question not pertinent to issues is not contempt.

Approved in *In re Shortridge*, 5 Cal. App. 375, 377, 90 Pac. 479, 480, holding order for commitment for contempt committed in presence of court must contain recital of facts which show contempt.

71 Cal. 242-248, 11 Pac. 682, SAN LUIS OBISPO COUNTY v. HENDRICKS.

License Tax Imposed by Supervisors on business of selling liquors is not penalty, and may be recovered in civil suit.

Approved in *State v. Wall*, 18 Idaho, 305, 109 Pac. 725, holding civil suit could be maintained for recovery of license tax against one who engaged in business of selling liquors without taking out license.

Distinguished in *Town of Selma v. Brewer*, 9 Cal. App. 74, 98 Pac. 62, holding ordinance designed to suppress liquor business to be in exercise of police power.

Publication of Ordinance of Board of supervisors is essential to its validity.

Approved in *County of Mono v. Depauli*, 9 Cal. App. 707, 100 Pac. 717, holding publication sufficient although name of chairman who voted for ordinance was omitted; *Santa Rosa etc. R. Co. v. Central St. Ry. Co. (Cal.)*, 38 Pac. 989, holding certificate of clerk of city council sufficient evidence of publication of ordinance.

71 Cal. 249-253, 16 Pac. 900, STANFORD v. FELT.

Lower Riparian Owner Need not Show present injury to enjoin unlawful diversion of water by upper owner.

Approved in *Huffner v. Sawday*, 153 Cal. 91, 94 Pac. 426, and *Anaheim Union Water Co. v. Fuller*, 150 Cal. 333, 88 Pac. 98, 11 L. R. A. (n. s.) 1062, both following rule; *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 532, 89 Pac. 343, holding water company entitled to judgment that use of water taken by upper owner should not ripen into an easement by adverse user.

71 Cal. 254-262, 12 Pac. 67, RIDDELL v. HARRELL.

Costs can be Allowed Only in manner provided by statute.

Approved in *State v. District Court*, 33 Mont. 533, 85 Pac. 368, refusing costs when memorandum was not filed.

Mere Fact That Several Separate Parcels of land were sold en masse at execution sale does not render sale void.

Approved in *Bechtel v. Wier*, 152 Cal. 447, 93 Pac. 77, 15 L. R. A. (n. s.) 459, upholding sale en masse after parcels had been offered separately without bids being received.

71 Cal. 263-267, 12 Pac. 71, PEOPLE v. STOKES.

Marriage Certificate is Proof of Marriage.

Approved in *State v. Walsh*, 25 S. D. 33, 125 N. W. 297, following rule; *State v. Nelson*, 39 Wash. 226, 81 Pac. 723, holding provision that marriage may be proven by marriage certificate did not preclude proof by eye-witness to ceremony.

Real Names of Parties may be Shown to be different from those in marriage certificate, offered in proof of marriage.

Reaffirmed in *State v. Thompson*, 31 Utah, 238, 87 Pac. 712.

After Proof of Marriage, Continuance of relation is presumed until contrary is shown.

Reaffirmed in *State v. Eggleston*, 45 Or. 356, 77 Pac. 741.

71 Cal. 269-273, 12 Pac. 118, EX PARTE CASEY.

Probate Court has No Power to determine title to property in dispute between estate and others.

Approved in *Estate of McTiernan*, 4 Cal. Prob. 473, *Estate of Curtis*, 1 Cal. Prob. 537, and *Caron v. Old Reliable G. M. Co.*, 12 N. M. 223, 78 Pac. 66, all following rule; *Humbarger v. Humbarger*, 72 Kan. 417, 115 Am. St. Rep. 204, 83 Pac. 1096, holding summary proceeding allowed to probate court to discover concealed property of estate was not proper mode to try title to property contested by strangers.

Summary Proceedings to Discover or recover property. See note, 115 Am. St. Rep. 214.

71 Cal. 273-285, 12 Pac. 161, LEVINS v. ROVEGNO.

Ownership of Land may be Pleaded as conclusion of law and determined as such by court and not as conclusion of fact.

Approved in *People v. McCue*, 150 Cal. 198, 88 Pac. 900, holding in action to abate obstruction to highway, allegation that streets were public highways was one of ultimate fact; *Carlson v. Carlson*, 10 Cal. App. 302, 101 Pac. 924, holding finding in divorce proceeding as to ownership of improvements on husband's separate property to be conclusion of law; *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 109, 93 Pac. 902, holding finding as to ownership of easement reserved in deed to be conclusion of law; *Street v. Sederburg*, 41 Colo. 133, 92 Pac. 31, holding allegation that one is possessed of realty by virtue of deed is allegation of conclusion of law and insufficient to show title; *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 374, 111 N. W. 528, holding averment that plaintiff paid judgment given in suit on appeal bond to be averment that judgment was affirmed on appeal, and not merely averment of conclusion of law; *Emerson v. Yosemite Gold Min. etc. Co.*, 149 Cal. 59, 85 Pac. 125, *arguendo*.

What are Ultimate Facts and what are conclusions of law are mixed questions.

Approved in *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 610, 117 Pac. 771, averments in complaint in suit by association formed to sell raisins for accounting of moneys paid by it to growers who had contracts with it and for distribution of fund in its hands. that some of defendants had received more and some less than their share, are averments of statements of facts.

Under Section 1 as Modified by Section 4 of act of 1860, husband and wife are not tenants in common in homestead in full common-law sense of term, but children take some interest by inheritance from deceased parent.

Approved in *Hannon v. Southern Pac. R. R. Co.*, 12 Cal. App. 354, 107 Pac. 337, following rule.

Rights of Children in Homestead of parent. See note, 56 L. R. A. 44.

Miscellaneous.—Cited in *Levins v. Rovegno* (Cal.), 12 Pac. 343, amending judgment in principal case.

71 Cal. 290-295, 12 Pac. 172, GILBERT v. SLEEPER.

Where Husband Made Agreement to exchange lands and later conveyed such lands to wife, who declared homestead thereon, homestead is subject to agreement to exchange.

Approved in *Smith v. Baugham*, 156 Cal. 366, 104 Pac. 692, holding homestead declared by wife on separate property of husband with knowledge of prior option, to be subject to such option.

Specific Performance of Contracts for conveyance where wife refuses to join. See note, 24 L. R. A. 764.

71 Cal. 295-300, 12 Pac. 167, HEINLEN v. BEANS.

Surety cannot be Held beyond express terms of his contract.

Reaffirmed in *Hewlett v. Beede*, 2 Cal. App. 565, 83 Pac. 1087.

Miscellaneous.—Cited in *Heinlen v. Beans* (Cal.), 12 Pac. 169, on another appeal.

71 Cal. 300-305, 12 Pac. 230, ESTATE OF CROWEY.

Appeal from Judgment Taken within sixty days permits review of evidence.

Approved in *Perkins v. Cooper* (Cal.), 24 Pac. 377, following rule.

71 Cal. 310-314, 12 Pac. 224, COMMISSIONERS OF SACRAMENTO FUNDED DEBT SINKING FUND v. SACRAMENTO.

Commissioners of Funded Debt Sinking Fund are so beneficially interested in levy of tax for redemption of city debt as to be entitled to bring mandamus to compel city trustees to levy tax ordered to be levied by legislature.

Approved in *San Buenaventura v. McGuire*, 8 Cal. App. 502, 97 Pac. 528, holding city could bring mandamus to compel president of board of trustees to sign police ordinance passed by majority of board.

Prohibition of Future Enactments of particular character by legislature brought into existence by same constitution which contains prohibition cannot be held to annul past legislation.

Approved in *Boca Mill Co. v. Curry*, 154 Cal. 340, 97 Pac. 1124, suggesting but not deciding that sections 287 and 401, Civil Code, as they stood at date of adoption of Constitution, are not inconsistent with section 7, article XII, Constitution, and are still in force.

71 Cal. 314-318, 12 Pac. 274, HARRIS v. HARRIS.

Title Acquired to Public Land when pre-emption was initiated before marriage belongs to separate estate of pre-emptor.

Distinguished in *Davidson v. Woodward*, 156 Fed. 917, 84 C. C. A. 495, holding where tide lots were acquired after marriage by deed in consideration of money paid before marriage on uncompleted contract with one having preferential right to state tide lands, such lots were community property.

Real Property Granted by Government to citizen as separate or community property. See notes, 96 Am. St. Rep. 920, 921; 4 Cof. Prob. 59; 26 L. R. A. (n. s.) 1118.

What is Community Property. See notes, 126 Am. St. Rep. 102, 117; 4 Cof. Prob. 44, 59.

71 Cal. 318-321, 12 Pac. 430, MOSELY v. TORRENCE.

Constitution, Article VII, Section 3, Providing that lands belonging to state which are suitable for cultivation can only be sold to actual settlers thereon, operates on applications to purchase made before Constitution took effect.

Approved in *Messenger v. Kingsbury*, 158 Cal. 617, 112 Pac. 67, applicant for purchase of tide lands under Political Code, sections 3440, 3443, who had not made part payment, acquired no such vested right as prohibited repeal of law.

71 Cal. 322-324, 12 Pac. 270, STUTTMEISTER v. SUPERIOR COURT.

Appealable Order will not be Reviewed on certiorari when time for appeal has passed.

Approved in *McCue v. Superior Court*, 71 Cal. 545, 12 Pac. 616, *Hall v. Justice's Court*, 5 Cal. App. 139, 89 Pac. 872, *Shumake v. Shumake*, 17 Idaho, 658, 107 Pac. 45, *Eels v. Bailie*, 118 Iowa, 524, 92 N. W. 670, and *Chapman v. Justice Court*, 29 Nev. 161, 86 Pac. 554, all following rule.

71 Cal. 325-328, 12 Pac. 244, TIPTON v. MARTIN.

Prior to Act of 1860 Abandonment of homestead could only be made by declaration of abandonment signed, acknowledged and recorded by both spouses in same manner as conveyance of realty.

Approved in *Cordano v. Wright*, 169 Cal. 619, 115 Pac. 231, deed of property covered by homestead for public highway, in which husband is sole grantor, though signed by wife, is not good as dedication by her.

71 Cal. 329, 12 Pac. 228, GRANT v. DE LAMORI.

Paper Signed by Four Justices of supreme court ordering extension of time for filing transcript is effective before filing.

Reaffirmed in *Desmond v. Faus*, 83 Cal. 135, 23 Pac. 303.

71 Cal. 330-331, 12 Pac. 227, LARKIN v. LARKIN.

Trial Court may Order Payment of Costs and counsel fees for wife's appeal after denying her divorce.

Approved in *Bruce v. Bruce*, 160 Cal. 30, 116 Pac. 67, and *Roby v. Roby*, 9 Idaho, 375, 74 Pac. 958, both following rule; *Bordeaux v. Bordeaux*, 29 Mont. 482, 75 Pac. 360, holding necessity for such allowance must be shown.

Jurisdiction to Award Temporary Alimony, suit money, and counsel fees pending appeal. See note, 27 L. R. A. (n. s.) 713.

71 Cal. 331-335, 12 Pac. 228, HITCHCOCK v. HASSETT.

Landlord has No Lien for Rent reserved in lease, or for value of use and occupation of land.

Approved in *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 568, 112 Pac. 733, and *Ibbetson v. Pearson*, 7 Cal. App. 263, 94 Pac. 252, both following rule; *Stockton Savings etc. Society v. Purvis* (Cal.), 42 Pac. 442, holding contract as to storage of crops raised by tenant and sale to pay rent created no lien thereon.

Landlord's Right to Lien on tenant's property. See note, 119 Am. St. Rep. 122.

71 Cal. 335-338, 12 Pac. 242, **EMERSON v. BERGIN.**

Liability for Withdrawing Water from reservoir. See note, 62 L. R. A. 579.

71 Cal. 349-351, 12 Pac. 232, **HEYWOOD v. BERKELEY LAND ETC. IMP. ASSOCIATION.**

Establishment, Regulation, and Protection of ferries. See note, 59 L. R. A. 545.

71 Cal. 351-352, 12 Pac. 226, **PEOPLE v. LAVELLS.**

On Trial for Assault to Murder witness may testify whether defendant appeared rational or irrational at time of assault.

Approved in *People v. Wong Loung*, 159 Cal. 533, 114 Pac. 835, upholding admission of testimony of policemen that when defendant was arrested he was puffing and was pale, nervous and excited; *People v. Vaughn*, 14 Cal. App. 206, 111 Pac. 623, holding jailer could testify as to whether prisoner appeared rational when committed to jail; *State v. McKnight*, 119 Iowa, 82, 93 N. W. 64, admitting in murder trial testimony that deceased "appeared despondent," and the like, after injury; *State v. Penna*, 35 Mont. 541, 90 Pac. 789, rejecting opinion of nonexpert to sanity; *Owen v. State*, 52 Tex. Cr. 69, 105 S. W. 515, holding witness could testify whether accused appeared angry.

Distinguished in *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 708, 87 Pac. 378, holding in suit for wrongful death lack of knowledge of danger on part of deceased could not be shown by testimony of mother who had no means of knowing knowledge of son.

Nonexpert Opinions as to Sanity or insanity. See note, 38 L. R. A. 727. .

71 Cal. 353-374, 12 Pac. 289, 13 Pac. 169, **IN RE TYLER.**

Disbarment of Suspension of Attorney for withholding client's money or property. See note, 19 L. R. A. (n. s.) 414.

71 Cal. 375-380, 60 Am. Rep. 539, 12 Pac. 284, **ROCHE v. WARE.**

Books of Account may be Admitted in evidence when shown to be correct.

Approved in *Hurwitz v. Gross*, 5 Cal. App. 620, 91 Pac. 111, admitting records and original papers of account of corporation mortgagee in action for damages for failure to pay chattel mortgages.

Admissibility in Evidence of Books of account. See note, 138 Am. St. Rep. 465.

Party's Books of Account as evidence in own favor. See note, 52 L. R. A. 591.

Code of Civil Procedure, Section 1880, subdivision 3, only prohibits plaintiff in action against administrator on claim against estate from testifying as to matters of fact occurring prior to death of decedent.

Approved in *McMurray v. Bodwell*, 16 Cal. App. 581, 117 Pac. 629, plaintiff's testimony, in action against daughter's executor for money his wife had placed in safe deposit box and daughter has converted after mother's death, that not till after daughter's death did he learn wife had placed money in box and that daughter had converted it, is admissible.

71 Cal. 380-382, 12 Pac. 265, WARREN v. ROBINSON.

Findings Considered and Held too indefinite to sustain judgments.

Approved in *Sharp v. Frank* (Cal.), 41 Pac. 861, holding findings too indefinite to support judgment.

71 Cal. 384-392, 12 Pac. 261, PEOPLE v. JOHNSON.

Information Charging Embezzlement by bailee considered and held sufficient.

Approved in *People v. Hemple*, 4 Cal. App. 123, 87 Pac. 228, upholding similar information; *State v. Swenson*, 13 Idaho, 5, 81 Pac. 380, holding insufficient information in forgery.

Motion in Arrest of Judgment must be founded upon defects appearing on face of indictment or information.

Reaffirmed in *State v. Tully*, 31 Mont. 371, 78 Pac. 762.

71 Cal. 395-399, 12 Pac. 272, PEOPLE v. McCOY.

Reading by Juror, During Progress of trial, of newspaper containing any matter in connection with subject matter of trial which would be likely to influence him in performance of duty, warrants new trial.

Approved in *People v. Wong Loung*, 159 Cal. 526, 114 Pac. 831, granting new trial where juror's wife read to him newspaper article about case; *People v. Feld*, 149 Cal. 478, 86 Pac. 1105, holding affidavit on information and belief that jurors read newspapers commenting on case during trial did not support motion for new trial; *State v. Caine*, 134 Iowa, 156, 111 N. W. 446, granting new trial where jurors read newspaper giving accounts of trial.

Effect of Failure to Give Accused opportunity to plead. See note, 13 L. R. A. (n. s.) 814.

71 Cal. 399-400, 12 Pac. 302, SCHRODER v. SCHMIDT.

Appeal from Judgment cannot be Taken until judgment is entered.

Approved in *Kennedy v. Citizens' Nat. Bank*, 119 Iowa, 126, 93 N. W. 72, holding appeal premature when clerk merely entered recital of order for judgment.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 627.

71 Cal. 406-407, 12 Pac. 432, MILLER v. THOMAS.

Notice of Appeal from Certain Portions of interlocutory decree in partition need only be served on parties whose rights would be affected by modification of part appealed from.

Reaffirmed in *Estate of Young*, 149 Cal. 175, 85 Pac. 145.

71 Cal. 407-418, 12 Pac. 410, HUSHEON v. HUSHEON.

Possession of Mortgaged Property by mortgagee under agreement with mortgagor is not adverse.

Reaffirmed in *Wadleigh v. Phelps*, 149 Cal. 641, 87 Pac. 99.

Inequality Between Value of Property conveyed by deed and price paid is circumstance tending to show deed was mortgage.

Approved in *Keifer v. Myers*, 5 Cal. App. 673, 91 Pac. 164, applying rule to transfer of stock; *Murray v. Butte-Monitor etc. Min. Co.*, 41 Mont. 460, 110 Pac. 500, holding rule applies to pledge of mining stock.

Deed Absolute in Form may be shown by parol to have been given to secure loan.

Approved in *Anglo-California Bank v. Cerf*, 147 Cal. 388, 81 Pac. 1079, that deed was given to secure future as well as existing debt may be shown by parol; *Wells v. Geyer*, 12 N. D. 322, 96 N. W. 291, holding deed to be mortgage when agreement to reconvey was made at same time.

71 Cal. 418-428, 12 Pac. 347, McCOMB v. SPANGLER.

When Wife Gave Mortgage in her own name on property deeded to her for consideration during marriage, husband is not estopped from asserting property belonged to community.

Approved in *Nilson v. Sarment*, 153 Cal. 532, 126 Am. St. Rep. 91, 96 Pac. 318, holding one who took deed of married woman, with notice of marriage, took subject to community interest.

What is Community Property. See notes, 126 Am. St. Rep. 124, 125; 4 Cof. Prob. 66, 67.

Decree in Foreclosure and Sale bars liens given by mortgagor subsequent to mortgage but does not affect prior mortgages.

Approved in *Wardlow v. Middleton*, 156 Cal. 586, 105 Pac. 738, and *Webb v. Winter* (Cal.), 65 Pac. 1030, both following rule.

71 Cal. 428-444, 12 Pac. 454, FISH v. BENSON.

Jury Trial is not Matter of Right in equity cases.

Approved in *Maas v. Dunmeyer*, 21 Okl. 439, 96 Pac. 593, holding defendant in foreclosure setting up equitable cross-complaint not entitled to jury trial on issues so raised.

When Facts Constituting Fraud and relief sought are such as are cognizable at law, parties are not entitled to jury, but where case as made by pleadings involves application of equitable doctrine and granting of relief obtainable in equity, parties are not entitled to jury.

Approved in *Kearney v. Bell*, 160 Cal. 663, 117 Pac. 926, defense that defendant's assent to account stated sued on was procured by fraud is triable by jury.

Judgment-roll in Unlawful Detainer is not evidence of title in ejectment.

Approved in *Stockley v. Cissna*, 119 Tenn. 152, 104 S. W. 796, holding judgment in ejectment no bar to action of forcible entry and detainer.

Effect of Judgment Against Tenant as res judicata. See note, 112 Am. St. Rep. 39.

71 Cal. 444-452, 9 Pac. 736, 12 Pac. 478, HAGGIN v. CLARK.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 333.

Judgment as Res Judicata between codefendants or coplaintiffs as to matters which were, or might have been, adjudicated. See note, 27 L. R. A. (n. s.) 654.

71 Cal. 454-456, 12 Pac. 497, McGRATH v. HYDE.

Pending Settlement of Bill of Exceptions before trial judge, appeal will not be dismissed for failure to file transcript.

Approved in *Turner v. Dewey* (Cal.), 30 Pac. 1016, following rule.

Unwarranted Delay in Settling bill of exceptions must be redressed in lower court.

Reaffirmed in *Young v. Updike*, 29 Nev. 306, 89 Pac. 458.

71 Cal. 456-460, 12 Pac. 491, THOMAS v. ENGLAND.

Adverse User to Establish Title must be uninterrupted for five years prior to commencement of action.

Approved in *Big Three Min. and Mill Co. v. Hamilton*, 157 Cal. 140, 137 Am. St. Rep. 118, 107 Pac. 306, holding uninterrupted possession of mining claim not shown.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1185.

Question Whether User of Easement is by consent is one of fact to be determined from all circumstances, and finding thereon is controlling in absence of evidence.

Approved in *Evans Ditch Co. v. Lakeside Ditch Co.*, 13 Cal. App. 130, 108 Pac. 1031, applying rule to user of water; *Knight v. Cohen*, 7 Cal. App. 47, 93 Pac. 398, holding title to right of way for pipe-line by adverse user sufficiently established; *Gurnsey v. Antelope Creek etc. W. Co.*, 6 Cal. App. 390, 92 Pac. 327, upholding finding in favor of adverse user of water right when there was evidence in support of each element of such right; *Jensen v. Hunter (Cal.)*, 41 Pac. 16, holding title to water by adverse possession could not be claimed when after three years' use claimant offered to pay for use.

71 Cal. 466-469, 12 Pac. 484, MAXWELL v. SAN LUIS OBISPO COUNTY.

Payment of Illegal Tax to avoid suit is voluntary, when invalidity of law would have been perfect defense to suit.

Distinguished in *Lewis v. San Francisco*, 2 Cal. App. 117, 82 Pac. 1108, payment of illegal tax to secure filing of inventory and appraisal of estate is involuntary.

Voluntariness of Payment of License Fee unlawfully exacted under color of authority. See note, 22 L. R. A. (n. s.) 875.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 437.

Right to Recover License Fee unlawfully exacted under color of authority. See note, 22 L. R. A. (n. s.) 868.

71 Cal. 481-487, 60 Am. Rep. 543, 11 Pac. 385, 12 Pac. 623, BRALY v. HENRY.

Failure of Consideration of promissory note may be shown by parol.

Approved in *Muir v. Hamilton*, 152 Cal. 636, 93 Pac. 858, following rule; *Merchants' etc. Bank v. Ohio etc. Furn. Co.*, 57 W. Va. 632, 50 S. E. 883, 70 L. R. A. 312, holding notice of lack of title of transferrer of negotiable paper to be defense to action thereon; *Sutton v. Weber*, 127 Iowa, 367, 101 N. W. 775, 778, holding oral evidence admissible in action on contract for sale of goods to show contemporaneous oral agreement to return goods under certain conditions.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 475, 476, 477.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 761.

Miscellaneous.—Cited in *Braly v. Hury (Cal.)*, 18 Pac. 798, on another appeal.

71 Cal. 488-491, 12 Pac. 498, COHN v. CENTRAL PACIFIC R. R. CO.

Principal Place of Business of corporation is its residence.

Approved in *Waechter v. Atchison etc. Ry. Co.*, 10 Cal. App. 73, 101 Pac. 42, and *Bloom v. Michigan Salmon Min. Co.*, 11 Cal. App. 124, 104 Pac. 325, both following rule; *McDonald v. California Timber Co.*, 151 Cal. 159, 90 Pac. 548, and *Krough v. Pacific Gateway etc. Co.*, 11 Cal. App. 238, 239, 104 Pac. 698, both holding corporation could demand change of venue to county of principal place of business.

71 Cal. 491-493, 12 Pac. 306, 416, LANG v. SUPERIOR COURT.

When Demurrer to Complaint is sustained without leave to amend, it becomes duty of clerk to enter appropriate judgment.

Approved in *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 434, 114 Pac. 1030, holding order sustaining demurrer without leave to amend did not prevent court from passing on pending motion for judgment on pleadings.

Granting of Motion to Strike Motion from files is equivalent to denial of original motion.

Reaffirmed in *Reid v. Fillmore*, 12 Wyo. 76, 73 Pac. 849.

71 Cal. 493-495, 12 Pac. 511, GRUELL v. SPOONER.

Notice of Appeal Describing Order appealed from as one made on certain day is sufficient designation of subject matter of appeal, when no other order was entered on that day.

Distinguished in *Kingsbury v. Pacific Coal etc. Co.*, 3 Alaska, 48, dismissing appeal from justice's court taken on similar notice.

Property or Invasion of Possession for which ejectment is maintainable. ' See note, 116 Am. St. Rep. 571.

71 Cal. 495-498, 12 Pac. 508, STARKIE v. PERRY.

Implication of Agreement to Pay for services of relative or member of household. See note, 11 L. R. A. (n. s.) 884, 888.

71 Cal. 504-509, 12 Pac. 562, FITZGERALD v. FERNANDEZ.

Prior to Act of March 9, 1868, homestead could not be selected from lands held in tenancy in common or joint tenancy.

Reaffirmed in *Schoonover v. Birnbaum*, 148 Cal. 549, 83 Pac. 999.

71 Cal. 513-535, 12 Pac. 570, DUFF v. DUFF.

Attorney in Fact to Sell Realty is bound to inform principal of all sales made of property to which agency extends.

Approved in *American Circular Loom Co. v. Wilson*, 198 Mass. 207, 126 Am. St. Rep. 409, 84 N. E. 137, holding corporation director and superintendent bound to communicate to employer all information acquired by him relating to interests of business.

Court Should Find Whether or not action is barred by limitations, when issue is raised, and not facts from which it may be inferred.

Approved in *Luco v. Toro (Cal.)*, 18 Pac. 868, following rule.

Rules in Regard to Admissions in pleadings apply to petition for letters of administration.

Approved in *Estate of King*, 4 Cal. Prob. 18, where petitioners are next of kin of testator, their request for appointment of another as administrator, who is appointed and dies pending administration,

does not deprive them of right to letters after death of such administrator.

71 Cal. 537-540, 12 Pac. 618, HANCOCK v. HUBBELL.

In Action for Breach of Contract special damages, to be recovered, must be pleaded.

Approved in *Harron, Rickard & McCone v. Wilson, Lyon & Co.*, 4 Cal. App. 500, 88 Pac. 516, following rule.

71 Cal. 545, 12 Pac. 615, McCUE v. SUPERIOR COURT.

Certiorari Does not Lie to review appealable judgment either before or after time for appeal has passed.

Approved in *Hall v. Justice's Court*, 5 Cal. App. 139, 89 Pac. 872, and *Chapman v. Justice Court*, 29 Nev. 161, 86 Pac. 554, both following rule.

71 Cal. 546-547, 12 Pac. 631, PEOPLE v. MORE.

No Appeal Lies on Behalf of people from order of superior court of its own motion dismissing criminal action.

Approved in *People v. More* (Cal.), 12 Pac. 632, following rule.

71 Cal. 548-550, 12 Pac. 721, PEOPLE v. COPSEY.

Religious Belief as Qualification of witness. See note, 42 L. R. A. 554, 555.

71 Cal. 550-552, 12 Pac. 672, HALL v. SUPERIOR COURT.

Where Superior Court Improperly divests itself of jurisdiction of appeal from justice court, such order may be reviewed on certiorari.

Approved in *Richmond v. Houser* (Cal. App.), 96 Cal. 909, following rule; dissenting opinion in *People v. Latimer*, 160 Cal. 722, 117 Pac. 1054, majority refusing to review order of superior court dissolving attachment against bank official for refusing to testify before board of equalization where board had then finally adjourned.

Qualified in *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 480, 481, 114 Pac. 980, 981, granting mandamus to compel superior court to entertain justice court appeal which it had erroneously dismissed for want of jurisdiction.

Notice of Appeal from Justice's Court need not be filed before service.

Approved in *State v. District Court*, 32 Utah, 422, 91 Pac. 135, and *State v. Brown*, 30 Nev. 499, 98 Pac. 872, both following rule.

71 Cal. 552-555, 12 Pac. 722, DEOLEZ v. SAVE.

Verdict Contrary to Instruction of court upon point of law is "against law."

Reaffirmed in *Gangier v. City of Fargo*, 12 N. D. 226, 96 N. W. 843.

71 Cal. 565-569, 12 Pac. 679, PEOPLE v. ROGERS.

Evidence Connecting Defendant with commission of other crimes is admissible when it tends to prove any fact pertinent to proof of crime for which he is on trial.

Approved in *People v. Glass*, 158 Cal. 685, 112 Pac. 290, on charge of bribery of one supervisor, evidence of payment of money to other supervisors was admissible; *People v. Glass*, 158 Cal. 682, 112 Pac.

289, on prosecution of telephone manager for bribing supervisor to vote against rival franchise, evidence of action taken by him long prior thereto in another city to prevent grant of franchise to another company is incompetent; *People v. Ruef*, 14 Cal. App. 602, 114 Pac. 65, admitting evidence of similar crimes in pursuance of common scheme; *People v. Tomalty*, 14 Cal. App. 234, 111 Pac. 517, upholding admission, on trial for falsification of public record, of evidence of falsification of other records done to make all records balance; *People v. Cahill*, 11 Cal. App. 690, 106 Pac. 117, admitting evidence of another crime committed at same time and place which tended to show motive; *People v. Smith*, 9 Cal. App. 647, 99 Pac. 1112, admitting evidence of previous quarrel of defendant with employee of deceased several hours before killing; *Vickers v. United States*, 1 Okl. Cr. 462, 98 Pac. 471, holding inadmissible, in trial for rape, evidence of commission of burglary by defendant in another state.

Admissibility of Evidence of other crimes. See notes, 105 Am. St. Rep. 985; 62 L. R. A. 281.

71 Cal. 569-578, 12 Pac. 783, PEOPLE v. GONZALES.

Admission of Hearsay Evidence Prejudicial to defendant is ground for reversal.

Approved in *People v. Schmitz*, 7 Cal. App. 356, 94 Pac. 414, reversing judgment for admission of prejudicial hearsay.

Statements of a Co-conspirator Made After completion of conspiracy are inadmissible.

Approved in *People v. Brady* (Cal.), 36 Pac. 950, admitting statements made by defendant's partner in crime to third person while carrying out transfer of stolen property in pursuance of agreement made by all three.

Instruction That to Justify Killing in self-defense, necessity must be apparent, actual, imminent, absolute, and unavoidable, is erroneous.

Approved in *People v. Bruggy* (Cal.), 26 Pac. 758, disapproving similar instruction.

Standpoint of Determination as to Danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 542.

Where First Assailant Seeks in good faith to withdraw from combat, before he gives mortal blow, he may show such blow given in self-defense.

Approved in *People v. Button* (Cal.), 38 Pac. 202, following rule.

Self-defense Set Up by Accused, who began conflict. See note, 45 L. R. A. 688, 707.

"Retreat to the Wall" in Homicide. See note, 2 L. R. A. (n. s.) 55, 59, 60.

71 Cal. 583-584, 12 Pac. 685, BAKER v. SUPERIOR COURT.

On Certiorari to Review Order of superior court, court is only necessary party respondent.

Approved in *Canadian Bank of Commerce v. Wood*, 13 Idaho, 801, 93 Pac. 259, refusing to quash writ for failure to serve upon parties concerned other than judge who made order reviewed; *Tod v. Crisman*, 123 Iowa, 702, 99 N. W. 689, holding contractor to pay whom supervisors have ordered tax levy is not necessary party to proceeding by certiorari to review order for levy.

Time to Plead cannot be Extended more than thirty days, and such order may be reviewed on certiorari.

Distinguished in *Voorman v. Superior Court*, 149 Cal. 268, 86 Pac. 695, refusing to review on certiorari order extending time to answer beyond thirty days when greater extension was already allowed by stipulation.

71 Cal. 584-585, 12 Pac. 780, **IN RE KNOTT.**

Necessity of Bad or Fraudulent Motive to justify disbarment. See note, 18 L. R. A. 402.

71 Cal. 594-598, 12 Pac. 723, **WALKER v. McCUSKER.**

Purchaser of Realty at Execution Sale for benefit of another becomes trustee of express trust and may maintain action for possession in his own name.

Reaffirmed in *Tandy v. Waesch*, 154 Cal. 110, 97 Pac. 70.

71 Cal. 602-608, 12 Pac. 781, **PEOPLE v. BUSH.**

View of Premises of Crime is taking of evidence.

Approved in *People v. White*, 5 Cal. App. 337, 90 Pac. 475, holding error in viewing premises of crime in absence of judge corrected by second view in his presence; *Beck v. Staats*, 80 Neb. 489, 114 N. W. 635, 16 L. R. A. (n. s.) 768, holding jury may view property which is subject of litigation or place where any material fact occurred when court deems it proper.

View by Jury. See note, 42 L. R. A. 376, 380, 384.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 55.

71 Cal. 608-611, 12 Pac. 794, **EX PARTE ROBINSON.**

Refusal to Pay Alimony Ordered, made in open court, may be punished as contempt without affidavit of nonpayment.

Distinguished in *In re McCarty*, 154 Cal. 540, 98 Pac. 543, holding when payment of alimony was not refused in presence of court, affidavit of nonpayment was essential to judgment of contempt; *Ex parte Caple*, 81 Ark. 506, 99 S. W. 831, holding where party refused to pay alimony ordered, he could be compelled to give bond, or ordered into custody in default of bond.

71 Cal. 611-617, 12 Pac. 788, **PEOPLE v. DEMOUSSET.**

To Constitute Offense of Abduction for purposes of prostitution, taking need not be forcible; it is sufficient if brought about by inducements of defendant.

Approved in *King v. Hanson*, 13 N. D. 99, 99 N. W. 1089, holding wife has action for alienation of husband's affections.

Crime of Abduction Does not Depend upon character of person abducted.

Distinguished in *State v. Connor*, 142 N. C. 706, 55 S. E. 790, holding evidence of character of wife since marriage admissible in prosecution for criminal elopement.

Court is not Required to Instruct Jury as to materiality of particular circumstances.

Approved in *State v. Buralli*, 27 Nev. 55, 71 Pac. 536, holding it not error to refuse instruction singling out and laying stress upon particular circumstances, when charge was given to consider all facts.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 681.

71 Cal. 618-624, 12 Pac. 791, PEOPLE ex rel. CLOUGH v. LEVY.

Nonexpert Opinions as to Sanity or insanity. See note, 38 L. R. A. 733.

71 Cal. 624-625, 12 Pac. 800, EX PARTE GILMORE.

Judgment Illegal Because Imposing both fine and imprisonment may be vacated within reasonable time and legal sentence imposed.

Approved in *State v. Tyree*, 70 Kan. 213, 78 Pac. 528, upon reversal of judgment in criminal case, supreme court may remand cause with instructions to lower court to set aside erroneous sentence and resentence defendant.

Distinguished in *In re Sullivan*, 3 Cal. App. 195, 84 Pac. 782, holding where court imposed valid fine, and imprisonment in state prison in default thereof, which was invalid, it could not thereafter vacate sentence and reimpose fine with imprisonment in county jail.

71 Cal. 626-627, 12 Pac. 799, HOME & LOAN ASSOCIATION v. WILKINS.

Undertaking on Appeal must Clearly identify appeal to which it is intended to apply.

Approved in *Estate of Sutro*, 152 Cal. 252, 92 Pac. 488, holding void undertaking on appeal which referred equally well to two notices of appeal; *Bergevin v. Wood*, 11 Cal. App. 647, 105 Pac. 937, holding void bond for only two of appellants on appeal from justice court; *Pacific Paving Co. v. Verso*, 11 Cal. App. 385, 105 Pac. 137, upholding bond on appeal which misrecited appellate court; *Commercial Bank v. Wells*, 5 Cal. App. 474, 90 Pac. 981, holding void undertaking as to which of two appeals it referred to.

71 Cal. 627-635, 12 Pac. 796, BOYS & GIRLS AID SOCIETY v. REIS.

Approval of Supervisors is not Necessary to validity of claim for support of minor committed to custody of charitable institution under section 1388, Penal Code.

Approved in *Trower v. San Francisco*, 157 Cal. 766, 109 Pac. 619, upholding action to recover fees illegally exacted by county clerk under void law without presentation for audit.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 72 CALIFORNIA.

72 Cal. 1-4, 12 Pac. 804, HOFFMAN v. REMNANT.

Where Vendee Fails to Complete payment of purchase money, vendor may sue in ejectment to recover possession.

Approved in *Miller v. Waddingham* (Cal.), 25 Pac. 690, vendee who has not paid purchase price cannot remove temporary houses built by him on land; *Gumaer v. Draper*, 33 Colo. 126, 79 Pac. 1041, *arguendo*.

When Vendor may Recover Possession from vendor. See note, 107 Am. St. Rep. 728.

72 Cal. 5-10, 1 Am. St. Rep. 17, 12 Pac. 801, OAKLAND PAVING CO. v. TOMPKINS.

Proposed Constitutional Amendment Need not be entered at large on journals of Senate and Assembly, reference by title and number being sufficient.

Approved in *People v. Sours*, 31 Colo. 420, 102 Am. St. Rep. 34, 74 Pac. 183, and *People v. Loomis*, 135 Mich. 562, 98 N. W. 264, both upholding sufficiency of entry of proposed amendment on journal of House, and as finally approved on journal of Senate; *West v. State*, 50 Fla. 163, 39 So. 415, upholding amendment not entered at length on journals.

Constitutional Amendments. See note, 102 Am. St. Rep. 67.

Effect of Noncompliance with prescribed method of amending Constitution. See note, 10 L. R. A. (n. s.) 151, 154.

72 Cal. 10-12, 12 Pac. 803, EX PARTE MOON FOOK.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 192.

Designation of Wrong Place of imprisonment as ground for discharge upon habeas corpus. See note, 13 L. R. A. (n. s.) 519.

72 Cal. 12-14, 12 Pac. 869, ORAMER v. TITTLE.

Undertaking on Appeal Given Pursuant to act of 1885, providing that bond of surety may be accepted as sole surety.

Approved in *Botsford v. Van Riper*, 32 Nev. 228, 106 Pac. 443, upholding giving of bond on appeal with surety company as sole surety under act of 1887, as amended in 1903.

Powers and Privileges of Surety and trust companies. See note, 48 L. R. A. 588.

72 Cal. 17-20, 12 Pac. 226, 870, **ROWLAND v. MADDEN.**

Demand is Condition Precedent to husband's suit against executors of wife's estate to recover property claimed to be community property.

Approved in *Burke v. Maguire*, 154 Cal. 470, 98 Pac. 27, where administrator became custodian of fund not part of estate action against him for such fund did not lie without previous demand; *Reiter v. Rothschild* (Cal.), 33 Pac. 851, claim for money given to decedent as security for lease need not be presented to his estate, but executor may be sued directly.

72 Cal. 29-32, 11 Pac. 871, 13 Pac. 51, **PLUMMER v. WOODRUFF.**

Affidavit for Purchase of school land which states there is no occupation adverse to applicant confers no right to purchase when land is in fact so occupied.

Approved in *Pardee v. Schanzlin*, 3 Cal. App. 600, 86 Pac. 813, upholding affidavit as to citizenship when applicant had only declared intention.

72 Cal. 32-34, 13 Pac. 65, **ROBINSON v. SPAULDING GOLD ETC. MIN. CO.**

Corporation has No Interest which creditor can dispose of in stock bought in by it for nonpayment of assessments.

Approved in *Tulare Irrigation Dist. v. Kaweah Canal etc. Co.* (Cal.), 44 Pac. 663, purchase of part of its own stock, until reissued, reduces stock of corporation to that extent.

72 Cal. 34-37, 13 Pac. 71, **DOLAND v. MOONEY.**

Description in Tax Deed held sufficient.

Reaffirmed in *Fox v. Townsend*, 152 Cal. 55, 91 Pac. 1008.

72 Cal. 38-46, 1 Am. St. Rep. 22, 13 Pac. 144, **FISK v. CENTRAL PACIFIC R. R. CO.**

Employer Held Liable for Injury to child placed at work upon dangerous machine with which he was unfamiliar.

Approved in *Force v. Standard Silk Co.*, 160 Fed. 1009, holding employer liable for injury to boy of fourteen employed in silk-mill and injured, when alone in room at noon hour, by dangerous machinery; *National Fire Proofing Co. v. Andrews*, 158 Fed. 299, 85 C. C. A. 526, holding employer liable for injury to boy, occasioned when directed to work upon machinery with which he was unfamiliar; *Lynchburg Cotton Mills v. Stanley*, 102 Va. 596, 46 S. E. 910, child between seven and fourteen presumed not to be guilty of contributory negligence in action for damages for injury in mill.

Assumption of Risk by minor employee. See note, 1 L. R. A. (n. s.) 280.

Duty of Master to Instruct and warn servants as to perils of employment. See note, 44 L. R. A. 63, 65, 72.

Knowledge as Element of employer's liability. See note, 41 L. R. A. 43.

Person Injured by Negligence of fellow-servant concurring with negligence of master may recover therefor.

Approved in *Gordon v. Chicago, Rock Island etc. Ry. Co.*, 129 Iowa, 753, 106 N. W. 179, following rule.

Relation of Proximate Cause doctrine to rule of liability of master for injuries to servant by combined negligence of himself and a fellow-servant. See note, 16 L. R. A. 819.

Master's Liability to Servant volunteering on duty with which he is not charged. See note, 85 Am. St. Rep. 626.

Vice-principalship Considered with reference to superior rank of negligent servant. See note, 51 L. R. A. 585.

Vice-principalship as Determined with reference to character of act causing injury. See note, 54 L. R. A. 174.

72 Cal. 46-48, 13 Pac. 149, **PEOPLE v. MARKS.**

Where Bill of Exceptions Fails to show venue of indictment for embezzlement was not proved, alleged error in venue is not ground for reversal.

Approved in *People v. Connelly* (Cal.), 38 Pac. 43, holding bill of exceptions showed venue of embezzlement was proven.

72 Cal. 53-54, 13 Pac. 148, **EX PARTE LEHMKUHL.**

Where Court had Jurisdiction of person convicted, and of offense of which convicted, habeas corpus does not lie.

Reaffirmed in *In re Talley*, 4 Okl. Cr. 400, 112 Pac. 37.

72 Cal. 59-62, 13 Pac. 77, **PEOPLE v. CLARY.**

Robbery is Larceny, With Element of intimidation or force added.

Approved in *State v. Luhano*, 31 Nev. 283, 102 Pac. 262, holding threatening word or gesture likely to create apprehension of danger to be sufficient intimidation.

Cruel and Unusual Punishments. See note, 35 L. R. A. 577.

72 Cal. 62-64, 13 Pac. 150, **PEOPLE v. MORTON.**

Defendant may Testify as to Intent with which alleged criminal act was done.

Approved in *Walker v. Chauslor*, 153 Cal. 125, 126 Am. St. Rep. 61, 94 Pac. 609, 17 L. R. A. (n. s.) 455, reaffirming rule.

Right of One to Testify as to his intent. See note, 23 L. R. A. (n. s.) 390.

72 Cal. 65-74, 1 Am. St. Rep. 34, 13 Pac. 73, **ANDERSON v. GOFF.**

Notice of Appeal is Sufficient when it identifies judgment appealed from though mistaken as to date of entry.

Approved in *Foss v. Johnstone*, 158 Cal. 123, 110 Pac. 296, and *Larson v. Larson*, 15 Cal. App. 536, 115 Pac. 342, both following rule.

Discharge in Bankruptcy to be Availed of as defense must be pleaded.

Approved in *Lane v. Holcomb*, 182 Mass. 362, 65 N. E. 794, discharge pleaded in arrest of judgment is too late.

Personal Judgment Against Nonresident on service of summons by publication supports execution sale of attached property.

Approved in *Mullenary v. Burton*, 3 Cal. App. 265, 84 Pac. 160, reaffirming rule; *Merchants' Nat. Union v. Buisset*, 15 Cal. App. 447, 115 Pac. 59, money judgment cannot be rendered against nonresident on service by publication; *Smith v. Supreme Lodge A. O. U. W.*, 12 Cal. App. 190, 106 Pac. 1103, although personal judgment obtained on

service by publication was set aside, plaintiff still had remedy by attachment.

Validity of Personal Judgments rendered upon constructive service. See note, 16 L. R. A. 231.

Affidavit for Publication of Summons upheld where it stated that defendant was resident of another state.

Approved in *Hoffman v. Superior Court*, 151 Cal. 390, 90 Pac. 940, upholding affidavit in *McEnerney* suit as to plaintiff's lack of knowledge, on information and belief, of other claimants; *McKnight v. Grant*, 13 Idaho, 640, 121 Am. St. Rep. 287, 92 Pac. 991, upholding affidavit for publication of summons on nonresident.

Affidavits for Service of Process by publication. See note, 89 Am. St. Rep. 762.

Service of Process Sufficient to constitute due process of law. See note, 50 L. R. A. 582, 583.

"Forthwith," Like "Immediately," is not to be necessarily construed as a time immediately succeeding without an interval, but an effectual and lawful time.

Approved in *Newlove v. Mercantile Trust Co.*, 156 Cal. 666, 105 Pac. 976, holding mailing notice to creditors four days after order to be "forthwith"; *Lewis v. Curry*, 150 Cal. 101, 103 Pac. 496, holding two days' delay in issuance and publication of governor's proclamation to comply with statute requiring such acts to be done "forthwith"; *Walker v. Detroit*, 138 Mich. 540, 101 N. W. 810, holding where tax-roll was delivered on July 1st, publication on first seven days of month excepting the fourth to be "forthwith" for six days required by statute.

Foreign Judgments. See note, 94 Am. St. Rep. 553.

When Service of Process is constructive. See note, 91 Am. St. Rep. 379.

72 Cal. 75-78, 13 Pac. 401, MONTGOMERY v. LOCKE.

Measure of Damages for Destruction of fruit-bearing trees is value of such trees on premises in growing state.

Approved in *Mogollon Gold etc. Co. v. Stout*, 14 N. M. 260, 91 Pac. 728, following rule; *Griffing Bros. Co. v. Winfield*, 53 Fla. 603, 43 So. 691, damages for failure to cultivate fruit trees for contract period held to be difference in actual value of land at end of period and what value would have been if contract had been properly executed; *Louisville & Nashville R. R. Co. v. Beeler*, 126 Ky. 335, 128 Am. St. Rep. 291, 103 S. W. 302, 11 L. R. A. (n. s.) 930, measure of damages for injury to orchard by fire held to be value of trees destroyed, and decrease of value of those injured, and not decrease in value of farm as whole; *Galveston etc. Ry. Co. v. Warnecke*, 43 Tex. Civ. App. 87, 95 S. W. 602, loss in value of land is measure of damages for destruction of orchard; *Gilman v. Brown*, 115 Wis. 7, 91 N. W. 229, value of shade trees to realty for purposes of occupancy is measure of damages for their destruction.

Measure of Damages for Injury to, or destruction of, trees. See note, 19 L. R. A. 658.

Liability for Damming Back Stream. See note, 59 L. R. A. 820.

72 Cal. 78-84, 13 Pac. 152, TREDINNICK v. RED CLOUD ETC. MIN. CO.

Where Several Mining Claims are consolidated, claimant of miner's lien need not designate in claim amount due on each property.

Approved in Phillips v. Salmon River Min. etc. Co., 9 Idaho, 151, 72 Pac. 886, and Peaceable Creek Coal Co. v. Jackson, 26 Okl. 9, 108 Pac. 412, both following rule.

Workmen in Mill Located on Mine held entitled to Men on mine.

Approved in Thompson v. Wise Boy etc. Min. Co., 9 Idaho, 367, 74 Pac. 960, and Park City Meat Co. v. Comstock etc. Min. Co., 36 Utah, 163, 103 Pac. 261, both following rule.

72 Cal. 86-89, 13 Pac. 158, SPRECKELS v. ORD.

Court Should Determine as Matter of Law that blazed tree as monument controls over head of arroyo.

Approved in Lillis v. Urrutia, 9 Cal. App. 559, 99 Pac. 992, monuments prevail over calls for course and distance.

72 Cal. 91-95, 1 Am. St. Rep. 42, 13 Pac. 156, KRUGER v. WESTERN FIRE ETC. INS. CO.

Issuance of Insurance Policy with knowledge by company's agent at time that circumstances exist which would render policy void under its conditions waives such condition.

Approved in German Ins. Co. v. Shader, 68 Neb. 4, 93 N. W. 974, 60 L. R. A. 918, following rule; Spalding v. New Hampshire Fire Ins. Co., 71 N. H. 443, 52 Atl. 859, applying rule to clause against insurance in other companies; Bayley v. Employers' etc. Assur. Corp. (Cal.), 56 Pac. 638, applying rule to false statement of insured as to payment for previous accidents on issuance of accident policy; dissenting opinion in Maupin v. Scottish etc. Ins. Co., 53 W. Va. 582, 45 S. E. 1013, majority holding iron-safe clause not waived by oral agreement of agent.

Waiver of Provisions of Nonwaiver or written waiver of conditions and forfeitures in policies. See note, 107 Am. St. Rep. 117, 141.

Parol Evidence Rule as to Varying or contradicting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies. See note, 16 L. R. A. (n. s.) 1209.

72 Cal. 99-103, 13 Pac. 161, BEACH v. COOPER.

Stockholder of Corporation may Maintain action in its behalf against directors for recovery of moneys fraudulently misappropriated by directors.

Approved in Zuelly v. Casper, 160 Ind. 460, 67 N. E. 105, 63 L. R. A. 133, taxpayer may maintain action against county auditor and commissioners for restitution by former of money illegally allowed to latter in excess of fees; McConnell v. Combination Min. etc. Co., 30 Mont. 249, 104 Am. St. Rep. 709, 76 Pac. 147, demand on officers of corporation to bring suit for their misappropriation of its funds is not condition precedent to right of action by minority stockholders.

Actions by Stockholders in Behalf of corporations. See note, 97 Am. St. Rep. 45.

72 Cal. 104-107, 13 Pac. 163, FOOT v. MURPHY.

Defendant in Ejectment cannot Plead as defense title in third person.

Reaffirmed in Dondero v. O'Hara, 3 Cal. App. 637, 86 Pac. 987.

Placing Findings of Facts among conclusions of law cannot change their character.

Approved in *Adams v. Hopkins* (Cal.), 69 Pac. 235, following rule.

72 Cal. 107-110, 13 Pac. 164, ESTATE OF BRISWALTER.

Error in Instruction is not Ground for reversal when jury would have been bound to find as they did in any event.

Approved in *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 783, 89 Pac. 1112, *Estate of Dolbeer*, 149 Cal. 230, 86 Pac. 697, *Greene v. Murdock*, 1 Cal. App. 139, 81 Pac. 994, and *People v. Taggart*, 1 Cal. App. 426, 82 Pac. 397, all following rule.

72 Cal. 114-117, 13 Pac. 170, IN RE LINEHAN.

Police Power of City Extends to regulating keeping of cows within certain limits in city.

Approved in *Grumbach v. Lelande*, 154 Cal. 684, 98 Pac. 1061, upholding ordinance prohibiting wholesale liquor business within certain limits of city; *St. Louis v. Fischer*, 167 Mo. 662, 664, 99 Am. St. Rep. 614, 67 S. W. 874, 875, 64 L. R. A. 679, upholding ordinance restricting dairies within city limits.

Municipal Corporations. See note, 99 Am. St. Rep. 623.

Municipal Power Over Nuisances affecting safety, health, and personal comfort. See note, 38 L. R. A. 332, 335.

Power of Municipal Corporations to define, prevent, and abate nuisances. See note, 36 L. R. A. 601.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

72 Cal. 117-120, 13 Pac. 168, PEOPLE v. HUFF.

Instance Where It was Held that view of scene of homicide by jury was made in presence of judge and defendant.

Distinguished in *Elias v. Territory*, 9 Ariz. 11, 76 Pac. 609, upholding view by jury made on motion of defendant, though in absence of defendant or judge, where no evidence taken during view.

72 Cal. 120-123, 13 Pac. 219, WILLIAMS v. SOUTHERN PACIFIC R. R. CO.

Care Due to Sick, Infirm, or helpless persons, with whom no contract relation is sustained. See note, 69 L. R. A. 523, 524, 544.

72 Cal. 125-131, 13 Pac. 310, EX PARTE FISKE.

Ordinance Prohibiting Alteration of Wooden building within fire limits except on approval of fire wardens held valid.

Approved in *Westport v. Mulholland*, 84 Mo. App. 326, reaffirming rule; *In re Newell*, 2 Cal. App. 768, 84 Pac. 226, upholding ordinance against erection of tents within fire limits; *Merced Falls Gas etc. Co. v. Turner*, 2 Cal. App. 723, 84 Pac. 240, upholding ordinance ordering change of light company's position on streets of lighting company's poles; *Pacific States Supply Co. v. San Francisco*, 171 Fed. 734, holding void ordinance prohibiting operation of stone quarry in city limits; *Cochran v. Preston*, 108 Md. 232, 129 Am. St. Rep. 432, 70 Atl. 115, 23 L. R. A. (n. s.) 1163, upholding ordinance restricting height of buildings; *Fellows v. City of Charleston*, 62 W. Va. 670, 125 Am. St. Rep. 990, 59 S. E. 625, 13 L. R. A. (n. s.) 737, upholding ordinance requiring permit to build house.

Constitutionality of Building Regulations. See note, 93 Am. St. Rep. 409.

Municipal Power Over Buildings and other structures as nuisances. See note, 38 L. R. A. 170.

Provision Requiring Ordinance to be published five successive days is complied with, though Sunday intervened during period.

Approved in *Porter v. Boyd Paving etc. Co.*, 214 Mo. 16, 112 S. W. 239, following rule.

Validity of Ordinance Vesting in officer's discretion as to subject matter. See note, 1 L. R. A. (n. s.) 941.

Constitutional Equality of Privileges, immunities and protection. See note, 14 L. R. A. 584.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

72 Cal. 133-145, 13 Pac. 315, **CANNON v. HANDLEY.**

Deed Delivered in Escrow takes effect upon performance of condition on which it was delivered.

Approved in *Flanagan v. Great Cent. Land Co.*, 45 Or. 341, 77 Pac. 487, following rule.

Nature and Elements of Escrows. See note, 130 Am. St. Rep. 939, 940.

Upon Performance of Conditions of escrow, depository becomes custodian of grantee, holding deed for him, and his possession is that of grantee.

Approved in *Bartley v. Fraser*, 16 Cal. App. 565, 117 Pac. 685, holding complaint against A and bank which was escrow holder stated no cause of action against bank.

Authority of Custodian of Deed to hold as escrow need not be in writing.

Approved in *Manning v. Foster*, 49 Wash. 544, 126 Am. St. Rep. 876, 96 Pac. 234, 18 L. R. A. (n. s.) 337, and *Tharaldson v. Everts*, 87 Minn. 171, 91 N. W. 468, both following rule.

Distinguished in *Womble v. Wilbur*, 3 Cal. App. 547, 86 Pac. 921, where written instructions to escrow were full and complete, escrow not bound by attempted oral modification.

Proof of Escrow Agreement by parol. See note, 18 L. R. A. (n. s.) 337.

Subsequent Purchaser from Grantors with notice of prior deed takes only what remains in grantor.

Approved in *May v. Emerson*, 52 Or. 271, 96 Pac. 1065, reaffirming rule; *Zenda Mining & Milling Co. v. Tiffin*, 11 Cal. App. 65, 104 Pac. 12, holding no judgment lien created when whatever interest judgment debtor had in property was conveyed prior to docketing of judgment.

72 Cal. 154-157, 13 Pac. 321, **DALY v. SAN FRANCISCO.**

Those Dealing With City must see to it that its agents have power to act.

Approved in *Citizens' Bank v. City of Spencer*, 126 Iowa, 106, 101 N. W. 645, city not liable for amount of sewer assessment certificates which had been declared invalid on ground of invalidity of ordinance for work; *Austin Mfg. Co. v. Twin Brooks Twp.*, 16 S. D. 132, 91 N. W.

472, denying recovery against township for road machine purchased by supervisors without authority.

72 Cal. 157-160, 12 Pac. 74, 13 Pac. 323, DUFFY v. GREENEBAUM.

On Appeal from Judgment awarding injunction and damages, undertaking purporting to stay execution is insufficient under sections 940 and 941, Code of Civil Procedure.

Distinguished in *Edminston v. Steele*, 12 Idaho, 616, 617, 87 Pac. 678, and *Edwards v. Superior Court*, 159 Cal. 713, 715, 115 Pac. 650, 651, both holding bond on appeal from justice court good as appeal bond though insufficient to stay execution.

72 Cal. 161-163, 13 Pac. 403, SAN FRANCISCO SAVINGS UNION v. MYERS.

Appeal will not be Dismissed on ground of consent to judgment unless record clearly shows consent.

Approved in *Hibernia Savings etc. Society v. Waymire*, 152 Cal. 288, 92 Pac. 646, dismissing appeal from consent judgment.

Superior Court cannot Amend its judgment while appeal therefrom is pending.

Approved in *In re Bullard's Estate* (Cal.), 31 Pac. 1120, and *Hynes v. Barnes*, 30 Mont. 28, 75 Pac. 524, both following rule.

72 Cal. 164-166, 13 Pac. 404, ESTATE OF STEVENSON.

Nonresident Surviving Widow may nominate administrator.

Approved in *Estate of Bedell*, 3 Cal. Prob. 81, reaffirming rule; *Estate of Bergin*, 3 Cal. Prob. 291, public administrator is not entitled to letters of administration with will annexed, as against resident devisee in foreign will who files authenticated copy thereof and of its foreign probate with petition for letters.

Right of One First Entitled to administration to nominate third person. See note, 22 L. R. A. (n. s.) 1162.

Right of Nonresidents to Act as executors or administrators. See note, 1 L. R. A. (n. s.) 347.

Code of Civil Procedure, Section 1365, does not conflict with section 1383.

Approved in *Estate of Griffiths*, 3 Cal. Prob. 549, 554, as between nominee of nonresident brothers of intestate and public administrator, latter is entitled to letters.

72 Cal. 166-170, 13 Pac. 471, TOWN OF DIXON v. MAYERS.

Lands Within Limits of Municipal Corporation but used solely as farm lands are subject to municipal taxation.

Approved in *Atherton v. Village of Essex Junction*, 83 Vt. 226, 74 Atl. 1121, following rule.

Municipal Taxation of Rural Lands. See note, 34 L. R. A. 196.

Power of Legislature to Annex territory to municipalities. See note, 27 L. R. A. 741.

72 Cal. 170-177, 13 Pac. 405, SAN LEANDRO v. LE BRETON.

Sale of Land in City Blocks, laid out by owner, with reference to map showing certain land as public park, dedicates such land as public park.

Approved in *Evans v. Blankenship*, 4 Ariz. 315, 39 Pac. 813, *Florida etc. Ry. Co. v. Worley*, 49 Fla. 306, 38 So. 621, *Village of Riverside v. MacLain*, 210 Ill. 320, 102 Am. St. Rep. 164, 71 N. E. 412, 66 L. R. A. 288, and *Sonadzki v. Salt Lake City*, 36 Utah, 134, 104 Pac. 113, all following rule; *Eureka v. Croghan (Cal.)*, 19 Pac. 486, conveyance of land by reference to streets on map of city together with five years' use of streets held to constitute complete dedication of streets.

Assessment of Public Square to private person and payment of taxes by him does not estop public from claiming under dedication.

Approved in *Evans v. Blankenship*, 4 Ariz. 316, 39 Pac. 814, following rule; *People v. Kerber*, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 879, title to public tide lands cannot be affected by reason of negligence of public agents; *Myers v. Oceanside*, 7 Cal. App. 94, 93 Pac. 689, evidence as to how property was assessed on city assessment-roll held immaterial in action to quiet title to land claimed by city as park; *Boise City v. Hon*, 14 Idaho, 282, 94 Pac. 170, assessment of street for taxation held not to impair public right thereto; *Lockey v. City of Bozeman*, 42 Mont. 398, 113 Pac. 290, listing for taxation by assessor of part of city street held not to estop city from claiming it by prescription.

Right to Acquire Title by adverse possession to lands devoted to public use. See note, 87 Am. St. Rep. 779, 780.

Formal Acceptance is not Necessary to make complete dedication of public square.

Approved in *Myers v. Oceanside*, 7 Cal. App. 92, 93 Pac. 688, holding acceptance of offer of dedication not shown.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 453.

72 Cal. 178-179, 13 Pac. 473, **BENNETT v. HOBRO.**

Trial Court may Grant New Trial when of opinion verdict is contrary to weight of evidence.

Approved in *Tathwell v. Cedar Rapids*, 122 Iowa, 57, 97 N. W. 98, upholding action of trial judge in setting aside verdict in action for personal injuries because inadequate.

Inadequacy of Damages as Ground for setting aside verdict. See note, 47 L. R. A. 50, 51.

72 Cal. 180-183, 1 Am. St. Rep. 45, 13 Pac. 478, **PIERCE v. GERMAN SAVINGS & LOAN SOCIETY.**

Purchaser of Reversionary Interest in real estate with full knowledge of nuisance thereon, for which owner would be liable, assumes liability for damages caused by such nuisance subsequent to his purchase.

Distinguished in *Castle v. Smith (Cal.)*, 36 Pac. 861, notice to grantee that erection on land by his grantor is nuisance is essential to right of party injured thereby to maintain action to abate.

Liability of Property Owner for nuisance which he did not create. See note, 86 Am. St. Rep. 514.

Liability to Third Persons of lessors of personal property. See notes, 92 Am. St. Rep. 532; 26 L. R. A. 202.

72 Cal. 183-187, 13 Pac. 476, PALMER v. GALVIN.

Where Defendant is Mere Intruder on land claimed by plaintiff under act of Congress, July 1, 1870, he cannot be permitted to show plaintiff was not beneficiary under that act.

Reaffirmed in *Galvin v. White*, 159 Cal. 800, 116 Pac. 43.

72 Cal. 192-193, 13 Pac. 475, TYRBELL v. BALDWIN.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 627.

72 Cal. 197-199, 13 Pac. 491, COLBERT v. BANKIN.

Servant Engaged in Working about defective machinery is not guilty of contributory negligence in so doing unless he knows, or might have known, by reason of defect employment involved danger.

Approved in *West Pratt Coal Co. v. Andrews*, 150 Ala. 376, 43 So. 351, servant injured while working on defective trestle not chargeable with knowledge of defect.

Contributory Negligence in Entering or remaining in an employment. See note, 49 L. R. A. 35.

72 Cal. 199-205, 13 Pac. 498, PEOPLE v. SAN FRANCISCO SAVINGS UNION.

Savings Bank cannot Pay as dividends interest earned but not actually collected, though amply secured.

Approved in *Siegman v. Maloney*, 63 N. J. Eq. 437, 51 Atl. 1009, stockholder cannot compel directors to repay to corporation dividends paid out of capital stock, assets of corporation not being insufficient to pay creditors; *American Steel etc. Co. v. Eddy*, 130 Mich. 268, 89 N. W. 952, stockholder of insolvent corporation liable to creditor for amount of capital stock paid him as dividends.

72 Cal. 205-206, 13 Pac. 496, LAWLER v. LINFORTH.

Court has Legal Discretion to excuse juror for bias.

Approved in *McKernan v. Los Angeles Gas etc. Co.*, 16 Cal. App. 283, 116 Pac. 678, holding error in excusing jurors on mere statement that they were customers of defendant, a gas company, is not prejudicial to defendant where it was not thereby prevented from securing impartial jury.

72 Cal. 207-212, 13 Pac. 584, RICHARDS v. DONNER.

Deed Given by Grantor when in great physical weakness under mistaken impression as to its effect will be set aside.

Approved in *Paulter v. Manuel*, 25 Okl. 69, 108 Pac. 753, setting aside conveyance made by weak-minded grantee.

72 Cal. 212-217, 13 Pac. 500, PEOPLE v. KALKMAN.

Evidence and Instructions as to Character of accused. See note, 20 L. R. A. 614.

72 Cal. 217-223, 13 Pac. 503, HEINE v. TREADWELL.

To Justify Setting Aside Judgment, aggrieved party must make clear showing of excusable neglect.

Approved in *Victor Power and Mining Co. v. Cole*, 11 Cal. App. 502, 105 Pac. 760, refusing to set aside second default judgment.

Tender or Payment as Condition Precedent to suit for specific performance of option contract to convey realty. See note, 24 L. R. A. (n. s.) 93.

72 Cal. 224-227, 13 Pac. 627, **WOOD v. BRUSH**.

When Note is Indorsed After Maturity, any defense which existed in favor of maker at time of indorsement may be set up against it.

Approved in *State Bank of Fillmore v. Hayes*, 16 S. D. 369, 92 N. W. 1069, applying rule to non-negotiable note.

Setoff Against Assignee of Commercial Paper of claim against assignor. See note, 23 L. R. A. 329.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 758, 789, 793.

Supplemental Answer, Though Marked by clerk as filed, is not part of judgment-roll until order permitting it to be filed has been obtained.

Distinguished in *Segerstrom v. Scott*, 16 Cal. App. 261, 116 Pac. 692, in absence of bill of exceptions or statement of case, where appeal is on judgment-roll alone, orders allowing or refusing amendments to pleadings are not part of record which appellate court may review.

72 Cal. 232-235, 1 Am. St. Rep. 48, 13 Pac. 621, **DORE v. DOUGHERTY**.

Judgment Lien. See note, 114 Am. St. Rep. 906.

72 Cal. 236-243, 13 Pac. 622, **MANLEY v. CUNNINGHAM**.

"Lands Suitable for Cultivation" means lands which by ordinary farming processes are fit for agricultural purposes.

Approved in *Robinson v. Eberhart*, 148 Cal. 499, 500, 83 Pac. 454, following rule; *Moran v. Bonyne*, 157 Cal. 299, 107 Pac. 314, holding it must be alleged in affidavit on application to purchase that land was unfit for cultivation to give right to purchase full section.

Under Section 3, Article XVII, Constitution, state land can only be sold to actual settler although application of nonsettler was filed before Constitution took effect.

Approved in *Messenger v. Kingsbury*, 158 Cal. 617, 112 Pac. 67, upholding right of state to withdraw from sale lands for which application to purchase was already filed; *Boggs v. Ganeard*, 148 Cal. 715, 84 Pac. 197, holding "suitable for cultivation" refers to condition of land at time of initiation of proceeding to purchase.

72 Cal. 248-251, 1 Am. St. Rep. 51, 13 Pac. 655, **SULLIVAN v. ROYER**.

Refusal to Allow Counsel to read law books or argue law to jury is not error.

Approved in *People v. Denomme* (Cal.), 56 Pac. 99, use of instructions in argument to jury within discretion of court.

Operation of Business Under Municipal permission does not authorize maintenance of nuisance.

Approved in *Judson v. L. A. Suburban Gas Co.*, 157 Cal. 173, 106 Pac. 583, upholding injunction against nuisance created by gasworks.

Effect of Legislative Authority upon liability for private nuisance. See note, 1 L. R. A. (n. s.) 111.

Presumption That Commission of Nuisance was not by statutory authority. See note, 70 L. R. A. 597.

Complaint to Abate Nuisance Sustained.

Approved in *Donahue v. Stockton Gas etc. Co.*, 6 Cal. App. 280, 92 Pac. 198, complaint held to state cause of action for abatement of nuisance.

Action to Abate Nuisance is Action in equity, and verdict of jury is merely advisory.

Reaffirmed in *Meek v. De Latour*, 2 Cal. App. 263, 83 Pac. 301.

Duty and Liability of Land Owners to adjoining proprietors. See note, 123 Am. St. Rep. 567.

Actions Against Two or More Persons creating or maintaining a nuisance. See note, 118 Am. St. Rep. 872.

Smoke and Soot as nuisances. See notes, 88 Am. St. Rep. 805; 106 Am. St. Rep. 429.

72 Cal. 251-254, 13 Pac. 689, **MOORE v. CAMPBELL.**

Objection That Finding is not Within Issues cannot be made for first time on appeal.

Approved in *Peck v. Noll*, 154 Cal. 354, 97 Pac. 866, following rule.

Distinguished in *Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 308, objection that findings do not support judgment appealed from may be made for first time on appeal.

72 Cal. 254-259, 1 Am. St. Rep. 55, 13 Pac. 659, **BARRY v. TERKILDSEN.**

Person Maintaining Trap-door in sidewalk without license is liable for injury of passer-by who falls in.

Approved in *Stockton Automobile Co. v. Confer*, 154 Cal. 405, 97 Pac. 883, holding superintendent of streets liable for injury to automobile caused by failure to post warning of obstruction in street undergoing repairs; *Bowley v. Mangrum & Otter*, 3 Cal. App. 233, 84 Pac. 998, holding property owner liable for injury to pedestrian caused by opening trap-door in sidewalk from beneath; *Wile v. Los Angeles Ice etc. Co.*, 2 Cal. App. 191, 83 Pac. 272, holding property owner liable for injury to pedestrian caused by projecting spike in sidewalk; *Merchants' Ice & Cold Storage Co. v. Bargholt*, 129 Ky. 72, 110 S. W. 368, holding company leaving cake of ice on sidewalk liable for injury to pedestrian falling over it; *Anderson v. Feutsch*, 31 Nev. 505, 103 Pac. 1014, party making excavation on sidewalk is liable for injury to pedestrian falling in; *Shippers' etc. Co. v. Davidson*, 35 Tex. Civ. App. 562, 80 S. W. 1035, company maintaining gangway across street without authority from city is liable for injury resulting to one using street; *Barker v. Ohio etc. R. R. Co.*, 51 W. Va. 426, 90 Am. St. Rep. 808, 41 S. E. 149, holding railroad liable for injury to passenger who unconsciously stepped back into hole on station platform.

Liability of Property Owner for accident caused by defective sidewalk in front of premises. See note, 106 Am. St. Rep. 365.

Liability of Property Owner in respect to coal holes in sidewalks. See note, 109 Am. St. Rep. 774.

Liability of Property Owners to persons injured by nonrepair of streets. See note, 115 Am. St. Rep. 994.

Excavations Under Highways. See note, 14 L. R. A. 398.

Liability of Municipal Corporations for injuries caused by defective streets. See note, 117 Am. St. Rep. 1064.

Liability for Acts of Independent Contractor where injuries result from nonperformance of absolute duties of employer. See note, 60 L. R. A. 124.

72 Cal. 259-264, 13 Pac. 687, HOPKINS v. WIARD.

Sale of Several Parcels of Land in one lot under foreclosure upheld.

Approved in *Bechtel v. Wier*, 152 Cal. 448, 93 Pac. 78, 15 L. R. A. (n. s.) 459, upholding sale en masse when no bids had been made for parcels offered separately.

Miscellaneous.—Cited in *Hopkins v. Wiard* (Cal.), 13 Pac. 689, companion case.

72 Cal. 264-267, 13 Pac. 661, STEWART v. SPAULDING.

Assignee of Plaintiff Pending Suit may be substituted as plaintiff, or he may prosecute suit in name of original plaintiff.

Approved in *Sykes v. Beck*, 12 N. D. 252, 96 N. W. 846, refusing to dismiss appeal on ground appellant assigned subject matter after judgment and before appeal was taken.

Interest on Foreign Judgment enforced in this state should be allowed according to law of foreign state.

Distinguished in *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa, 165, damages for malicious prosecution determined by *lex fori*.

Conflict of Laws as to Measure of damages. See notes, 91 Am. St. Rep. 735, 737; 56 L. R. A. 309.

When Statute of Limitations will Govern Action in another state or country. See note, 48 L. R. A. 640.

Applicability to Nonresidents of Provision suspending limitations until "return" of absent defendant. See note, 25 L. R. A. (n. s.) 25.

72 Cal. 267-270, 13 Pac. 685, GREEN v. CAROTTA.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 725.

72 Cal. 270-278, 13 Pac. 690, HEFFLON v. BOWERS.

Injunction Granted ex Parte cannot be set aside on showing by defendant matter complained of has been abated, unless notice is given to plaintiff of motion to dissolve.

Approved in *Thayer v. Bellamy*, 9 Idaho, 5, 71 Pac. 545, holding on such application plaintiff may present opposing affidavits.

72 Cal. 290-293, 13 Pac. 856, TYLER v. PRESLEY.

Writ of Error to Supreme Court of United States only operates as supersedeas when judgment against which writ is directed requires some process for its enforcement.

Approved in *Clute v. Superior Court*, 155 Cal. 18, 123 Am. St. Rep. 54, 99 Pac. 364, appeal in injunction suit held to operate as supersedeas when injunction granted was mandatory in effect though prohibitory in form.

Right of Disbarred or Suspended Attorney or unlicensed person to transact legal business for another. See note, 24 L. R. A. (n. s.) 756.

72 Cal. 293-297, 1 Am. St. Rep. 60, 13 Pac. 858, **PALMER v. HOWARD**.

Whether Contract is Executory Contract of sale is question of intention—contract herein held to pass title to vendee.

Cited in *Freed Furniture & Carpet Co. v. Sorensen*, 28 Utah, 429, 430, 107 Am. St. Rep. 731, 79 Pac. 567, 568, holding contract to be conditional sale; *Studebaker Bros. v. Maw*, 13 Wyo. 367, 110 Am. St. Rep. 1001, 80 Pac. 153, holding contract to be conditional sale, although vendee was bound to pay purchase price whether or not vendor chose to retake property on default.

What Constitutes a Transaction or Sale. See note, 94 Am. St. Rep. 235, 239.

Bona Fide Purchasers from Person to whom personal property is delivered under executory contract of sale get no valid claim to property.

Approved in *Liver v. Mills*, 155 Cal. 462, 101 Pac. 300, following rule; *Runge v. Wilson*, 7 Cal. App. 579, 95 Pac. 179, upholding sale of personal property of decedent by executrix without notice of bill of sale given by decedent, possession not having changed.

Mortgages of Personal Property to be valid against third persons must observe legal formalities.

Approved in *Hopper v. Keys*, 152 Cal. 494, 92 Pac. 1020, failure to record mortgage in county to which mortgaged property was removed avoids it as to creditors of mortgagor.

Retention of Title to Personalty until payment as characterizing sale as executory. See note, 5 L. R. A. (n. s.) 476.

Right of One Leaving Chattels in another's possession as against latter's vendee or creditors. See note, 25 L. R. A. (n. s.) 785.

72 Cal. 297-303, 13 Pac. 863, **CARROLL v. GIRARD FIRE INS. CO.**

Notice of Loss is Waived where insurer makes no objection to lack of notice but joins in proceedings to determine loss by arbitration.

Approved in *McCollough v. Home Ins. Co.*, 155 Cal. 663, 664, 102 Pac. 816, statements of adjuster held to constitute waiver of notice of loss; *Allen v. Phoenix Assur. Co.*, 12 Idaho, 663, 88 Pac. 247, 8 L. R. A. (n. s.) 903, notice and proof of loss held waived by refusal of agent to pay on other grounds.

Explained in *Winchester v. North British etc. Co.*, 160 Cal. 6, 7, 116 Pac. 65, fire policy requiring written notice of appointment of appraisers by either party and providing that loss shall be payable sixty days after proof of damage and award by appraisers when required, requires insurer desiring appraisal to serve written notice within sixty days after proof of loss.

Agreements to Arbitrate. See note, 15 L. R. A. 143.

Where Contract of Insurance requires submission to arbitration, offer to arbitrate is condition precedent to right to sue on policy.

Approved in *Lew v. Commercial etc. Ins. Co.*, 15 N. D. 364, 107 N. W. 61, *Graham v. German-American Ins. Co.*, 75 Ohio St. 401, 79 N. E. 932, 15 L. R. A. (n. s.) 1055, *Grady v. Home Fire & Marine Ins. Co.*, 27 R. I. 442, 63 Atl. 175, 4 L. R. A. (n. s.) 288, and *Southern Home*

Ins. Co. v. Faulkner, 57 Fla. 197, 131 Am. St. Rep. 1098, 49 So. 543, all following rule; **Bernhard v. Rochester German Ins. Co.**, 79 Conn. 396, 65 Atl. 137, insured may sue on policy when award failed without fault of either party; **Vernon Ins. Co. v. Maitlen**, 158 Ind. 399, 63 N. E. 757, failure of appraisers to agree held not to waive condition, but parties must select other appraisers.

Distinguished in **Williams v. Branning Mfg. Co.**, 154 N. C. 209, 70 S. E. 291, agreement to submit to arbitration liability and loss under contract not consummated by award is void, and does not bar action on contract.

Arbitration as Condition Precedent to action on insurance policy. See note, 15 L. R. A. (n. s.) 1063, 1065.

Effect of Failure of Arbitration under provision of insurance policy. See note, 4 L. R. A. (n. s.) 290.

In Action on Insurance Policy providing for submission of loss to arbitration complaint must allege award, or show it was prevented by insurer.

Approved in **Gray v. Reliable Ins. Co.**, 26 Okl. 597, 598, 110 Pac. 729, 730, complaint on policy held defective in not alleging giving notice of loss stipulated for in policy, or excusing failure to do so.

72 Cal. 307-313, 13 Pac. 866, **RAYNOB v. DREW**.

Deed Absolute on Face but Given as security for money is mortgage, and conveys no legal title to mortgagee.

Approved in **Halloran v. Holmes**, 13 N. D. 420, 101 N. W. 314, and **Murdock v. Clarke (Cal.)**, 24 Pac. 274, both following rule.

Collateral Oral Agreement as to Matter on which writing is silent may be shown by parol, when not inconsistent with terms of writing.

Approved in **Wells v. Hocking Valley Coal Co.**, 137 Iowa, 543, 114 N. W. 1083, construing written agreement together with contemporaneous oral agreement not inconsistent therewith relating to same matter.

Possession by Mortgagee Under Lease cannot be adverse until five years after last payment of rent.

Approved in **Wadleigh v. Phelps**, 149 Cal. 641, 87 Pac. 99, possession of mortgagee held not adverse to mortgagors.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 87, 92.

Mortgagor may Redeem from Mortgagee in possession at any time, unless mortgagee has held adversely for five years.

Distinguished in **Green v. Thornton**, 8 Cal. App. 106, 96 Pac. 385, prior to enactment of section 430, Code of Civil Procedure, right to redeem was barred when debt was barred; **Allen v. Allen (Cal.)**, 27 Pac. 32, time for redemption from mortgage is fixed by laws in force at time mortgage is given.

Statute of Frauds—Agreements not to be performed within a year. See note, 138 Am. St. Rep. 599.

72 Cal. 313-317, 14 Pac. 20, **TOBELMAN v. HILDEBRANDT**.

Order of Probate Court Settling Final Account cannot be collaterally attacked.

Approved in **In re Burton**, 5 Cof. Prob. 238, reaffirming rule.

Trustee's Account. See note, 94 Am. St. Rep. 45.

Decree of Probate Court Settling administrator's account may be attacked for fraud or mistake.

Approved in *Hanley v. Hanley*, 4 Cof. Prob. 479, upholding equity jurisdiction to set aside order for probate homestead procured to be set apart by fraud.

72 Cal. 317-321, 13 Pac. 869, ESTUDILLO v. MEYERSTEIN.

Verbal Agreement of Insolvent to Pay certain creditors in full on condition of their not opposing his discharge is void.

Approved in *Benicia Agricultural Works v. Estes* (Cal.), 32 Pac. 940, holding void note given in consideration of withdrawal of opposition to discharge in insolvency.

72 Cal. 321-322, 13 Pac. 872, BLAKEMAN v. PUGET SOUND IRON CO.

Purchaser at Execution Sale of Stocks with notice that execution debtor is not owner acquires no better title than latter possessed.

Approved in *National Bank of the Pacific v. Western Pac. Ry. Co.*, 157 Cal. 577, 580, 108 Pac. 678, 679, unregistered stock not subject to attachment in suit against transferrer.

Validity of Pledge or Other Transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers. See note, 67 L. R. A. 680.

72 Cal. 322-330, 14 Pac. 12, FURLONG v. COONEY.

After Title has Been Acquired by adverse possession, offer of adverse possessor to buy rights of holder of paper title does not admit such title to be good, or affect title by adverse possession.

Approved in *Rennert v. Shirk*, 163 Ind. 554, 72 N. E. 550, and *Miller v. Bensinger* (Cal.), 31 Pac. 578, both following rule.

72 Cal. 330-334, 14 Pac. 16, NOBLE v. DESMOND.

Liability of Ministerial Officers for nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 114.

72 Cal. 335-344, 13 Pac. 880, ESTATE OF MOORE.

Jury Trial in Probate Proceeding is not matter of right.

Approved in *Estate of Dolbeer*, 153 Cal. 657, 659, 96 Pac. 268, 269, no right to jury trial on a second contest of will after probate when jury trial was had on first contest before probate.

Court cannot Allow Claim of Administrator for money expended in erecting new buildings on estate, such money not being expended in care and management of estate.

Approved in *Estate of Hincheon*, 159 Cal. 752, 116 Pac. 50, executor not bound to pay for completion of building in course of construction, devised by decedent.

Administrator is not Chargeable with interest on loan of moneys of estate made by him which he fails to collect.

Distinguished in *Estate of Richmond*, 9 Cal. App. 409, 99 Pac. 557, holding administrator issuing new notes, and including interest as principal, in place of old notes, on his own authority, liable for accumulated interest on final accounting.

Allowance to Administrator for Services of bookkeeper. See note, 1 Cof. Prob. 107.

Allowance to Administrator for Traveling expenses of his attorney. See note, 1 Cof. Prob. 125.

Miscellaneous.—Cited in *Carter v. Waste*, 159 Cal. 26, 112 Pac. 728, appeal lies from proceeding for final distribution of estate of decedent wherein special issues of fact are framed; *In re Antoniolis' Estate*, 42 Mont. 223, 111 Pac. 1034, motion for new trial in probate proceeding does not lie in absence of formal pleadings; *Gwinn v. Melvin*, 9 Idaho, 209, 108 Am. St. Rep. 119, 72 Pac. 962, as to what special proceedings are civil actions.

72 Cal. 345-350, 13 Pac. 878, CRAVEN v. CENTRAL PACIFIC R. R. CO.

Remoteness of Evidentiary Fact goes to weight and not to admissibility of evidence.

Approved in *Brunger v. Pioneer Roll Paper Co.*, 6 Cal. App. 694, 92 Pac. 1044, following rule.

Instruction as to Contributory Negligence considered and, though erroneous, held to be harmless.

Approved in *Tobin v. Omnibus Cable Co. (Cal.)*, 34 Pac. 127, erroneous instruction as to contributory negligence rendered harmless by subsequent instructions.

Injuries in Getting on and Off railroad trains. See note, 21 L. R. A. 358.

72 Cal. 359-362, 13 Pac. 885, IN RE MOORE.

Disbarment or Suspension of Attorney for withholding client's money or property. See note, 19 L. R. A. (n. s.) 414.

72 Cal. 363-367, 14 Pac. 88, HECHT v. SLANEY.

Order Setting Aside Homestead is matter of public record and party seeking to establish trust in property set aside is chargeable with notice of order.

Approved in *Tracy v. Muir*, 151 Cal. 370, 121 Am. St. Rep. 117, 90 Pac. 834, party seeking to contest probate of will after lapse of statutory time held to have had notice of order from records; *Williamson v. Beardsley*, 137 Fed. 470, 69 C. C. A. 615, where alleged irregularities in conveyances by executor urged as ground to set them aside had been matters of record for many years, action to set aside is barred by laches.

Public Records as Notice to set statute running against action based on fraud. See note, 22 L. R. A. (n. s.) 208.

Limitations Run in Favor of Defendant chargeable as trustee of implied trust from date wrong complained of was done.

Approved in *Norton v. Bassett*, 154 Cal. 416, 129 Am. St. Rep. 162, 97 Pac. 896, repudiation of implied trust not necessary to start statute in trustee's favor; *De Leonis v. Hammel*, 1 Cal. App. 395, 82 Pac. 351, holding complaint showing constructive trust in legal title procured by fraud more than three years back, barred by limitations; *Burling v. Newlands (Cal.)*, 39 Pac. 52, holding cause of action for fraud against trustee not taken from limitations when slightest examination of public records would have revealed fraud; *Farneman v. Farneman*, 46 Ind. App. 457, 90 N. E. 776, applying rule to action for alienation of husband's affections.

72 Cal. 371-375, 14 Pac. 22, HEILBRON v. HEINLEN.

Possession to Sustain Trespass must be actual possession at time of alleged entry.

Approved in *Fisch v. Nice*, 12 Cal. App. 62, 106 Pac. 599, lawful possession to sustain trespass need only be peaceable or quiet possession as distinguished from tortious possession.

72 Cal. 376-379, 14 Pac. 24, HEILBRON v. HEINLEN.

Clerical Error in Description of Land in complaint may be corrected by amendment.

Approved in *Gensler v. Nicholas*, 151 Mich. 534, 115 N. W. 459, correcting erroneous description by amendment.

Distinguished in *Venable v. Burton*, 118 Ga. 159, 45 S. E. 30, refusing amendment setting up description of different land and praying correction of deed to meet description as setting up new cause of action.

Interlineations on Transcript and on margins are not part of record.

Reaffirmed in *Johnson v. State*, 84 Ark. 97, 104 S. W. 930.

72 Cal. 379-384, 14 Pac. 37, FRESNO CANAL ETC. CO. v. WARNER.

One Contracting With Apparent Corporation as such is estopped in suit on the contract to deny existence of corporation.

Approved in *Tutt v. Davis*, 13 Cal. App. 719, 110 Pac. 692, applying rule to partnership; *Tustin Fruit Assn. v. Earl Fruit Co. (Cal.)*, 53 Pac. 696, where contract sued on described plaintiff as corporation, no further proof of its incorporation was necessary.

Transactions in Name of Supposed but nonexistent corporation. See note, 94 Am. St. Rep. 596.

72 Cal. 384-387, 14 Pac. 96, EX PARTE MCCARTHY.

Information for Vagrancy. See note, 137 Am. St. Rep. 957, 958, 961.

72 Cal. 387-389, 14 Pac. 100, LASSEN COUNTY v. CONE.

Ordinance Imposing Tax on Sheep pastured in county held to be revenue and not license tax.

Approved in *Flanigan v. County of Sierra*, 196 U. S. 559, 25 Sup. Ct. 314, 49 L. Ed. 597, and *Placer County v. Whitney Estate Co.*, 2 Cal. App. 617, 84 Pac. 278, both following rule.

Test of Validity of Municipal Ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 49.

Constitutional Equality of Privileges, immunities and protection. See note, 14 L. R. A. 583.

72 Cal. 393-397, 14 Pac. 98, SCAMMON v. DENIO.

When Contract Provides Claims for extra work should be submitted to arbitration, suit cannot be brought for such work until claimant has made offer to arbitrate.

Approved in *Davisson v. East Whittier Land etc. Co.*, 153 Cal. 85, 96 Pac. 89, following rule.

Agreements to Arbitrate. See note, 15 L. R. A. 143.

72 Cal. 398-402, 14 Pac. 33, EX PARTE AMBROSE.

Judgment Should be Construed in connection with circumstances surrounding it.

Approved in *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 435, 114 Pac. 1030, judgment for interest at rate given in note construed

in connection with pleadings and held to give such rate only to entry of judgment, and legal interest thereafter.

Instance Where Court in Divorce Suit entered decree granting divorce but reserving all questions as to property and alimony for future decision.

Cited in *Lindquist v. Lindquist*, 148 Iowa, 262, 126 N. W. 1111, under Code, section 3180, court may, on motion, modify former decree with respect to custody of children where change in circumstances and conditions of parties authorize same.

72 Cal. 402-403, 14 Pac. 97, PEOPLE v. WATSON.

In Prosecution for Larceny, information alleging thing stolen was property of certain woman is sufficient to sustain conviction, though property was bought with money of her husband.

Approved in *State v. Rathbone*, 8 Idaho, 174, 67 Pac. 190, where indictment charged property taken as belonging to one person and evidence showed it to belong to him and another, variance is immaterial.

Whether Indictment Involving Felonious Taking may lay ownership in one in possession as agent or bailee. See note, 21 L. R. A. (n. s.) 314.

72 Cal. 404-442, 14 Pac. 71, LENT v. TILLSON.

Power to Determine Expediency of proposed public improvement rests with legislature or local authorities to whom such power is delegated.

Approved in *Wolff v. Denver*, 20 Colo. App. 138, 77 Pac. 365, legislature may confer power of special assessment upon municipalities, with right to determine what property, as regards location with respect to local improvements, shall be assessed.

Constitutional Right to Due Process of law will not be given such effect as will render impossible laws which are essential to safety of society.

Approved in *In re McCue*, 7 Cal. App. 766, 96 Pac. 111, upholding act providing for punishment of idle, lewd, or dissolute person, as vagrant; *United Real Estate etc. Co. v. Barnes*, 159 Cal. 248, 113 Pac. 169, act of March 6, 1889, empowering city council to set time for hearing objections to reports of commissioners in assessment proceedings held not to violate constitutional provision for due process of law; *Hodge v. Muscatine County*, 121 Iowa, 491, 104 Am. St. Rep. 304, 96 N. W. 971, 67 L. R. A. 624, upholding tax on buildings used in manufacture of cigarettes as not taking property without due process of law.

Necessity of Special Benefit to sustain assessments for local improvements. See note, 14 L. R. A. 755.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 111, 113, 115.

Miscellaneous.—Cited in *Robinson v. Linscott*, 12 Cal. App. 433, 107 Pac. 705, as to power of legislature in matters of taxation; *Sheehan v. Osborne (Cal.)*, 69 Pac. 843, referring historically to principal case.

72 Cal. 442-447, 14 Pac. 178, DEAN v. GRIMES.

Notice Issued December 7th to Creditors to meet January 6th following, held to be thirty days' notice.

Approved in *Petition of Los Angeles Trust Co.*, 158 Cal. 608, 112 Pac. 58, holding daily publication from July 27th to August 23d to be for four weeks; *Bank of Lemoore v. Fulgham*, 151 Cal. 238, 90 Pac. 937, holding notice published May 28th of sale on June 18th to give twenty-one days' notice; *Greenwood v. Hassett (Cal.)*, 61 Pac. 173, holding posting notice on eighth of month to be two days after posting done on sixth.

72 Cal. 448-449, 14 Pac. 177, GREENWADE v. DE CAMP.

Failure of Applicant to Purchase state lands to commence action to determine contest between himself and prior claimant within sixty days after order of reference does not deprive him of right to make second application.

Approved in *Ewbank v. Mikel*, 6 Cal. App. 142, 91 Pac. 673, holding failure to initiate contest in sixty days after order of reference to forfeit rights under application.

72 Cal. 459-462, 1 Am. St. Rep. 65, 14 Pac. 196, PEOPLE v. KRAKER.

Conviction on Testimony of accomplice. See note, 98 Am. St. Rep. 161, 174.

72 Cal. 462-475, 1 Am. St. Rep. 67, 14 Pac. 27, MILLER v. DUNN.

Words Having Technical and Definite meaning must be taken in sense in which they were understood when introduced into instrument.

Approved in *Lauritsen v. Seward*, 99 Minn. 323, 109 N. W. 408, term "jury trial," as used in Constitution, refers to jury trial as known at common law.

Term "Authorized by Law," as Used in Constitution, construed.

Distinguished in *Orange County v. Harris (Cal.)*, 32 Pac. 595, *arguendo*.

Judicial Ground for Interference with act of legislature must be plain and substantial.

Approved in *State v. Kelly*, 71 Kan. 814, 81 Pac. 451, 70 L. R. A. 450, holding void act appropriating money for "works of internal improvement."

72 Cal. 475-476, 14 Pac. 87, WHITE v. SUPERIOR COURT.

Writ of Prohibition. See note, 111 Am. St. Rep. 947.

72 Cal. 477-485, 14 Pac. 198, FITZELL v. LEAKY.

Declaration of Mortgage by Wife is good as against prior unrecorded mortgage executed by husband.

Distinguished in *Smith v. Baugham*, 156 Cal. 367, 104 Pac. 693, homestead declared by wife on landlord's separate property with knowledge of option for its sale is subject to such option.

Owner of Easement on Land has no right of entry, nor has he any right to possess land as such.

Approved in *San Francisco v. Grote (Cal.)*, 47 Pac. 940, city cannot maintain ejectment for recovery of possession of street dedicated by user, without showing ownership in fee.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 188, 207.

72 Cal. 487-490, 14 Pac. 35, STUTTMEISTER v. SUPERIOR COURT.

Demand of Attorney for Services Rendered administrator allowed by administrator is a "claim" against estate within meaning of section 963, Code of Civil Procedure, and order allowing it is appealable.

Approved in *Cross v. Superior Court*, 2 Cal. App. 344, 83 Pac. 816, order directing payment of collateral inheritance tax is appealable.

Distinguished in *In re Williams' Estate* (Cal.), 32 Pac. 242, money paid by bidder at sale of property of estate, sale to whom was confirmed and afterward reversed, is not "claim against estate."

72 Cal. 490-494, 14 Pac. 202, **PEOPLE v. BRADY.**

When Juror is Excused for Sickness after jury is sworn, and before taking evidence, court may refuse to discharge others, and may impanel another juror.

Approved in *People v. Weber*, 149 Cal. 336, 86 Pac. 675, applying rule where peremptories were not exhausted by either side; *State v. Ronk*, 91 Minn. 427, 98 N. W. 337, holding consent of defendant to selection of new juror from new venire after one had been excused for illness to waive irregularity in proceeding.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 643, 644; 56 L. R. A. 429.

When Statute Commences to Run against action for money paid on judgment subsequently reversed. See note, 25 L. R. A. (n. s.) 38.

72 Cal. 494-498, 14 Pac. 102, **DAVIS v. BAKER.**

"Occupant" of Property Means One who has actual use or possession of thing.

Approved in *McCauley v. Town of McCauleyville*, 111 Minn. 425, 127 N. W. 191, owner in actual possession and control of land, though residing in village near by, is occupant thereof requiring personal service of notice of hearing of petition for road over land.

72 Cal. 498-510, 1 Am. St. Rep. 75, 14 Pac. 190, **COBURN v. GOODALL.**

Interest cannot be Allowed on Damages before judgment when unliquidated and uncertain.

Approved in *Hooper v. Patterson* (Cal.), 32 Pac. 515, following rule.

Distinguished in *Courteney v. Standard Box Co.*, 16 Cal. App. 613, 117 Pac. 784, allowing interest on amount awarded for goods in action on contract for price of goods as fixed by contract.

When Damages Recoverable are Capable of being made certain by calculation, interest at legal rate is allowable thereon from date when right to damages vests.

Approved in *Erickson v. Stockton etc. R. R. Co.*, 148 Cal. 207, 82 Pac. 961, interest is allowable on balance struck on account from day amount was ascertained; *Krasilnikoff v. Dundon*, 8 Cal. App. 412, 97 Pac. 174, interest on unliquidated damages not recoverable till judgment.

72 Cal. 510-512, 14 Pac. 104, **LEZINSKY v. SUPERIOR COURT.**

Refusal to Obey Subpoena issued by notary public before whom deposition is to be taken is not punishable as contempt.

Overruled in *O'Neill v. Thomas Day Co.*, 152 Cal. 362, 92 Pac. 858, refusal to answer on taking deposition before notary punishable as contempt; *United States v. Pratt*, 3 Alaska, 404, 418, court in which original cause is pending can punish witness for refusal to obey subpoena of notary to attend taking of deposition.

Notary's Power to Punish for contempt. See note, 36 L. R. A. 822.

72 Cal. 517-520, 14 Pac. 137, MERRIAM v. YUBA COUNTY.

Injunction Does not Lie at Suit of taxpayer to restrain supervisors from examining, auditing or ordering paid certain claims on ground they are not valid claims against county.

Approved in *Winn v. Shaw* (Cal.), 25 Pac. 244, writ does not lie to restrain auditor from issuing warrant for alleged illegal claim allowed by supervisors.

If Auditor Draws Warrant for Illegal Claim, it is no excuse for treasurer in paying it.

Reaffirmed in *Kelley v. Sersanous* (Cal.), 46 Pac. 300.

72 Cal. 520-523, 14 Pac. 133, HEDGES v. DAM.

Any Pleading may be Amended once by party as matter of course before answer or demurrer filed.

Approved in *Dunbar v. Griffiths*, 14 Idaho, 124, 93 Pac. 655, time to file amended pleading does not extend beyond time allowed to file answer or demurrer, where no such pleading has in fact been filed.

Complaint Against Supervisors to Recover Amount of claims alleged illegal and paid from county treasury must aver nature of claims in order to determine whether acts complained of are illegal.

Approved in *People v. Lanterman*, 9 Cal. App. 681, 100 Pac. 722, holding indictment against coroner for presenting fraudulent claim against county insufficient in absence of allegation of fact showing authority of supervisors to allow claim.

Taxpayer can Only Bring Suit against board of supervisors to recover amount of illegal claims allowed upon showing refusal or neglect of district attorney to bring suit.

Approved in *Merriman v. Southern Paving etc. Co.*, 142 N. C. 548, 55 S. E. 368, 8 L. R. A. (n. s.) 574, sustaining demurrer to complaint in such action brought by taxpayers which failed to show exhaustion of all means to have city bring suit.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 619.

72 Cal. 523-527, 14 Pac. 138, BROWN v. CENTRAL PACIFIC R. R. CO.

Where Death of Conductor was Due to his own contributory negligence together with negligence of brakeman, railroad is not liable in damages.

Approved in *Hardesty v. Lary Lumber Co.*, 34 Mont. 164, 86 Pac. 33, holding master liable for injury of employee in lumber-yard caused by fall of pile of lumber which had been carelessly piled.

As to When Conductor Deemed a Coservant of other railway employees. See note, 46 L. R. A. 338, 361.

72 Cal. 528-534, 14 Pac. 182, THOMPSON v. SPRAY.

Location of Excessive Mining Claim is good for as much as party is entitled to hold, and void for excess only.

Approved in *McElligott v. Krogh*, 151 Cal. 133, 90 Pac. 826, and *McPherson v. Julius*, 17 S. D. 123, 95 N. W. 434, both following rule; *Zimmerman v. Funchion*, 161 Fed. 860, 89 C. C. A. 53, holding owner in possession working claim could determine what part of claim should be considered excess.

Distinguished in *Harper v. Hill*, 159 Cal. 258, 113 Pac. 166, where location is not of excessive width, fact that one side line proves to be more than three hundred feet from apex of lode as afterward determined does not affect right of locator to such excess.

Recording Notice of Location of Mining Claim before posting does not render it invalid.

Approved in *Green v. Gavin*, 11 Cal. App. 508, 105 Pac. 762, following rule; *Creede etc. Milling Co. v. Uinta Tunnel etc. Co.*, 196 U. S. 351, 25 Sup. Ct. 266, 49 L. Ed. 501, holding as between government and locator, discovery of mineral in lode need not be made before taking steps required to perfect location.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 815, 817, 819.

Complaint in Action to Quiet Title to mining claim which does not show on face it is brought under section 2326, United States Revised Statutes, is not defective for failing to allege plaintiff to be citizen.

Distinguished in *Allyn v. Schultz*, 5 Ariz. 159, 48 Pac. 962, complaint in action under Revised Statutes, section 2326, brought by adverse claimants of mining claim, held defective in not alleging citizenship of plaintiff.

In Ordinary Actions in Relation to mining claims, general allegation that plaintiff is owner is sufficient.

Approved in *Bryan v. Tormey* (Cal.), 21 Pac. 726, where in action to quiet title complaint alleges plaintiff to be owner in fee, finding that he is such owner is sufficient to show fact.

Cotenants in Mines. See note, 91 Am. St. Rep. 855, 861.

Right of Cotenant, Agent, or Other Fiduciary to relocate mining claim for own benefit. See note, 50 L. R. A. 185.

72 Cal. 535-540, 14 Pac. 180, 359, **HEGARD v. CALIFORNIA INS. CO.**

Objection That Proceedings in Lower Court for new trial were not had in time allowed by law will not be considered on appeal where no such objection was raised either on settlement of bill of exceptions on which motion was based, or on hearing to quash motion.

Approved in *Steve v. Bonners Ferry etc. Co.*, 13 Idaho, 390, 92 Pac. 364, following rule.

72 Cal. 540-544, 14 Pac. 516, **LINDSAY v. STEWART.**

Plaintiff can Plead as Defensive Matter items included in pending action in justice's court in which parties are reversed.

Approved in *Davis v. Rawhide Gold Min. Co.*, 15 Cal. App. 117, 113 Pac. 902, holding countervailing debt sued upon in federal court could be pleaded as setoff in action in state court.

72 Cal. 544-548, 14 Pac. 204, **WISE v. WILLIAMS.**

Failure to Allege Partnership of defendants in caption of complaint is not indispensable if body thereof shows such relation.

Approved in *Nisbet v. Clio Min. Co.*, 2 Cal. App. 443, 83 Pac. 1080, holding mistake in name of defendant corporation could be corrected by amendment when complaint showed what corporation was intended.

Unless It Clearly Appears on Face of complaint that cause of action is barred, defense of limitations can only be raised by answer.

Approved in *Chemung Min. Co. v. Hanley*, 9 Idaho, 794, 77 Pac. 228, following rule; *Hewell v. Hugin*, 3 Cal. App. 252, 84 Pac. 1004, 1005, holding amendment to answer at trial to plead limitations properly refused.

Miscellaneous—Cited in *Wise v. Williams* (Cal.), 42 Pac. 573, on another appeal.

72 Cal. 549-552, 14 Pac. 513, ESTATE OF SULLENBERGER.

Claim Against Estate Which has been allowed cannot be substantially changed after expiration of time for filing claims.

Reaffirmed in *Hughes v. Potts*, 39 Tex. Civ. App. 184, 87 S. W. 710.

Statement of Claims Against Estates of decedents. See notes, 13 Am. St. Rep. 324; 5 Cal. Prob. 310.

Ex Parte Order may be Set Aside without notice.

Approved in *Glass v. Glass*, 4 Cal. App. 609, 88 Pac. 735, holding court could, without notice, vacate ex parte order allowing wife attorney's fees when procured by imposition; *Estate of Coryell*, 16 Idaho, 213, 101 Pac. 727, ex parte order allowing claim against estate may be contested by heir or devisee.

Person to Whom Acknowledgment or new promise must be made to toll statute or remove bar of limitations. See note, 25 L. R. A. (n. s.) 806.

72 Cal. 553-554, 14 Pac. 304, WINTERS v. PEARSON.

Affidavit for Attachment is Rendered fatally defective by alternative statement that obligation is not secured or if secured security has become valueless.

Reaffirmed in *O'Connell v. Walker*, 12 Cal. App. 697, 108 Pac. 669.

Proceedings to Dissolve Attachment. See note, 123 Am. St. Rep. 1049.

Affidavit for Attachment cannot be Amended.

Approved in *Pajaro Valley Bank v. Scurich*, 7 Cal. App. 734, 95 Pac. 912, fatally defective affidavit cannot be amended.

Distinguished in *Fairbanks etc. Co. v. Getchell*, 13 Cal. App. 460, 463, 110 Pac. 331, 333, under amendment of 1909 to section 558, Code of Civil Procedure, irregular affidavit may be amended.

Right to Amend Affidavit for attachment. See note, 31 L. R. A. 425.

72 Cal. 555-556, 14 Pac. 206, GASSEN v. BOWER.

Error not Affecting Substantial Rights of parties will be disregarded.

Approved in *Butler v. Delafield*, 1 Cal. App. 371, 81 Pac. 261, *Yordi v. Yordi*, 6 Cal. App. 32, 91 Pac. 353, *Preston v. Central Cal. etc. Irr. Co.*, 11 Cal. App. 198, 104 Pac. 465, and *Huffner v. Lawday*, 153 Cal. 89, 94 Pac. 425, all holding overruling demurrer on ground of uncertainty not ground for reversal when defendants were not misled.

72 Cal. 556-562, 1 Am. St. Rep. 84, 14 Pac. 306, CONNOR v. STANLEY.

Belief in Spiritualism as Evidence of insanity. See note, 2 Cal. Prob. 31.

72 Cal. 562-565, 1 Am. St. Rep. 89, 14 Pac. 308, ALLISON v. THOMAS.

When Court has Acquired Jurisdiction of defendant, defective return of summons properly served may be amended after default.

Approved in *Call v. Rocky Mt. Bell Tel. Co.*, 16 Idaho, 556, 133 Am. St. Rep. 135, 102 Pac. 147, following rule; *Jones v. Gunn*, 149 Cal. 693, 87 Pac. 579, amending defective return of proper service after judgment; *Nisbet v. Clio Min. Co.*, 2 Cal. App. 441, 83 Pac. 1080, mistake in name of corporation may be corrected in amended pleading.

Return of Service of Summons. See note, 137 Am. St. Rep. 680.

Service of Summons. See note, 133 Am. St. Rep. 139.

Nature and Elements of quitclaim deeds. See note, 105 Am. St. Rep. 858.

Effect of Quitclaim in Otherwise perfect record title. See note, 29 L. R. A. 34.

Proceedings Against Persons by Less or other than full Christian names. See note, 132 Am. St. Rep. 566.

Middle Initial as Part of name. See note, 124 Am. St. Rep. 623.

72 Cal. 565-568, 14 Pac. 305, HITCHCOCK v. McELRATH.

Measure of Damages for Conversion of stock which has no market value is proportionate share of property owned by corporation at time of conversion.

Approved in *Industrial & General Trust v. Tod*, 180 N. Y. 232, 73 N. E. 12, value of bonds without market value determined from value of property on which they were first lien.

72 Cal. 568-571, 14 Pac. 514, MONROE v. FOHL.

Where Mortgage Provides for Specified counsel fees on foreclosure, court cannot make greater allowance.

Approved in *Peckham v. Fox*, 1 Cal. App. 309, 82 Pac. 92, upholding statute allowing attorney's fees on foreclosure of mechanic's lien; *Hewett v. Dean* (Cal.), 25 Pac. 756, where note provided for five per cent counsel fee and mortgage securing it for reasonable fee, fee allowed on foreclosure cannot exceed amount called for in note.

Distinguished in *Hildreth v. Williams* (Cal.), 33 Pac. 1113, allowing reasonable sum as fees when note stipulated for fees but did not fix amount.

In Action on Note by Payee, answer admitting execution and delivery but denying plaintiff is holder raises no issue.

Approved in *Berry v. Barton*, 12 Okl. 246, 71 Pac. 1082, 66 L. R. A. 513, following rule; dissenting opinion in *McGuffin v. Coyle & Guss*, 16 Okl. 702, 86 Pac. 968, 6 L. R. A. (n. s.) 524, majority holding note void as against public policy.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 550.

72 Cal. 572-576, 14 Pac. 207, BAUGHMAN v. SUPERIOR COURT.

Prohibition will not Issue to Restrain superior court from proceeding in matter alleged to be in excess of jurisdiction unless its attention has been called to alleged excess.

Approved in *Burge v. Justice's Court*, 11 Cal. App. 215, 104 Pac. 582, following rule.

Writ of Prohibition. See note, 111 Am. St. Rep. 965.

Trial Court may Hear Motion to discharge receiver appointed for purpose ancillary to suit although appeal has been taken from final judgment to supreme court.

Approved in *Nail v. Superior Court*, 11 Cal. App. 30, 103 Pac. 903, superior court cannot review action of justice's court on attachment upon appeal from its judgment.

72 Cal. 577-578, 14 Pac. 369, ESTATE OF ROSE.

Appeal from Probate Order cannot be Taken before order is entered in minute-book of court.

Reaffirmed in *Estate of Dunphy*, 148 Cal. 3, 109 Pac. 628.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 627.

72 Cal. 582-585, 14 Pac. 359, PEOPLE v. ECKMAN.

Instruction is Proper That "to Convict upon circumstantial evidence it should be such as to produce nearly same degree of certainty as that which arises from direct testimony."

Approved in *People v. Taggart*, 1 Cal. App. 425, 82 Pac. 397, instruction as to effect of circumstantial evidence considered and criticised, but held not to warrant reversal when evidence of guilt was uncontradicted and satisfactory; *People v. Dole* (Cal.), 51 Pac. 946, approving instruction on circumstantial evidence.

Circumstantial Evidence. See note, 97 Am. St. Rep. 776.

Evidence of Good Character to create doubt of guilt. See note, 103 Am. St. Rep. 896.

Evidence and Instructions as to Character of accused. See note, 20 L. R. A. 613.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 735.

72 Cal. 585-591, 18 Pac. 82, RAYNOR v. MINTZER.

Cause of Action Founded on Tort arises when wrongful act, causing damage, is done, and limitations then begin to run though damages may not all have been sustained at that time.

Approved in dissenting opinion in *Gillette v. Tucker*, 67 Ohio St. 136, 93 Am. St. Rep. 639, 65 N. E. 873, majority holding where physician left sponge in abdomen of patient during operation limitation did not begin to run until his treatment of patient ended, as against cause of action for negligence.

Operation of Statute of Limitations where cause of action for nominal damages subsequently ripens into right to actual damages. See note, 126 Am. St. Rep. 952.

72 Cal. 591-598, 15 Pac. 769, KEARNEY v. KEARNEY.

Proceedings in Probate for Settlement of estate of deceased are in nature of proceedings in rem, and judgments upon parties interested without notice to them.

Approved in *Hanley v. Hanley*, 4 Caf. Prob. 480, 484, reaffirming rule; *Estate of Renton*, 3 Caf. Prob. 122, will which has been proved in another state where probate has not yet become final is subject to contest when offered for probate here as a domestic will; *Barrette v. Whitney*, 36 Utah, 581, 106 Pac. 524, lack of notice in probate pro-

ceeding cannot be ground for collateral attack on judgment; *Hanley v. Hanley*, 4 Cof. Prob. 482, *arguendo*.

In Probate Proceedings, if No Homestead has been selected during marriage, homestead not exceeding five thousand dollars in value may be set apart for widow though there are no minor children.

Approved in *Estate of Hessler*, 2 Cof. Prob. 359, allowing probate homestead of over five thousand dollars in value to widow when there are no minor children. See note, 1 Cof. Prob. 219.

Rights of Children in Homestead of parent. See note, 56 L. R. A. 52.

72 Cal. 598-609, 14 Pac. 379, ALHAMBRA ADDITION WATER CO. v. RICHARDSON.

In Action to Maintain Riparian Right, defense of prescriptive right of diversion is sufficiently pleaded by setting up code section under which right was acquired.

Reaffirmed in *Lillis v. People's Ditch Co. (Cal.)*, 29 Pac. 781, 783.

Answers to Special Interrogatories submitted to jury should be read together and construed to avoid contradiction if possible.

Approved in *New York etc. Ry. Co. v. Hamlin*, 170 Cal. 31, 83 N. E. 346, holding answers not to be in conflict; *Fishbaugh v. Spunaugle*, 118 Iowa, 345, 92 N. W. 61, holding inconsistency between special findings not fatal to general verdict.

What Special Verdict must Contain. See note, 24 L. R. A. (n. s.) 26, 48, 70, 71.

Findings of Probative Facts are sufficient if ultimate fact results therefrom.

Approved in *O'Neill v. Quarnstrom*, 6 Cal. App. 471, 92 Pac. 392, following rule; *Antonian v. Southern Pacific Co.*, 9 Cal. App. 731, 100 Pac. 883, special findings by jury in personal injury suit held reconcilable with general verdict; *Rogers v. Overracker*, 4 Cal. App. 340, 87 Pac. 1110, judgment reversed when findings failed to determine extent of superior water right; *Later v. Haywood*, 14 Idaho, 53, 93 Pac. 377, reversing judgment for failure to find on all material issues.

Right to Use of Water Held Acquired by adverse user, when only part of flow of stream was taken.

Approved in *Wutchumna Water Co. v. Ragle*, 148 Cal. 764, 84 Pac. 164, and *Hubbs etc. Ditch Co. v. Pioneer Water Co.*, 148 Cal. 417, 83 Pac. 257, both following rule; *Robinson v. Thornton (Cal.)*, 31 Pac. 937, adverse possession creates title but does not transfer title of disseisor to disseisee.

Objection to Form of Special Verdict not taken before receipt and recordation of verdict will not be considered on appeal.

Approved in *Napa Valley Pkg. Co. v. San Francisco Relief etc. Funds*, 16 Cal. App. 470, 118 Pac. 472, reaffirming rule.

Where Evidence is Conflicting, Findings will not be set aside on ground that they are not supported by evidence.

Approved in *Jules Levy & Bro. v. Mautz*, 16 Cal. App. 669, 117 Pac. 937, reaffirming rule.

Liability of Water Companies. See note, 81 Am. St. Rep. 495.

Miscellaneous.—Cited in *Alhambra Addition Water Co. v. Richardson*, 95 Cal. 491, 30 Pac. 577, referring historically to principal case.

72 Cal. 609-623, 14 Pac. 566, **PEOPLE v. KERNAGHAN.**

Instruction as to Reasonable Doubt given in murder trial upheld.

Reaffirmed in *People v. Del Cerro*, 9 Cal. App. 773, 100 Pac. 891.

Emotional Insanity Beginning on Eve of criminal act and leaving off when act is consummated cannot be offered as defense to crime.

Reaffirmed in *People v. Trebilcox*, 149 Cal. 308, 86 Pac. 684.

In Murder in First Degree, Slayer is presumed to be actuated by intent which may not exist, while in manslaughter, slayer is not presumed to be actuated by intent to kill, though such intent may, in fact, exist.

Approved in *People v. Jones*, 160 Cal. 371, 117 Pac. 182, discussing burden of proof of showing circumstances in mitigation, justification or excuse for killing.

72 Cal. 623-630, 14 Pac. 310, **PEOPLE v. LEE SARE BO.**

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 663; 56 L. R. A. 382, 411, 432.

Burden and Measure of Proof of Alibi. See note, 41 L. R. A. 530, 532.

What Constitutes Reasonable Doubt in criminal cases. See note, 17 L. R. A. 705.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 73 CALIFORNIA.

73 Cal. 3-6, 2 Am. St. Rep. 772, 14 Pac. 366, LUCO v. BROWN.

Injunction Does not Lie to Restrain execution of justice's default judgment void on face.

Approved in *Luco v. Bushyhead* (Cal.), 14 Pac. 368, following rule.

Injunctions Against Execution Sales of other proceedings under final process. See note, 30 L. R. A. 135.

Motion to Set Aside Execution and not Injunction is remedy when justice's court judgment is void on face.

Disapproved in *Carr v. Pennsylvania R. R. Co.*, 108 Mo. App. 391, 83 S. W. 982, justice cannot take cognizance of motion to quash execution.

Injunctions Against Judgments for Want of jurisdiction or invalidity. See note, 31 L. R. A. 201, 204, 209.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 328.

73 Cal. 7-9, 14 Pac. 373, PEOPLE v. MONTEITH.

Under Information for Stealing Horses, evidence of theft of geldings does not constitute variance.

Approved in *State v. Matejousky*, 22 S. D. 37, 115 N. W. 99, following rule; *State v. Collett*, 9 Idaho, 615, 75 Pac. 273, term "horse" sufficiently describes property alleged to have been stolen.

Nonexpert Witness may Testify as to apparent condition of defendant as to sobriety at time of offense.

Approved in *Palmer v. Schurz*, 22 S. D. 289, 117 N. W. 153, following rule; *People v. Wong Loung*, 159 Cal. 533, 114 Pac. 835, police officers may describe such phenomena as paleness, excitement, intoxication.

Opinion Evidence by Nonexperts as to intoxication. See note, 11 L. R. A. (n. s.) 639.

73 Cal. 13-17, 14 Pac. 604, WARD v. MATTHEWS.

Subsequent Oral Agreement not within statute of frauds, modifying written contract, is valid.

Approved in *Stamey v. Hemple*, 173 Fed. 63, 97 C. C. A. 379, upholding subsequent oral agreement extending time of written contract of sale of mining claims.

73 Cal. 21-25, 14 Pac. 375, DOE v. TYLER.

Location of Mining Claim, Otherwise Sufficient, not rendered invalid by fact that marks of its boundary are by mistake placed upon adjoining claims.

Approved in *McElligott v. Krogh*, 151 Cal. 131, 90 Pac. 825, following rule; *Green v. Gavin*, 10 Cal. App. 334, 101 Pac. 932, upholding sufficiency of notice of location of mining claim; *Upton v. Santa Rita*, 14 N. M. 130, 89 Pac. 286, location of mining claim, otherwise sufficient, not rendered invalid by reason of fact that location notice is posted, by mistake, on adjoining claim.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 854.

73 Cal. 26-28, 14 Pac. 378, STEPHENS v. DOE.

Foreman of a Mine and Miner, employed to work under his directions, are fellow-servants.

Approved in *Squilache v. Tidewater Coal & Coke Co.*, 64 W. Va. 345, 62 S. E. 450, following rule.

Master not Liable for Injuries to employee through negligence of fellow-servant, unless he failed to use ordinary care in selection of fellow-servant.

Approved in *Hardesty v. Largy Lumber Co.*, 34 Mont. 164, 86 Pac. 33, holding master liable for injury caused by falling of lumber negligently piled by fellow-servant.

Duty of Mine Owners to Prevent injury to employees. See note, 87 Am. St. Rep. 561, 576.

Duty of Master With Respect to employment of his servants. See note, 48 L. R. A. 370.

Liability of Master for Injuries to servant by incompetency of fellow-servant. See note, 25 L. R. A. 713.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 534, 607.

73 Cal. 29-42, 11 Pac. 602, 14 Pac. 610, GREEN v. STATE.

Where No Statutory or Constitutional Provision fixing different liability exists, state's responsibility determined by same rule as governs liability of private litigants.

Approved in *Hoagland v. State (Cal.)*, 22 Pac. 143, *Todhunter v. State (Cal.)*, 14 Pac. 615, and *Todhunter v. State (Cal.)*, 11 Pac. 604, all following rule; *State v. Campbell*, 3 Cal. App. 605, 86 Pac. 842, unless defendant consents to trial elsewhere, suit by state to recover money paid superintendent of asylum must be brought in county in which defendant resides.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 37, 66.

Miscellaneous.—Cited in dissenting opinion in *Thomason v. Ashworth*, 73 Cal. 81, 14 Pac. 619, as illustrating rule of stare decisis.

73 Cal. 43-51, 14 Pac. 385, CADWALADER v. NASH.

Deed to Land Sold at Execution sale describing property conveyed by reference to nonofficial map, to be operative, must clearly identify particular map referred to.

Approved in *Donnelly v. Tregaskis*, 154 Cal. 264, 97 Pac. 423, map referred to in describing property must be produced and identified or

description must fail; *Baird v. Monroe*, 150 Cal. 573, 89 Pac. 357, holding insufficient description in assessment in connection with map describing property sufficient to identify property.

Deed is Void for Uncertainty when on face it contains two inconsistent descriptions, either of which would identify different piece of property from that described by other description.

Approved in *Stough v. Reeves*, 42 Colo. 439, 95 Pac. 960, description of land in tax proceeding as portion of larger tract by number and block, without reference to map, not sufficient to identify land assessed; dissenting opinion in *Hall v. Bartlett*, 158 Cal. 645, 112 Pac. 179, majority holding description of property sold under execution not uncertain.

Distinguished in *Hall v. Bartlett*, 158 Cal. 642, 112 Pac. 177, upholding certainty of description of property sold under execution.

73 Cal. 54-58, 14 Pac. 560, HOGUE v. FANNING.

Judgment in Replevin Decreeing that plaintiff recover possession of property described in complaint not void for uncertainty if complaint specifically describes property sued for.

Approved in *Lee Chu v. Noar*, 14 Haw. 649, upholding decree of sale in partition suit which described property as "lands described in plaintiff's petition."

Mandamus to Compel Inferior Court to enforce its judgment or decree. See note, 24 L. R. A. (n. s.) 887.

73 Cal. 58-61, 14 Pac. 390, WOOSTER v. NEVILLS.

Demand as Condition of Action to recover money collected by agent. See note, 28 L. R. A. (n. s.) 631.

73 Cal. 61-68, 14 Pac. 361, TUBBS v. WILHOIT.

Swamp Land Act of 1850 is Present grant to state of all overflow lands then belonging to United States situated within state.

Approved in *Foss v. Johnstone*, 158 Cal. 130, 110 Pac. 299, land within meander lines constituting pond passed to California under swamp land act of 1850.

73 Cal. 73-93, 14 Pac. 615, THOMASON v. ASHWORTH.

Street Improvement Act of 1883 was repealed by Vrooman Act of 1885.

Reaffirmed in *Millsap v. Balfour*, 154 Cal. 304, 97 Pac. 668.

Legislature has Power to Pass general laws affecting charter of municipality without its consent.

Distinguished in *Boise City Nat. Bank v. Boise City*, 15 Idaho, 802, 100 Pac. 96, street improvement act of 1905 not applicable to cities incorporated under special charter.

73 Cal. 93-95, 15 Pac. 57, RANKIN v. CENTRAL PACIFIC R. R. CO.

Verdict Against One of Several joint tort-feasors who answer separately and silent as to others will be set aside at instance of plaintiff.

Approved in *McMahon v. Hetch-Hetchy etc. Ry. Co.*, 2 Cal. App. 403, 84 Pac. 351, where verdict is against one defendant and no verdict as to other defendant, there is mistrial.

Distinguished in *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 156, 157, 86 Pac. 180, where verdict was against two tort-feasors, granting of new trial did not vacate verdict and judgment as to other.

73 Cal. 96-97, 15 Pac. 57, RANKIN v. CENTRAL PACIFIC R. R. CO.

As to Party not Aggrieved by order granting new trial, appeal must be dismissed.

Distinguished in *In re Heaton's Estate* (Cal.), 73 Pac. 186, holding on appeal by special administrator from order setting aside account and requiring him to pay over balances, determination that he was not aggrieved would be determination of merits of appeal.

73 Cal. 97-98, 14 Pac. 393, EX PARTE WILSON.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 184.

Contempt Proceedings to Compel Payment of alimony. See note, 24 L. R. A. 439.

73 Cal. 99-104, 14 Pac. 394, WILLIAMS v. WILLIAMS.

Clear and Distinct Bequest cannot be Affected by other words in will not equally clear and distinct.

Reaffirmed in *Estate of Goetz*, 13 Cal. App. 270, 109 Pac. 106.

Property of Decedent Vests immediately upon his death either in his heirs or in devisees and legatees.

Approved in *Estate of Campbell*, 149 Cal. 717, 87 Pac. 575, will making no trust devise and limiting power of executrix to sell for fixed period, which may extend beyond lives in being, does not suspend power of alienation of devisees; *Estate of O'Connor*, 2 Cal. App. 475, 84 Pac. 319, vested interest created in testamentary trustee at death of testator; *Estate of Clancy*, 3 Cal. Prob. 351, *arguendo*.

When Estate Vests. See note, 4 Cal. Prob. 449, 450.

Jurisdiction of Equity to Construe Will. See note, 129 Am. St. Rep. 80.

Miscellaneous.—Cited in *Estate of Spreckels*, 5 Cal. Prob. 369, to point that Civil Code, section 715, applies to trusts in personalty.

73 Cal. 105-106, 14 Pac. 393, WHITE v. WHITE.

In Action for Divorce, Order Directing husband to pay costs, alimony, and counsel fees, will not be interfered with on appeal unless court grossly abused discretion.

Reaffirmed in *Stewart v. Stewart*, 156 Cal. 655, 105 Pac. 957.

Miscellaneous.—Cited in *White v. White* (Cal.), 33 Pac. 400, on another appeal.

73 Cal. 106-109, 14 Pac. 397, VALENSIN v. VALENSIN.

Expert Testimony of Physician Based on hypothetical question is not within rule as to privileged communications.

Approved in *Crago v. Cedar Rapids*, 123 Iowa, 50, 98 N. W. 355, sustaining hypothetical question as to cause of injury to person whom physician attended.

In Action for Divorce, Question whether false or malicious charges made by parties against each other would be less apt to inflict grievous mental anguish is for court to determine in view of all facts.

Approved in *McDonald v. McDonald*, 155 Cal. 673, 102 Pac. 931, 25 L. R. A. (n. s.) 45, fact that parties are separated is relevant only in determining question whether false and malicious charges made by one spouse against other inflicted grievous mental suffering.

73 Cal. 109-120, 14 Pac. 401, GREGORY v. PERSHBAKER.

Discovery of Mineral Within Placer Mining claim before location is made is not essential to validity of location.

Overruled in New England etc. *Oil Co. v. Congdon*, 152 Cal. 213, 92 Pac. 181, discovery of mineral within limits of mining claim is essential to validity of placer and lode locations.

Discovery of Mineral in Mining Claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 186.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 784, 786, 809, 810, 822, 825, 832, 858, 887.

73 Cal. 120-124, 14 Pac. 399, IN RE KOWALSKY.

Prisoner cannot be Released on Habeas Corpus where indictment, although defective, shows offense has been committed of which court has jurisdiction.

Approved in *In re Bunkers*, 1 Cal. App. 70, 81 Pac. 752, applying rule under indictment for bribery; *State v. Shrader*, 73 Neb. 621, 119 Am. St. Rep. 913, 103 N. W. 277, applying rule to indictment for selling land to which accused had no title.

Prisoner's Right to Discharge on Habeas Corpus after commitment and before trial. See note, 100 Am. St. Rep. 35.

73 Cal. 125-137, 2 Am. St. Rep. 775, 14 Pac. 625, LAMB v. RECLAMATION DISTRICT.

It is Duty of State to Reclaim swamp and overflowed lands granted it by general government.

Approved in *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 410, 105 Pac. 282, in action by reclamation district to recover assessment, legality of its organization is not assailable on ground that act creating district includes two other districts within its limits.

Reclamation District has Right to maintain levee across mouth of slough through which, during flood time, waters of river escape upon adjoining low lands.

Approved in *Humphreys v. Moulton*, 1 Cal. App. 258, 81 Pac. 1085, in suit to enjoin nuisance in flooding lands by surface water, where it is found that several channels were brought together into channel complained of, plaintiff may recover irrespective of other findings; *Singleton v. Atchison, Topeka etc. R. R. Co.*, 67 Kan. 291, 72 Pac. 783, channel in ground forming bank of river is not natural watercourse and may be obstructed.

Liability of Drainage District for flooding land. See note, 19 L. R. A. (n. s.) 992.

Right to Confine Flood Water within banks. See note, 24 L. R. A. (n. s.) 216.

What is Surface Water. See note, 25 L. R. A. 530.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 722.

Legislative Power to Condemn private property. See note, 94 Am. St. Rep. 740.

73 Cal. 137-142, 14 Pac. 518, GLASCOCK v. CENTRAL PACIFIC R. CO.

Person of Mature Age in Full Possession of faculties are guilty of contributory negligence, if when about to cross over railroad crossing,

the view of the track on either side being unobstructed, they fail to stop, look and listen.

Approved in *Matteson v. Southern Pacific Co.*, 6 Cal. App. 326, 92 Pac. 105, following rule; dissenting opinion in *Chicago, R. I. & P. R. Co. v. Pounds*, 1 Ind. Ter. 73, 35 S. W. 256, majority holding where deaf person attempts to cross track and testimony as to whether he stopped, looked and listened is conflicting, question of contributory negligence is for jury.

Distinguished in *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 779, 89 Pac. 1110, holding question of negligence of one walking along street-car track in failing to watch and listen for cars is for jury.

Where Evidence Indisputably Shows plaintiff failed to use care such as prudent men usually exercise in positions of like danger, question of contributory negligence is for court.

Approved in *Braly v. Fresno City Ry. Co.*, 9 Cal. App. 431, 99 Pac. 407, applying rule where passenger on street-car assaulted by conductor for nonpayment of fare and fell while car in motion; *Wardlaw v. California Ry. Co. (Cal.)*, 42 Pac. 1076, passenger going on side of platform car opposite platform at place other than that arranged to receive passengers and attempting to board by placing foot in bumper cannot recover for injuries caused by engine bumping cars.

Presumption of Exercise of Care. See note, 116 Am. St. Rep. 126.

Person Having Age and Faculties to understand danger is charged with knowledge of them and is bound to act upon knowledge as prudent man under circumstances would.

Approved in *Paaupau Sugar Plantation Co. v. Palapala*, 127 Fed. 926, 62 C. C. A. 552, winchman guilty of negligence in lowering sugar into boat without signal when he saw sea was rough.

Opinion and Conclusion of Witness as to circumstances of accident not competent evidence in action for damages.

Approved in *Wheeler v. Oregon R. R. etc. Co.*, 16 Idaho, 408, 102 Pac. 359, statement of witness made soon after accident that accident was her fault is inadmissible.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 342.

73 Cal. 142-152, 14 Pac. 405, IN RE SIO.

Ordinances in Conflict With General Laws of state on same subject are void.

Approved in *In re Wilcox*, 14 Cal. App. 168, 111 Pac. 375, part of city ordinance relating to street excavation which requires payment of fee as condition for receipt for deposit to secure restoration of street conflicts with Code of Civil Procedure, section 2075; *Ex parte Snowden*, 12 Cal. App. 525, 107 Pac. 725, holding Los Angeles speed ordinance does not violate state motor vehicle act of 1907; *In re Desanta*, 8 Cal. App. 303, 96 Pac. 1031, holding void San Francisco milk ordinance; *Ex parte Sweetman*, 5 Cal. App. 579, 580, 90 Pac. 1070, holding void Berkeley ordinance penalizing sale of liquor without license; *Terr. of Hawaii v. McCandless*, 18 Haw. 622, holding void county ordinance relating to gutters on awnings as conflicting with statute.

Cities and Towns may Pass and Enforce, within their limits, ordinances which do not conflict with general laws of state.

Approved in *County of Plumas v. Wheeler*, 149 Cal. 768, 87 Pac. 913, upholding county ordinance requiring license for grazing sheep.

Power of Municipality to Punish Acts already covered by statute. See notes, 110 Am. St. Rep. 151, 152; 17 L. R. A. (n. s.) 53, 62, 70; 1 L. R. A. (n. s.) 383.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 457.

73 Cal. 157-165, 14 Pac. 576, **GOLSON v. DUNLAP.**

Trustee may Purchase from His Beneficiary if transaction is fair in all respects.

Approved in *Currey v. King*, 6 Cal. App. 576, 92 Pac. 665, holding agent to sell who procured seller to sell to pretended purchaser, on pretense that he had found purchaser and received deposit, whereas he was purchasing himself, is trustee of seller; *Tafft v. Presidio & Ferries R. Co. (Cal.)*, 22 Pac. 488, applying rule where attorney in fact sold corporate stock to himself.

It is Duty of Trial Court to Find upon all material issues whether evidence be introduced or not.

Approved in *Dillon Implement Co. v. Cleveland*, 32 Utah, 6, 88 Pac. 672, following rule; *Mitchell v. Jensen*, 29 Utah, 360, 81 Pac. 168, where evidence is scant, failure to find whether or not company was transacting business in corporate capacity avoids judgment.

73 Cal. 166-174, 14 Pac. 678, **WISE v. BURTON.**

Assignments of Error That Evidence is insufficient to support findings are sufficient, although particulars in which evidence is claimed to be insufficient are not stated.

Approved in *Low v. Burton (Cal.)*, 14 Pac. 683, following rule.

73 Cal. 174-176, 14 Pac. 683, **WISE v. BURTON.**

Judgment will not be Reversed for Want of findings on issues in relation to which there is no evidence.

Approved in *Himmelman v. Henry (Cal.)*, 21 Pac. 731, following rule; *Eva v. Symons*, 145 Cal. 205, 78 Pac. 649, applying rule in ejectment; *Hatton v. Gregg*, 4 Cal. App. 546, 88 Pac. 596, applying rule in injunction suit.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 178.

73 Cal. 176-181, 2 Am. St. Rep. 785, 14 Pac. 580, **CONNEAU v. GEIS.**

Rule of Court Requiring Party demanding jury to deposit jury fees with clerk in advance of trial is not impairment of right of trial by jury.

Approved in *Williams v. Gottschalk*, 231 Ill. 179, 83 N. E. 142, municipal court act of 1905 is not encroachment upon right of trial by jury.

Distinguished in *Story v. Walker*, 71 N. J. L. 262, 58 Atl. 352, holding justice lost jurisdiction in proceeding under landlord and tenant act of 1874, and supplement of 1903 in denying jury trial upon refusal of defendant to prepay costs thereof.

Conditions and Restrictions Which Legislature may impose on right of trial by jury. See note, 98 Am. St. Rep. 538.

There may be Delivery in Escrow where deed is deposited with third person to be delivered upon failure of grantor to make stipulated payment.

Distinguished in *Tooker v. Siegel-Cooper Co.*, 194 N. Y. 446, 87 N. E. 775, refusing to apply doctrine of delivery in escrow to uphold chattel mortgage as against creditors where it is delivered to third party to be delivered to mortgagee upon condition that debt secured thereby is not paid on certain day.

Where Grantor Deposits Deed in Escrow to be ineffectual on performance of conditions, third party taking deed with notice of escrow before grantor performs escrow agreement acquires no title as against first grantee.

Distinguished in *May v. Emerson*, 52 Or. 270, 96 Pac. 1065, where land is sold under contract and deed is delivered in escrow, purchaser at execution sale had before terms of escrow are fulfilled acquires whole interest of vendor.

73 Cal. 182-185, 14 Pac. 686, **BAKER v. FIREMAN'S FUND INS. CO.**

Actions to Determine Right or interest in real property must be brought in county in which property is situated.

Approved in *Hannah v. Canty*, 2 Cal. App. 227, 81 Pac. 1036, applying rule where accounting was asked as mere incident to suit to establish trust in land.

73 Cal. 191-193, 14 Pac. 674, **REYNOLDS v. LINCOLN.**

Color of Title. See note, 88 Am. St. Rep. 727.

Invalid Tax Deed as Color of Title within general statutes of limitations. See note, 11 L. R. A. (n. s.) 785.

73 Cal. 193-195, 14 Pac. 831, **BALL v. NICHOLS.**

On Appeal by One of Several defendants, defects in complaint affecting only rights of defendants not appealing will not be considered.

Approved in *People v. Rea*, 2 Cal. App. 111, 83 Pac. 165, in action to try title to office, errors not prejudicing appellants cannot be considered.

73 Cal. 202-204, 14 Pac. 677, **ESTATE OF CARPENTER.**

Appointment of Special Administrators. See notes, 4 Cal. Prob. 333; 1 Cal. Prob. 208.

73 Cal. 206-210, 14 Pac. 781, **REID v. REID.**

Transcript of Testimony Given by Party in prior action is not admissible in subsequent action as evidence of what party said on former trial.

Distinguished in *Carpenter v. Ashley*, 15 Cal. App. 468, 115 Pac. 271, holding where correctness of transcript is admitted, it is admissible as evidence of what witness testified to at former trial.

Transcript of Testimony Given by Party in prior action may be used by such party for purpose of refreshing his memory when testifying in subsequent actions.

Approved in *Batcheller v. Whittier*, 12 Cal. App. 267, 107 Pac. 143, witness may use memorandum made in account-book to refresh his memory; *People v. Lanterman*, 9 Cal. App. 684, 100 Pac. 724, witness may refresh his memory by referring to report to ticket auditor showing use of railroad pass; *People v. Izlar*, 8 Cal. App. 606, 97 Pac. 687, when examining witness in criminal case, district

attorney may refresh his memory by reading transcript of testimony given at preliminary hearing; *State v. Marren*, 17 Idaho, 780, 107 Pac. 997, witness permitted to read transcript of testimony given at former trial for purpose of refreshing his memory.

Distinguished in dissenting opinion in *State v. Marren*, 17 Idaho, 797, 798, 107 Pac. 1004, majority holding that witness might read transcript of testimony given in former trial for purpose of refreshing his memory.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 359, 363.

73 Cal. 213-216, 2 Am. St. Rep. 789, 14 Pac. 787, CROSSMORE v. PAGE

Option Given Holder of Note of having same become due immediately upon default of interest, to be available against indorser, must be exercised within reasonable time.

Approved in *Kinsel v. Ballou*, 151 Cal. 758, 91 Pac. 622, following rule; *Trinity Co. Bank v. Haas*, 151 Cal. 556, 91 Pac. 386, holding option is lost if before rights under option are exercised mortgagor offers to pay overdue interest.

Delay of Seven Months Before Attempting to exercise option is unreasonable.

Approved in *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 750, 103 Pac. 939, holding notice of acceptance of option to purchase boxes ten months after option was given not given within reasonable time; *Hewett v. Dean* (Cal.), 25 Pac. 755, delay of three months after default in interest does not waive right to exercise option, when delay is caused by reason of defendant's request for additional time.

73 Cal. 216-219, 14 Pac. 786, GOLD v. SUN INS. CO.

Making Proof of Loss is not condition precedent to maintenance of action for breach of oral contract to renew fire insurance policy brought after property is destroyed.

Approved in *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 485, 88 Pac. 942, holding proof of loss waived where before expiration of time for furnishing proof of loss as provided in written contract, company repudiates oral contract of insurance.

Distinguished in *American C. Co. v. Agricultural I. Co.*, 12 Cal. App. 139, 106 Pac. 723, holding evidence insufficient to support finding that there was oral contract of insurance.

73 Cal. 220-222, 14 Pac. 851, PEOPLE v. RICE.

Information for Receiving Stolen Property need not allege value of property.

Approved in *State v. Moxley*, 41 Mont. 409, 110 Pac. 86, holding evidence in prosecution for receiving stolen goods sufficient, although it fails to establish value of property as alleged.

73 Cal. 222-226, 14 Pac. 849, PEOPLE v. KERRIGAN.

Where During Criminal Trial Defendant becomes greatly excited, order of court excluding all spectators from courtroom does not violate defendant's right to public trial.

Approved in *State v. Callahan*, 100 Minn. 68, 110 N. W. 345, following rule; *State v. Worthen*, 124 Iowa, 410, 100 N. W. 331, it is not infringement upon right to public trial to exclude defendant's witnesses from courtroom during examination of other witnesses.

Distinguished in *State v. Osborne*, 54 Or. 293, 294, 103 Pac. 64, holding it is error to exclude all spectators from courtroom during criminal prosecution.

Right to Exclude Public during criminal trial. See note, 9 L. R. A. (n. s.) 278.

Right to Public Trial in criminal case. See note, 14 L. R. A. 809.

73 Cal. 226-228, 15 Pac. 44, PEOPLE v. GUIDICE.

Instance of Instructions on Self-defense held proper.

Reaffirmed in *Wilson v. Territory*, 7 Ariz. 51, 60 Pac. 698.

73 Cal. 230-235, 14 Pac. 853, PEOPLE v. LEONARD.

Word "Eligible," as Used in Section 20, article IV of Constitution, refers to capacity to hold as well as to be elected to office.

Approved in *Bradfield v. Avery*, 16 Idaho, 773, 102 Pac. 689, 23 L. R. A. (n. s.) 1228, and *State v. Huegle*, 135 Iowa, 102, 112 N. W. 235, both holding persons elected to office of county superintendent are not entitled to hold such office unless possessing qualifications required by law.

Loss of One Office by accepting another. See note, 86 Am. St. Rep. 588.

Miscellaneous.—Cited in *Ballantyne v. Bower*, 17 Wyo. 362, 99 Pac. 871, office of justice of peace in civil office under state within meaning of Constitution, article VI, section 4.

73 Cal. 238-240, 14 Pac. 832, BOSTWICK v. MAHONEY.

In Unlawful Detainer, Tenant is estopped to deny landlord's title.

Distinguished in *Teich v. Arms*, 5 Cal. App. 478, 90 Pac. 963, holding tenant may introduce evidence showing landlord's title has expired during tenancy.

Offer to Prove by Parol Evidence facts which can only be proved by documentary evidence is properly refused although offer embraces other unobjectionable matters.

Approved in *People v. Hogan*, 11 Cal. App. 603, 105 Pac. 940, where offer of impeaching evidence includes matters to which attention of prosecuting witness was not called and matters to which attention was called, rejection of whole offer will be sustained.

73 Cal. 240-241, 14 Pac. 855, HEINLEN v. BEANS.

Where Supreme Court on Appeal affirms judgment, or directs entry of specific judgment and such judgment is entered, case is ended.

Approved in *State v. District Court*, 32 Mont. 24, 79 Pac. 411, where order taxing costs does not include certain items, trial court has no jurisdiction to make order taxing such items after judgment is affirmed.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324.

73 Cal. 243-248, 15 Pac. 86, PEOPLE v. SUTTON.

Accused Who has Testified on Own Behalf and on cross-examination volunteers statements not embraced in his examination in chief may be cross-examined for purpose of explaining such statements.

Approved in *People v. Gallagher* (Cal.), 33 Pac. 893, where defendant denies advising party to draw money from bank for purpose of embezzling it, and all knowledge of intention of such party to do so, it is error on cross-examination to allow him to answer questions relating to facts transpiring after money was drawn.

Cross-examination of Defendant in criminal cases. See note, 15 L. R. A. 669.

Where Insanity is Pleaded in Murder Case medical expert may be asked, on cross-examination, questions based on hypothetical facts, for purpose of testing his competency.

Reaffirmed in *Parrish v. State*, 139 Ala. 44, 36 So. 1021.

Application for New Trial on ground of newly discovered evidence will not be granted unless moving party could not with reasonable diligence have discovered and produced evidence during trial.

Approved in *Weinburg v. Somps* (Cal.), 33 Pac. 342, holding application for new trial because of newly discovered evidence failed to show reasonable diligence.

To Entitle Party to New Trial on ground of newly discovered evidence it must appear that evidence and not its materiality is newly discovered.

Approved in *State v. Cook*, 13 Idaho, 53, 88 Pac. 242, in prosecution for stealing of mare, production of colts which were in existence during trial is not newly discovered evidence but material to prisoner's defense only.

Order Denying Motion for New Trial on ground of newly discovered evidence will not be disturbed on appeal except for abuse of discretion.

Approved in *People v. Weber*, 149 Cal. 350, 86 Pac. 681, holding court did not abuse discretion in discrediting affidavit filed in support of application for new trial on ground of newly discovered evidence; *Gruss v. Robertson* (Cal.), 37 Pac. 772, when affidavits in support of application for new trial on ground of newly discovered evidence are conflicting, court has power to determine which are true.

Expert Opinions as to Sanity or insanity. See note, 39 L. R. A. 326.

Scientific Books and Treatises as evidence. See note, 40 L. R. A. 568.

73 Cal. 252-257, 14 Pac. 796, PEOPLE v. WHEELER.

On Preliminary Examination, Accused Party may be held for any offense which evidence shows him to have committed.

Approved in *State v. Wisnewski*, 13 N. D. 653, 102 N. W. 884, upholding sufficiency of complaint charging person with keeping and maintaining nuisance; *Malheur County v. Carter*, 52 Or. 624, 98 Pac. 492, holding bail bond void where it recited charge preferred against prisoner and upon which he was arrested and not that for which he was held to appear before grand jury; *State v. Anderson*, 35 Utah, 501, 101 Pac. 387, upholding conviction for perjury secured upon complaint, sufficiency of which was attacked.

On Preliminary Examination, Party charged in complaint under fictitious name may be held to answer and informed against under his true name.

Approved in *State v. King*, 71 Kan. 292, 80 Pac. 606, upholding commitment of party for burglary under warrant wherein he was designated by fictitious name.

Whether False Imprisonment may be Predicated of partial or conditional restraint. See note, 20 L. R. A. (n. s.) 969.

73 Cal. 257-260, 14 Pac. 860, PEOPLE v. DOBBINS.

Where Different Provisions of Same Statute all passed at same time cannot be reconciled, one last in point of position must prevail.

Approved in *Alameda County v. Dalton*, 148 Cal. 251, 82 Pac. 1052, holding section 160, subdivision 7, and section 215 of County Government Act of 1897 are in conflict, and that section 215, being later section, must prevail; *Estate of Schade*, 4 Cal. Prob. 444, Code of Civil Procedure, section 1465, prevails over Civil Code, section 1265; *Speidel v. Warder*, 56 W. Va. 608, 49 S. E. 536, holding section 34 of chapter 50, code of 1899, as amended in 1903, prevails over section as originally enacted.

Where Two Laws upon Same Subject passed at different times are inconsistent with each other, one last passed must prevail.

Approved in *County of Trinity v. County of Mendocino*, 151 Cal. 284, 90 Pac. 687, holding special act of 1872, relating to county boundary lines, would prevail over Political Code, sections 3969-3972, in case of inconsistency.

The Four Codes Constitute but one statute.

Approved in *Sunset Telephone etc. Co. v. Pomona*, 172 Fed. 834, 97 C. C. A. 251, federal court must give word "telegraph," as used in section 536 of Civil Code, same construction as was given it by California supreme court in construing section 591 of Penal Code.

73 Cal. 260-263, 14 Pac. 841, SHUMWAY v. LEAKEY.

Sheriff is Entitled to Such Fee for Taking and keeping possession and preserving property under attachment, execution or other process, as court shall allow.

Approved in *Alexander v. Wilson* (Cal.), 79 Pac. 275, sheriff is entitled to allowance of his necessary expenses for keeping and preserving property during pendency of bankruptcy proceedings.

73 Cal. 265-271, 14 Pac. 833, HIPPE v. JOHNSON.

Fact That Money Turned Over by treasurer to successor in office was irregularly collected does not absolve sureties on bond of successor from liability where he embezzles money so turned over.

Approved in *Philipsburg v. Degenhart*, 30 Mont. 306, 76 Pac. 696, where city treasurer embezzles money illegally collected, sureties on his official bond are liable.

Persons Severally Liable upon Same Obligation may all or any of them be included in same action at option of plaintiff.

Approved in *Moreing v. Weber*, 3 Cal. App. 22, 84 Pac. 223, holding plaintiff may join as defendants two or more of a number of property owners jointly and severally liable upon contract for street work.

In Absence of Evidence Showing misappropriation of funds occurred during prior terms, sureties on bond of county treasurer for his last term are liable.

Approved in *Priet v. De La Montanya* (Cal.), 22 Pac. 173, if party is prevented from obtaining full payment on warrant by reason of

Illegal deficiency occurring during city treasurer's second term of office, sureties on bond for second term are liable.

Liability of Sureties of Public Officer for default during prior term. See note, 23 L. R. A. (n. s.) 133.

Form of Judgment on Penal Bonds. See note, 62 L. R. A. 448.

73 Cal. 271-272, 14 Pac. 863, GRUPE v. BYERS.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 926.

Effect of Divorce on Homestead Rights. See note, 23 L. R. A. 239.

73 Cal. 281-282, 14 Pac. 840, ROACH v. COFFEY.

Administrator cannot Represent Either Side of contest between heirs, devisees or legatees contesting for distribution of estate.

Approved in *In re Healy's Estate* (Cal.), 66 Pac. 176, holding administrator is not allowed to employ attorney representing one of several heirs in action to enforce contract made by testator; *Lamar v. Lamar*, 118 Ga. 690, 45 S. E. 501, executor cannot bring under review decree giving directions as to manner in which fund is to be distributed and fixing amount of executor's compensation in so far as it affects interests of other parties to litigation who are satisfied with results thereof.

Distinguished in *Bruning v. Golden*, 159 Ind. 208, 64 N. E. 660, holding special administrator may bring action against heir to compel accounting of partnership affairs of firm of which heir and testator were only members.

73 Cal. 285-290, 2 Am. St. Rep. 791, 14 Pac. 791, BELL v. HUDSON.

Equity will not Entertain Suit for accounting of partnership affairs brought by personal representative of one partner twenty-five years after his death against personal representative of other partner unless complaint accounts for delay.

Approved in *Beswick v. Dorris*, 174 Fed. 506, holding creditor's bill to set aside conveyance made eight years before it was filed is demurrable for laches.

Equity will not Aid a Party whose application is destitute of conscience, good faith and reasonable diligence.

Approved in *Stevenson v. Boyd*, 153 Cal. 136, 96 Pac. 287, 19 L. R. A. (n. s.) 525, where one cotenant with knowledge of purchase of outstanding claim for more than four years neglects to elect to bear her portion of expense of purchase and to claim benefits, suit by such cotenant to obtain benefits of purchase is barred by laches; *Elliott v. Clark*, 5 Cal. App. 9, 89 Pac. 455, holding action to enforce trust resulting from transaction which took place forty-five years prior to commencement of action is barred by laches; *Burling v. Newlands* (Cal.), 39 Pac. 52, relief from alleged fraud will not be granted where complainants could have informed themselves by exercise of diligence but delayed bringing suit for over ten years and until after death of all participants in transaction; *Patterson v. Hewitt*, 11 N. M. 24, 66 Pac. 558, 55 L. R. A. 658, holding certain claimants were guilty of laches in failing to institute action to enforce alleged rights in mining claims which accrued eight years prior to commencement of action; *Miller v. Ash*, 156 Cal. 566, 105 Pac. 609, *arguendo*.

In Action for Accounting, Defense of staleness of plaintiff's claim may be raised by general demurrer.

Approved in *Marsh v. Lott*, 156 Cal. 646, 105 Pac. 969, sustaining demurrer to action to enforce option for purchase of property three years after repudiation of option.

73 Cal. 291-295, 14 Pac. 874, WARDER v. ENSLEN.

Where Party Enters into Possession of land under deed and agreement of second party to sell land, pay indebtedness for which deed was given as security and redeem land, his possession is not adverse until second party refuses to redeem.

Approved in *Wadleigh v. Phelps*, 149 Cal. 641, 87 Pac. 99, so long as mortgagee in possession holds by consent of mortgagor and by virtue of his agreement to apply rents and profits to indebtedness, his holding is not adverse.

Where There is Discrepancy Between Findings of particular facts and findings general in their nature, former must control.

Approved in *Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 466, 86 Pac. 818, in action for cancellation of deed, general finding that deed was delivered is controlled by specific findings showing deed was not delivered.

73 Cal. 297-298, 14 Pac. 864, OULLAHAN v. MORRISSEY.

Appeal from Judgment Entered by consent will be dismissed.

Approved in *Hibernia Savings etc. Society v. Waymire*, 152 Cal. 288, 92 Pac. 646, dismissing appeal from judgment entered by consent in action of ejectment.

73 Cal. 299-301, 14 Pac. 794, TURNER v. WHITE.

Generally, Allegation of Ownership is one of ultimate fact, but context may be such as to show it is conclusion of law.

Approved in *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 610, 117 Pac. 771, averments in complaint in suit by association formed to sell raisins for accounting of moneys paid by it to growers, who had contracts with it and for distribution of fund in its hands, that some of defendants had received more and some less than their share, are averments of statements of facts; *Emerson v. Yosemite Gold Min. etc. Co.*, 149 Cal. 59, 85 Pac. 125, holding conclusion of law as to ownership may be obviated by amending pleadings; *Hutchinson v. McNally (Cal.)*, 23 Pac. 132, where complaint sets out deraignment of title and then alleges "while plaintiff was owner," etc., allegation as to ownership is conclusion of law; *Street v. Sederburg*, 41 Colo. 133, 92 Pac. 31, allegation that mortgagee is entitled to possession of property without alleging special or general ownership is conclusion of law; *Paine v. British-Butte Min. Co.*, 41 Mont. 31, 108 Pac. 13, in action for conversion of stock allegation "that plaintiff is owner" following allegations setting out deraignment of title is conclusion of law.

73 Cal. 302-307, 2 Am. St. Rep. 808, 14 Pac. 885, CROSS v. EUREKA LAKE ETC. CO.

As Between Pledgor and Pledgee, general property in pledge remains in pledgor.

Approved in *Sparks v. Caldwell*, 157 Cal. 403, 108 Pac. 277, pledging of note as security transfers to pledgee only such title as is

necessary to enable pledgee to collect note from maker thereof; *Gilmer v. Morris*, 35 Fed. 682, holding pledgee holds pledged stock by virtue of pledgor's title; *Hershey v. Welch*, 96 Minn. 146, 104 N. W. 822, holding ownership of stock pledged with bank as collateral security is in pledgor.

Right to Dividends on Transfer of stock. See note, 45 L. R. A. 394.

73 Cal. 310-313, 14 Pac. 795, PRITCHETT v. STANISLAUS COUNTY.

Under Sections 855 and 881 of Municipal Government Act of 1883, marshal of city of sixth class is not entitled to compensation for execution of criminal processes unless ordinance so provides.

Approved in *Carlisle v. Tulare County* (Cal.), 49 Pac. 4, under section 790 of Municipal Government Act as amended in 1893, fees earned by marshal of city of fifth class in serving process of justice's court of township in which city is situated are chargeable to county.

73 Cal. 313-317, 14 Pac. 836, PEOPLE v. KUNZ.

Every Fact Testified to by Accomplice need not be specifically corroborated in order to warrant conviction.

Approved in *People v. Leavens*, 12 Cal. App. 184, 106 Pac. 1106, in prosecution for obtaining money by false pretenses, testimony of bookkeeper, who was accomplice, held sufficiently corroborated to justify conviction within Penal Code, section 1111; *People v. Garwood*, 11 Cal. App. 667, 106 Pac. 114, on trial for robbery, evidence held to sufficiently corroborate testimony of accomplice.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 167.

73 Cal. 317-320, 2 Am. St. Rep. 812, 11 Pac. 791, 14 Pac. 864, CHANDLER v. PEOPLE'S SAVINGS BANK.

Where Judgment is Reversed on Ground of insufficiency of evidence to sustain particular finding and cause is remanded for further proceedings according to views expressed by supreme court in reference to such finding, on retrial testimony may be confined to issue erroneously decided, and in other respects court may pass upon issues in light of testimony already before it.

Approved in *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 295, 111 Pac. 763, where parties by theory upon which they present their case at second trial approve former proceedings and findings not disturbed by judgment of reversal, court may adopt such proceedings of former trial as were necessary to support judgment and as to which no proceedings were had at second trial.

Distinguished in *Jacobs v. Walker* (Cal.), 33 Pac. 92, where on appeal new trial is ordered without limitation for specified reason, new trial should not be limited to one issue discussed.

Reversal of Judgments. See note, 96 Am. St. Rep. 129.

73 Cal. 320-323, 14 Pac. 876, McCLAIM v. BUCK.

Whether Presumption of Fraud Flowing from retention of chattel by vendor may be overcome. See note, 24 L. R. A. (n. s.) 1139.

73 Cal. 329-344, 2 Am. St. Rep. 814, 14 Pac. 879, McLERAN v. BEN-TON.

Finding That Party is Owner in Fee is sufficient finding of ownership.

Approved in *Bryan v. Tormey* (Cal.), 21 Pac. 726, where pleading alleges party is owner in fee, finding in language of pleading is sufficient.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 84 L. R. A. 344.

Who may Plead Statute of Limitations. See note, 104 Am. St. Rep. 748, 770.

Nature and Elements of adverse possession. See note, 131 Am. St. Rep. 1083.

Statute of Limitations. See note, 87 Am. St. Rep. 804, 859.

73 Cal. 345-347, 14 Pac. 848, PEOPLE v. WEST.

Where Court Instructs Jurors not to converse among themselves, injury to defendant will not be presumed from fact that one juror at close of instructions stated to court that there was disagreement among them as to testimony upon particular point.

Approved in *Judd v. Letts*, 158 Cal. 367, 111 Pac. 15, in action for personal injuries, fact that one of jurors suggested viewing place of accident and others approved suggestion by nodding their heads does not constitute violation of duty on part of jurors.

73 Cal. 348-354, 15 Pac. 5, PEOPLE v. CLOUGH.

In Addition to Accomplice's Testimony there must, to justify conviction, be evidence tending to connect accused with offense.

Approved in *People v. Spadoni*, 11 Cal. App. 219, 220, 104 Pac. 589, holding testimony of accomplice in prosecution for theft of horses was sufficiently corroborated.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 163, 169.

73 Cal. 355-360, 15 Pac. 8, PEOPLE v. DAVIS.

Indictment for Murder is Sufficient if it charges defendant did unlawfully, feloniously and of his malice aforethought kill deceased, naming him, time and place being stated.

Approved in *Molina v. Territory*, 12 Ariz. 16, 95 Pac. 103, indictment for murder need not allege means or instrument by which wound was inflicted or nature of wound.

Information Alleging Defendant "Did Willfully, feloniously, premeditatedly and of his malice aforethought make assault upon person and did then and there inflict mortal wound upon body of said person, of which said mortal wound so inflicted said person afterward died," charges that assault and infliction of mortal wound were felonious.

Approved in *Daniels v. State*, 52 Fla. 23, 41 So. 611, following rule:

73 Cal. 365-375, 14 Pac. 888, EX PARTE MIRANDE.

Under Sections 11 and 12, article XI, of Constitution, and subdivision 27, section 25, of County Government Act, supervisors may pass ordinance imposing license upon business of sheep-raising for purposes of revenue or regulation, or both.

Approved in *City of Los Angeles v. Lankershim*, 160 Cal. 802, 118 Pac. 216, holding void ordinance imposing license tax of specified amount per room on all persons maintaining office buildings; *County of Plumas v. Wheeler*, 149 Cal. 766, 87 Pac. 912, license of ten cents

per head imposed upon business of sheep-raising is not so excessive that as matter of law it can be said ordinance is revenue measure; *Placer Co. v. Whitney Estate Co.*, 2 Cal. App. 617, 84 Pac. 278, and *Flanigan v. County of Sierra*, 196 U. S. 559, 25 Sup. Ct. 314, 49 L. Ed. 597, both holding ordinance imposing license upon business of sheep-raising is revenue measure.

Grading License Tax According to volume of business, or capital employed. See note, 17 L. R. A. (n. s.) 899; 12 L. R. A. (n. s.) 569.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 264.

Test of Validity of Municipal Ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 49.

Limit of Amount of License Fees. See note, 30 L. R. A. 426, 439.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

73 Cal. 378-385, 15 Pac. 13, PEOPLE v. RASCHKE.

Nature and Elements of Larceny. See note, 88 Am. St. Rep. 573.

73 Cal. 385-389, 15 Pac. 19, ROSE v. NEVADA ETC. LUMBER CO.

Provisions of United States Statutes relating to homesteads prohibiting alienation of homestead claims prior to issuance of patent are not applicable to additional homesteads allowed under section 2306 of Revised Statutes.

Approved in *Bryan v. Graham*, 5 Cal. App. 602, 91 Pac. 115, under lake land act as amended in 1899, one who after filing application and before issuance of certificate to purchase agrees to sell such certificate does not lose right to purchase.

73 Cal. 394-399, 15 Pac. 16, ROBERTS v. ELDRED.

Objection That Relief Awarded was not warranted by facts found cannot be considered on appeal from order denying new trial.

Approved in *Merced Bank v. Price*, 9 Cal. App. 179, 98 Pac. 385, on appeal from order denying new trial in foreclosure proceeding, sufficiency of complaint or findings to support judgment cannot be reviewed; *Raskin v. Roberts* (Cal.), 35 Pac. 764, question whether finding that action was barred is supported by evidence cannot be considered on appeal from order denying new trial.

Objection That There is Misjoinder of causes of action must be taken by demurrer.

Approved in *Conde v. Dreisani Gold Mining Co.*, 3 Cal. App. 590, 86 Pac. 828, holding defendant waived alleged misjoinder of parties by failing to take advantage thereof by special demurrer or answer.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 451, 492.

73 Cal. 399-403, 15 Pac. 24, GOULD v. HUNTLEY.

Where Circumstances Attending Change of ownership and possession are sufficient to raise presumption that creditors of vendor had notice of sale, vendee may loan or employ vendor to perform services on property sold to same extent as though he were stranger.

Approved in *Reynolds v. Beck*, 108 Mo. App. 200, 83 S. W. 296, sale of carriage is not void as against subsequent mortgagee from seller, notwithstanding vendee, after holding possession of carriage for two months, returns it to vendor together with team for purpose of keeping.

73 Cal. 403-405, 15 Pac. 33, **PEOPLE v. RAMIREZ.**

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 662; 56 L. R. A. 382.

73 Cal. 411-414, 15 Pac. 22, **CORBIN v. WACHHORST.**

Advances on Notes and Other Obligations given for gambling debts. See note, 119 Am. St. Rep. 179.

73 Cal. 415-419, 15 Pac. 49, **ANSON v. TOWNSEND.**

Part Performance Sufficient to Take parol contract out of statute of frauds must be such as will work fraud upon vendee unless agreement is fulfilled.

Approved in *Fritz v. Mills*, 12 Cal. App. 119, 106 Pac. 727, fact that vendee continued in force mortgage on premises which vendor was to assume and occupied premises from time of execution of contract does not take contract out of statute of frauds; *Snow v. Snow*, 98 Minn. 351, 108 N. W. 296, holding continued possession of land given under parol gift is not sufficient to take gift out of statute of frauds.

Taking Possession of Realty as Part performance to satisfy statute of frauds. See note, 3 L. R. A. (n. s.) 809.

Contract cannot be Specifically Enforced where party asking its performance cannot be compelled to perform on his part.

Approved in *Pacific etc. Ry. Co. v. Campbell-Johnston*, 153 Cal. 112, 94 Pac. 626, agreement to convey right of way in consideration of party constructing and operating railroad across land cannot be specifically enforced; *Deitz v. Stephenson*, 51 Or. 607, 95 Pac. 808, contract for sale of stock made in consideration of man and wife agreeing to manage hotel cannot be specifically enforced.

Trustee may Maintain Action to recover possession.

Approved in *Koch v. Story*, 47 Colo. 339, 107 Pac. 1095, trustee of property is proper plaintiff in action to restrain threatened interference with and to recover damages for injury to reservoirs and water rights.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 620.

What Title or Interest will support ejectment. See note, 18 L. R. A. 784.

73 Cal. 420-423, 15 Pac. 34, **MANNING v. DALLAS.**

Statute of Limitations may be Pleaded by alleging that cause of action is barred by certain section of Code of Civil Procedure relied upon, giving number of section and subdivision if subdivided.

Approved in *Pryal v. Pryal* (Cal.), 71 Pac. 804, where wife's grantees fail to object that action by husband's heirs to recover alleged community property conveyed by her to them is barred by section 164 of Civil Code, as amended in 1897, objection cannot be raised on appeal; *Wolters v. Thomas* (Cal.), 32 Pac. 567, plea al-

leging cause of action is barred by section 339 of Code of Civil Procedure is insufficient, since such statute contains several subdivisions.

Under Indebitatus Assumpsit for Services performed in absence of agreement, party is entitled to reasonable value of his services.

Approved in *Krieger v. Feeny*, 14 Cal. App. 541, 112 Pac. 902, complaint alleging indebtedness to assignors, assignment to plaintiff, ownership of claim and that claim is unpaid, is sufficient to entitle plaintiff to judgment for reasonable value of goods; *Preston v. Central Cal. etc. Irr. Co.*, 11 Cal. App. 197, 104 Pac. 464, complaint alleging sale and delivery of lumber and materials, indebtedness, assignment of claim and nonpayment states cause of action in indebitatus assumpsit.

73 Cal. 425-429, 15 Pac. 51, STOCKTON v. KNOCK.

Where Complaint in Divorce Describes Land as homestead and alleges it is community property, decree setting aside community property to husband passes homestead to him.

Approved in *Towne v. Towne*, 6 Cal. App. 705, 92 Pac. 1054, decree in divorce awarding community property, including homestead, to husband need not particularly describe property.

Effect of Divorce on Homestead Rights. See note, 23 L. R. A. 240.

73 Cal. 437-438, 15 Pac. 55, MILLER v. THOMAS.

Appeal from Portions of Interlocutory Judgment in partition will be dismissed unless portions appealed from can be modified without disturbing whole judgment and prejudicially affecting rights of parties not served with notice of appeal.

Approved in *Miller v. Rea* (Cal.), 15 Pac. 55, following rule.

73 Cal. 438-452, 15 Pac. 76, EX PARTE YOUNG AH GOW.

Enhancing Penalty for Crimes by habitual criminals or prior offenders. See note, 34 L. R. A. 405.

73 Cal. 452-459, 2 Am. St. Rep. 823, 15 Pac. 82, HUTCHINSON v. AINSWORTH.

Statute of Limitations Does not Run while question in litigation is being determined on appeal.

Approved in *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 242, 105 N. W. 1083, while question of fraudulent transfer is being litigated, statute of limitations as to claims dependent upon that question does not run as between parties to action.

Complaint Praying for Reformation of mortgage and enforcement of same as reformed states one cause of action.

Approved in *Messer v. Hibernia Sav. etc. Society*, 149 Cal. 127, 84 Pac. 837, complaint in suit for specific performance of contract to exchange land praying in alternative for damages states one cause of action; *Thayer v. Smoky Hollow Coal Co.*, 129 Iowa, 553, 105 N. W. 1024, amendment of petition for injury to employee making additional allegations of negligence does not change cause of action; *Cox v. Am. Freehold & Land Mortgage Co.*, 88 Miss. 102, 40 So. 742, in suit to redeem, amended bill alleging sale was not conducted as required by trust deed, no such allegation appearing in original bill, states new cause of action; *Bremen Min. etc. Co. v. Bremen*, 13 N. M.

128, 79 Pac. 812, where original bill prays for redemption, amended bill praying for cancellation of trustee's deed and quieting of title should be allowed.

Reformation of Instrument on Ground of mistake will be denied unless upon all evidence mistake is clearly established.

Approved in *Home and Farm Co. v. Freitas*, 153 Cal. 684, 96 Pac. 610, in action to reform deed, evidence held sufficient to establish case of mutual mistake; *Ward v. Yorba (Cal.)*, 54 Pac. 82, upholding finding that provision requiring good title was inserted in contract to convey by mistake.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 875, 899, 921.

Relation of New Pleadings to statutes of limitations. See note, 3 L. R. A. (n. s.) 273.

73 Cal. 459-464, 14 Pac. 302, 15 Pac. 64, **BOWDEN v. PIERCE.**

Executors de Son Tort. See note, 98 Am. St. Rep. 191.

73 Cal. 464-475, 15 Pac. 58, **HONIG v. PACIFIC BANK.**

Duties of Savings Banks toward depositors. See note, 105 Am. St. Rep. 743.

73 Cal. 475-476, 15 Pac. 63, **PENDERGRASS v. CROSS.**

Where Party Complies With Law in presentment of bill of exceptions, judgment must settle and certify same.

Approved in *Brode v. Goslin*, 158 Cal. 701, 112 Pac. 281, holding mandamus proper remedy when judge wrongfully refuses to settle bill of exceptions.

73 Cal. 477-482, 15 Pac. 105, **DOWER v. RICHARDS.**

Owner of Quartz Ledge cannot Invoke Doctrine of eminent domain to acquire right to run tunnel under adjacent property.

Approved in *Sutter County v. Nicols*, 152 Cal. 694, 93 Pac. 874, 15 L. R. A. (n. s.) 616, action of debris commissioners in approving hydraulic mining is not bar to injunction against nuisance caused by mine operation.

Exercisability of Eminent Domain for production of gold. See note, 15 L. R. A. (n. s.) 617.

Rights Under Tunnel-site Locations. See note, 53 L. R. A. 799.

73 Cal. 482-485, 15 Pac. 74, **AMADOR QUEEN M. CO. v. DEWITT.**

Right of Way Through Mining Claim for private use of another mine owner is not public use.

Approved in *County of Sutter v. Nicols*, 152 Cal. 694, 93 Pac. 874, 15 L. R. A. (n. s.) 616, action of debris commissioners under act of Congress in approving hydraulic mining is not bar to injunction against nuisance caused by mine operation; *Great Western Nat. Gas & Oil Co. v. Hawkins*, 30 Ind. App. 575, 66 N. E. 771, instrument of appropriation of natural gas company in proceeding to condemn for pipe-line must show it is supplying gas to public; *Alfred Phos. Co. v. Duck River Phos. Co.*, 120 Tenn. 273, 113 S. W. 413, 22 L. R. A. (n. s.) 701, right of way over private railroad to be used by mining company in transporting its products is not public use; *Hench v. Pritt*, 62 W. Va. 277, 125 Am. St. Rep. 966, 57 S. E. 811, railroad

to be used by lumber company in transporting timber from its timber lands is not public use.

Uses for Which Power of Eminent Domain cannot be exercised. See note, 102 Am. St. Rep. 829.

Exercisability of Eminent Domain for production of gold. See note, 15 L. R. A. (n. s.) 616.

Exercise of Eminent Domain for mining road. See note, 1 L. R. A. (n. s.) 978.

Exercise of Eminent Domain for mining tunnel. See note, 4 L. R. A. (n. s.) 107.

73 Cal. 486-511, 15 Pac. 110, EX PARTE HENSHAW.

Judgment Imposing Fine and Imprisonment as alternative is valid.

Approved in *Ex parte Krouse*, 148 Cal. 233, 82 Pac. 1044, following rule; *Union Ice Co. v. Rose*, 11 Cal. App. 363, 104 Pac. 1009, under act of 1901, creating police courts, persons convicted in police court must be imprisoned in city jail.

Effect of Excessive Sentence. See note, 45 L. R. A. 148, 149.

Finding of Court as to Existence of public office cannot be attacked collaterally notwithstanding it is erroneous.

Approved in *Philbrook v. Newman*, 148 Cal. 175, 82 Pac. 773, denying petition to obtain order of supreme court vacating decision and judgment of that court affirming order denying new trial.

One Who Unlawfully Exercises Duties of office which has been abolished is estopped in action for usurpation of office to deny its existence.

Approved in *State v. Milwaukee Ind. Tel. Co.*, 133 Wis. 596, 114 N. W. 111, 315, where telephone company exercises franchise attempted to be conferred by ordinance, in proceedings to oust company from exercise of franchise it is estopped to deny it has exercised such franchise.

Who are Public Officers. See note, 17 L. R. A. 249.

Necessity of Finding Facts before adjudging one guilty of contempt. See note, 30 L. R. A. (n. s.) 565.

73 Cal. 511-518, 15 Pac. 102, PEOPLE v. FLYNN.

Judgment will not be Reversed when instruction states law inaccurately if instructions as whole clearly state law.

Approved in *People v. Webster*, 13 Cal. App. 351, 109 Pac. 638, following rule; *People v. Bisold*, 154 Cal. 370, 97 Pac. 874, holding instruction relating to intent when read with other instructions does not assume there was killing; *People v. Del Cerro*, 9 Cal. App. 769, 100 Pac. 890, instruction in larceny that accused need not be present if he otherwise aided in theft when read with other instructions is not prejudicial; *People v. Cain*, 7 Cal. App. 167, 93 Pac. 1039, instruction relating to effect to be given to circumstantial evidence when read with other instructions is not prejudicial; *People v. Quimby*, 6 Cal. App. 488, 92 Pac. 496, instruction defining murder which omits question of malice is not prejudicial if other parts of charge define malice essential to crime.

Where Accused Fails to Testify, failure of court to instruct that such failure is not presumptive evidence of his guilt is not error if accused did not request such instruction.

Approved in *People v. Provost*, 144 Mich. 19, 107 N. W. 717, when requested by accused, it is error to refuse instruction that failure of accused to testify raises no presumption of guilt.

In Absence of Request, Court need not give instruction defining "reasonable doubt."

Approved in *Territory v. West*, 4 Ariz. 217, 36 Pac. 209, in prosecution for assault to commit murder, court need not, in absence of request, define "deadly weapon."

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 499.

Circumstantial Evidence. See note, 97 Am. St. Rep. 773.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 681.

Miscellaneous.—Cited in *People v. King*, 4 Cal. App. 218, 87 Pac. 402, section 459 of Penal Code, defining burglary, applies to dwelling.

73 Cal. 518-520, 15 Pac. 91, WALDEN v. PURVIS.

Declarations of Donor Made after parting with property are not admissible against donee to prove gift was fraudulent.

Approved in *Bollinger v. Bollinger*, 154 Cal. 705, 99 Pac. 200, declarations of grantor made subsequent to conveyance are not admissible to establish trust; *Wegerer v. Jordan*, 10 Cal. App. 365, 101 Pac. 1067, holding it questionable whether party is bound by admissions relating to stock made by holders after transferring it; *First Nat. Bk. of Enid v. Yoeman*, 17 Okl. 617, 90 Pac. 413, statements of mortgagor made subsequent to execution of mortgage are not admissible for purpose of impeaching it.

73 Cal. 520-522, 15 Pac. 88, MORGAN v. TILLOTTSON.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 406.

Relocation of Mining Claim as Abandoned or forfeited. See note, 68 L. R. A. 848.

73 Cal. 522-526, 15 Pac. 100, CHUNG KEE v. DAVIDSON.

It is not Necessary That Parties for whose benefit contract is made should be named in contract.

Approved in *Bacon v. Davis*, 9 Cal. App. 101, 98 Pac. 78, where owner agrees to convey to any purchaser secured by broker, contract is for benefit of purchaser procured by broker.

Right of Third Party to Sue upon contract made for his benefit. See note, 25 L. R. A. 263, 265.

73 Cal. 537-540, 15 Pac. 108, JANUARY v. SUPERIOR COURT.

If Attorney is Absent from Office, depositing copy of notice through door into box used for reception of documents is sufficient service.

Approved in *Spencer v. Arlington*, 54 Wash. 261, 103 Pac. 31, holding services sufficient where notice was dropped through transom and allowed to drop on floor in front of door.

73 Cal. 541-545, 15 Pac. 93, GARTHE v. HART.

Party in Prior Possession of Mining Claim is not entitled to possession as against one who subsequently locates same in compliance with law.

Approved in *Cook v. Klonos*, 164 Fed. 536, 90 C. C. A. 403, parties who make discovery are entitled to possession of mining claim as against those who locate and hold possession; *Johanson v. White*, 160 Fed. 903, 88 C. C. A. 83, one of two parties locating same mining claim who makes discovery is exclusively entitled to claim.

Under Section 1091 of Civil Code, transfer of mining claim must be in writing.

Approved in *Cascaden v. Dunbar*, 2 Alaska, 412, refusing to decree specific performance of oral contract to convey interest in mining claim.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 780, 785.

73 Cal. 545-548, 15 Pac. 121, **ESTATE OF HERTEMAN.**

Query, Whether Under Provisions of Code of Civil Procedure every contested motion in probate proceedings assumes character of civil action so as to permit new trial of issues.

Cited in *Carter v. Waste*, 159 Cal. 26, 112 Pac. 728, motion for new trial is authorized where written objections to petition for distribution are made; In *re Antonioli's Estate*, 42 Mont. 223, 111 Pac. 1034, in absence of issue as to competency of parties petitioning for letters of administration, motion for new trial does not lie after granting one petition and denying other.

Liability of Executors or Trustees for compound interest. See note, 29 L. R. A. 635.

73 Cal. 548-550, 15 Pac. 95, **PEOPLE v. MEYER.**

When Accused Pleads Guilty to one of two offenses, it is error on trial for other to admit evidence of offense as to which he pleads guilty.

Approved in *State v. Hazlet*, 16 N. D. 438, 113 N. W. 378, in prosecution for murder it is error to admit evidence of sodomy.

73 Cal. 550-555, 15 Pac. 131, **RIVERSIDE LAND ETC. CO. v. JENSEN.**

Appellant cannot Object That Findings are unauthorized when facts found are alleged in his pleading.

Approved in *Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 3, 82 Pac. 1120, following rule.

Relation of New Pleadings to statutes of limitations. See note, 3 L. R. A. (n. s.) 264.

73 Cal. 555-557, 15 Pac. 135, **ESTATE OF FREUD.**

Where on Contest for Revocation of probate of will, will is declared invalid, probate should be annulled and powers of executor revoked:

Approved in *Clements v. McGinn* (Cal.), 33 Pac. 921, following rule; *Estate of Dolbeer*, 149 Cal. 246, 86 Pac. 703, holding probate cannot be granted as to portion of will and denied as to remainder.

73 Cal. 560-564, 15 Pac. 130, **SIDDALL v. HARRISON.**

Findings Adverse to Admissions in pleadings must be disregarded in determining whether proper conclusion of law was drawn from facts found and admitted by pleadings.

Approved in *Lambert v. Lambert*, 1 Cal. App. 115, 81 Pac. 716, where pleadings admit land is community property, finding that party

purchased land before marriage does not affect validity of conclusion of law that land is community property.

Superior Court will not Entertain Action to obtain opinion as to proper construction of will.

Approved in *McDaniel v. Pattison* (Cal.), 27 Pac. 654, in action by devisees to cancel deed, chancery court has no jurisdiction to probate will; *Appleby v. Watkins*, 95 Minn. 462, 104 N. W. 303, when construction of will is necessary to administration of estate, probate court possesses exclusive original jurisdiction.

Jurisdiction of Equity to Construe Will. See note, 129 Am. St. Rep. 81.

73 Cal. 564-573, 15 Pac. 125, ESTATE OF DOYLE.

New Trial cannot be Asked on Ground that law has been misapplied to facts where all material issues are found and findings are not attacked as unsustained by evidence.

Approved in *Quist v. Sandman*, 154 Cal. 753, 99 Pac. 207, where case is tried on agreed statement of facts agreed to be considered findings, new trial on ground that decision is against law will not lie; *Swift v. Occidental M. & P. Co.* (Cal.), 70 Pac. 741, sufficiency of complaint and question whether findings sustain judgment cannot be considered on appeal from order denying new trial; *Hayford v. Wallace* (Cal.), 46 Pac. 302, question of sufficiency of findings to support judgment cannot be considered on appeal from order denying new trial.

Distinguished in *Sharon v. Sharon*, 79 Cal. 653, 22 Pac. 32, holding decision on prior appeal was not law of case.

Miscellaneous.—Cited in *Estate of Dalton*, 2 Cal. Prob. 103, discussing nature of will contest.

73 Cal. 574-580, 15 Pac. 294, PEOPLE v. MELONE.

Statute of Limitations Applies to State, same as to private person.

Approved in *Bannock County v. Bell*, 8 Idaho, 4, 101 Am. St. Rep. 140, 65 Pac. 711, statute of limitations is applicable to counties.

Distinguished in dissenting opinion in *Bannock County v. Bell*, 8 Idaho, 9, 101 Am. St. Rep. 140, 65 Pac. 713, majority holding statute of limitations is applicable to counties.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 185.

73 Cal. 580-583, 15 Pac. 293, PEOPLE v. TRAVERS.

Verdict of Conviction in Burglary Case must specify degree of crime.

Approved in *People v. Wing* (Cal.), 24 Pac. 1026, following rule; *People v. Bannister* (Cal.), 34 Pac. 710, where in burglary case verdict fails to specify degree of crime, accused is entitled to new trial only; *McLane v. Territory*, 8 Ariz. 155, 71 Pac. 939, holding verdict in larceny case which failed to specify degree of crime insufficient; dissenting opinion in *State v. Mish*, 36 Mont. 178, 122 Am. St. Rep. 343, 92 Pac. 462, majority holding in prosecution for attempted burglary verdict need not specify degree of crime.

Correction of Verdict in Criminal Cases. See note, 23 L. R. A. 727.

73 Cal. 583-589, 2 Am. St. Rep. 829, 15 Pac. 287, IN RE NOAH.

Where Husband and Wife Agree to live apart, wife is not entitled to family allowance out of husband's estate.

Approved in *Estate of Edelman*, 148 Cal. 237, 113 Am. St. Rep. 231, 82 Pac. 963, where in will contest proponents rely upon agreement of husband and wife to live apart, proof of fairness of agreement is not condition precedent to having effect given thereto.

Word "Family," as Used in Section 122, Probate Act, embraces those who are immediate family of deceased and entitled to look to him for support.

Approved in *Estate of Miller*, 158 Cal. 422, 424, 111 Pac. 256, 257, on application for whole estate under section 1469 of Code of Civil Procedure, evidence is admissible to show widow abandoned husband before his death; *Ullman v. Abbott*, Admr., 10 Wyo. 111, 67 Pac. 469, wife separated from husband thirty years and not residing in state is not entitled to homestead.

Validity and Effect of Separation Agreements. See note, 83 Am. St. Rep. 879.

Miscellaneous.—Cited in *Estate of Tiffany*, 1 Cof. Prob. 516.

73 Cal. 590-594, 2 Am. St. Rep. 834, 15 Pac. 290, **ESTATE OF NOAH; S. C.**, 5 Cof. Prob. 278.

Under Section 1465 of Code of Civil Procedure, husband's separate property which could not have been homesteaded during his lifetime cannot be set apart as homestead to his surviving wife.

Approved in *Estate of Davidson*, 159 Cal. 100, 115 Pac. 50, holding widow not entitled to homestead in deceased husband's undivided interest in land held by them as tenants in common.

Probate Court may Set Apart Homestead, value whereof does not exceed five thousand dollars.

Approved in *Estate of Hessler*, 2 Cof. Prob. 359, holding widow is entitled to probate homestead where there are no minor children.

73 Cal. 594-599, 15 Pac. 297, **IN RE SCHEDEL.**

"Children" in Bequest to Children of testator's deceased sister, held to mean grandchildren.

Cited in *Estate of Fitzgerald*, 2 Cof. Prob. 175, construing word "heirs" in will.

73 Cal. 599-604, 15 Pac. 302, **WEEKS v. GARIBALDI SOUTH G. M. CO.**

Erroneous Ruling in Rendering Judgment on pleadings may be reviewed on appeal without being incorporated in bill of exceptions.

Approved in *Kahului R. R. Co. v. Hawaiian Commercial etc. Co.*, 11 Haw. 753, following rule.

In Absence of Affidavit of Publication, recitals in judgment will not be accepted as substitute for proof of service of summons.

Distinguished in *Brown v. Caldwell*, 13 Cal. App. 31, 108 Pac. 875, failure to serve summons upon party, absence of answer, demurrer or other appearance all appearing from judgment-roll, is not inconsistent with recital in judgment that party appeared by attorney.

Recognition or Exclusion of foreign corporations. See note, 24 L. R. A. 290.

Right of Corporation not Complying with local laws to defend action. See note, 17 L. R. A. (n. s.) 1117.

73 Cal. 604-610, 15 Pac. 305, FREDERICKS v. JUDAH.

In Absence of Showing, it will be presumed court instructed jury to disregard statements of attorneys outside of record.

Reaffirmed in *People v. Molina*, 126 Cal. 509, 59 Pac. 36.

Construction or Weight Given to Evidence is not subject of inquiry upon motion for new trial.

Approved in *Spencer v. Spencer*, 31 Mont. 640, 79 Pac. 322, special findings of jury cannot be attacked by affidavits of dissenting jurors on ground that conclusion of majority was reached by giving wrong construction or too much weight to part of evidence.

Admissibility of Evidence Given in former trial in civil case. See note, 91 Am. St. Rep. 200.

73 Cal. 610-613, 15 Pac. 311, SAN FRANCISCO v. LUNING.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 186.

73 Cal. 614-616, 15 Pac. 354, VANDOR v. ROACH.

Acts and Statements of Donor may be considered in determining whether intention to give is sufficiently manifest to constitute gift causa mortis.

Approved in *Fisher v. Ludwig*, 6 Cal. App. 151, 91 Pac. 661, holding certain acts sufficient to establish valid gift of bank deposit inter vivos although account was not transferred on books until after decedent's death; *Foley v. Harrison*, 233 Mo. 573, 136 S. W. 389, upholding sufficiency of delivery where donor, with intention of making gift causa mortis of contents of safe deposit vault, delivered keys thereof to donee.

Gifts Causa Mortis. See note, 99 Am. St. Rep. 891, 916.

73 Cal. 625-630, 15 Pac. 356, PRICE v. BEAVER.

Affidavit of Female Applicant for Purchase of swamp land must show she has capacity to purchase.

Approved in *Henshall v. Marsh*, 151 Cal. 302, 90 Pac. 698, where applicant for purchase of swamp land is unmarried woman, her application is valid although it imperfectly states she is entitled to purchase.

Statement in Affidavit for Purchase of swamp land that applicant is an unmarried woman, over age of eighteen years, a citizen of the United States, and a resident of California, of lawful age, complies with Political Code, section 3444.

Approved in *Segerstrom v. Scott*, 16 Cal. App. 260, 116 Pac. 692, reaffirming rule; *Dean v. Dunn*, 9 Cal. App. 357, 99 Pac. 382, holding capacity to purchase of female applicant to purchase state land was sufficiently established.

73 Cal. 630-632, 15 Pac. 313, CAREY v. CAREY.

Instance Where Finding of Willful Desertion held sustained by evidence.

Cited in *Patterson v. Patterson*, 45 Wash. 299, 88 Pac. 198, granting divorce for abandonment though plaintiff had never urged wife to return.

Desertion as Ground for Divorce. See notes, 119 Am. St. Rep. 629; 138 Am. St. Rep. 154.

73 Cal. 632-634, 15 Pac. 368, EX PARTE McNALLY.

Ordinance Imposing Annual License Tax of two hundred dollars upon liquor business does not violate any provision of state Constitution.

Approved in *Los Angeles v. Los Angeles etc. Gas Co.*, 152 Cal. 768, 93 Pac. 1007, monthly license tax of one hundred dollars upon gas companies, regardless of earnings, is not unreasonable discrimination.

Power of Municipality to Regulate Business may be exercised by imposing license tax in amount reasonably necessary to regulate such business.

Reaffirmed in *John Rapp & Son v. Kiel*, 159 Cal. 706, 115 Pac. 653.

Limit of Amount of License Fees. See note, 30 L. R. A. 428, 436.

Proceedings for Violations of Ordinances as prosecutions for crime. See note, 33 L. R. A. 36.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

73 Cal. 634-635, 15 Pac. 310, BEARDSLEY v. FRAME.

Right of Disbarred or Suspended Attorney or unlicensed person to transact legal business for another. See note, 24 L. R. A. (n. s.) 752.

73 Cal. 635-639, 15 Pac. 353, PEOPLE v. KETCHUM.

Error in Permitting Wife to Testify against husband is cured if husband subsequently testifies to same effect.

Approved in *State v. Johnny*, 29 Nev. 219, 87 Pac. 8, error in admitting confessions of defendant cured by his subsequent corroboration of his confessions.

Jurisdiction to Punish Crimes committed by or against Indians. See note, 21 L. R. A. 173.

73 Cal. 641-645, 15 Pac. 300, BYRNE v. CRAFTS.

Change of Use or Channel of Water appropriated. See note, 30 L. R. A. 368.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 74 CALIFORNIA.

74 Cal. 1-8, 5 Am. St. Rep. 513, 15 Pac. 307, **BARKLY v. COPELAND.**

Only Circumstances Within Knowledge of defendant before slanderous words spoken can be alleged in mitigation.

Approved in *Tingley v. Times-Mirror*, 151 Cal. 26, 89 Pac. 1107, allegation that there were rumors of matters set up in plea in mitigation of libel is insufficient.

In Action for Slander, Evidence of defendant's financial condition is admissible.

Approved in *Tingley v. Times-Mirror*, 151 Cal. 19, 89 Pac. 1104, applying rule in libel suit against corporation.

Evidence of Prior Similar Statements made by impeached witness, at time when imputed motive did not exist, is admissible.

Approved in *Driggers v. United States*, 21 Okl. 73, 1 Okl. Cr. 180, 129 Am. St. Rep. 823, 93 Pac. 617, evidence is inadmissible to support impeached witness by proof of prior consistent statements where his motive is not impugned; *Kesselring v. Hummer*, 130 Iowa, 149, 106 N. W. 502, evidence of statements by one afterward called as witness is inadmissible to corroborate him where no contradictory statements shown; *Aetna Ins. Co. v. Eastman*, 95 Tex. 37, 64 S. W. 863, declarations by assured day after taking out additional insurance beyond sum prohibited by policy, that he notified agent of original company, are inadmissible.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 67.

In Action for Slander for Charging plaintiff with being interested with another in particular cattle theft, evidence of other similar crimes is admissible under plea of justification.

Approved in *Davis v. Hamilton*, 88 Minn. 72, 92 N. W. 515, admitting declarations of plaintiff in libel tending to establish truth of alleged libel.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 319.

74 Cal. 9-11, 15 Pac. 362, **JAHANT v. CENTRAL PACIFIC R. R. CO.**

In Action Against Railroad for Killing Horses, evidence that horses went through open gate in fence is inadmissible in absence of allegation of negligence on part of defendant in maintaining gate.

Distinguished in *McCoy v. Southern Pac. Co. (Cal.)*, 26 Pac. 631, in action against railroad for negligently killing sheep, allegation that damage was caused by defendant's failure to maintain proper fence includes any defect in fence without more particular averment.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 349.

74 Cal. 11-20, 15 Pac. 431, WEBBER v. OLARKE.

Where Cause Submitted on Briefs, all points not stated in opening brief are considered waived.

Reaffirmed in *Hibernia Sav. & Loan Soc. v. Farnham*, 153 Cal. 584, 126 Am. St. Rep. 129, 96 Pac. 12, *Murphy v. Stelling*, 8 Cal. App. 705, 97 Pac. 674, *Maxwell v. Fresno City Ry. Co.*, 4 Cal. App. 752, 89 Pac. 369, and *Lewis v. San Francisco*, 2 Cal. App. 119, 82 Pac. 1109.

Possession of Part of Tract Entered under color of title gives constructive possession of whole tract described in instrument.

Reaffirmed in *Owsley v. Matson*, 156 Cal. 404, 104 Pac. 989.

Actual Possession Consists in Subjection to will and dominion of claimant.

Approved in *Johnston v. Albuquerque*, 12 N. M. 28, 72 Pac. 11, holding claimant to ownership of land on Albuquerque town grant did not have adverse possession of land; *Lambert v. Howard*, 49 Or. 345, 90 Pac. 151, possession of mortgagee of premises is sufficient where he has manifested by sundry acts of ownership continuous dominion over mortgaged land; *Knapp v. Alexander-Edgar Lumber Co.*, 145 Wis. 530, 130 N. W. 505, homesteader on public land cannot maintain trespass for timber cut before he went into possession.

Deed, by One Having Neither Title nor possession, if not void on face, constitutes color of title.

Approved in *Illinois Steel Co. v. Budziz*, 139 Wis. 298, 119 N. W. 938, purchaser from tenant without notice of relation of landlord and tenant, who takes and remains in possession as owner for statutory period, acquires title as against owner; *McCann v. Welch*, 106 Wis. 142, 81 N. W. 997, possession for statutory period by cotenant who has recorded deed purporting to give him full title to property, and who mortgages same, bars action by cotenants.

Color of Title. See note, 88 Am. St. Rep. 727.

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1242.

Invalid Tax Deed as Color of Title within general statutes of limitations. See note, 11 L. R. A. (n. s.) 778, 785.

74 Cal. 20-29, 5 Am. St. Rep. 418, 15 Pac. 318, EX PARTE CAMPBELL.

Under Constitution, Article XI, Section 11, counties are empowered to pass local police regulations not in conflict with general laws.

Approved in *Ex parte Thomas*, 56 Fla. 102, 47 So. 796, under charter of 1895, Pensacola may pass ordinance limiting hours of liquor traffic.

Municipal Anti-saloon Ordinance does not violate federal constitution or conflict with state law.

Approved in *Ex parte Young*, 154 Cal. 322, 323, 97 Pac. 824, 22 L. R. A. (n. s.) 330, upholding Orange county anti-saloon ordinance; *Ex parte Mogensen*, 5 Cal. App. 597, 90 Pac. 1064, under municipal act

of 1903, city of sixth class may pass prohibition ordinance; *Reed v. Collins*, 5 Cal. App. 499, 90 Pac. 975, discussing grounds upon which supervisors may refuse liquor license under ordinance; *Ex parte Fedderwitz* (Cal.), 62 Pac. 940, 941, upholding city ordinance punishing sale or gift of liquor by anyone.

Power of Municipality to Regulate Dealing in intoxicating liquors. See note, 114 Am. St. Rep. 298, 299, 301.

Discrimination as Between Different Localities, in respect to right to sell liquor. See note, 8 L. R. A. (n. s.) 363.

Constitutional Right to Prohibit sale of intoxicants. See note, 15 L. R. A. (n. s.) 932, 937.

Under County Government Act of 1883, Section 25, right of supervisors to enact police regulations not in conflict with general laws does not deprive cities of same right.

Distinguished in *In re O'Brien*, 29 Mont. 542, 75 Pac. 199, liquor law giving counties local option applies to sales in incorporated town in county which has gone dry.

74 Cal. 38-45, 15 Pac. 436, EX PARTE KOHLER.

Numerous Provisions Having One General object fairly indicated by title may be united in same act.

Approved in *Murphy v. Bondshu*, 2 Cal. App. 252, 83 Pac. 280, upholding act of 1901, amending provisions of Political Code relating to taxation.

As to When Title of Statute embraces only one subject, and what may be included thereunder. See note, 79 Am. St. Rep. 464.

Constitutionality of Code Amendment or revision. See note, 86 Am. St. Rep. 273.

74 Cal. 46-48, 15 Pac. 369, NEWELL v. DESMOND.

Where Property is not in Existence at time of sale, requirements of section 3440, Civil Code, with reference to change of possession, do not apply.

Approved in *Sequeira v. Collins*, 153 Cal. 429, 95 Pac. 877, applying rule to contract for pledging property not in existence.

74 Cal. 49-52, 15 Pac. 360, EUREKA ETC. R. R. CO. v. McGRATH.

Miscellaneous.—Cited in *De Hansen v. District Court*, 11 Ariz. 384, 94 Pac. 1127, as instance where condemnation proceedings were abandoned.

74 Cal. 52-60, 15 Pac. 364, ESTATE OF CAHILL.

Where Proceedings are Commenced by minor in propria persona, and guardian ad litem is appointed at trial, proceedings are not void for want of jurisdiction.

Approved in *Johnston v. Southern Pacific Co.*, 150 Cal. 539, 89 Pac. 350, minor may cure irregular appointment by affirming, pending appeal, where he attains majority before hearing; *Hill v. Reed*, 23 Okl. 621, 103 Pac. 857, irregularity in appointment of guardian may be cured by amendment on appeal.

Distinguished in *Estate of Harris*, 3 Cof. Prob. 3, arguendo.

74 Cal. 60-81, 15 Pac. 371, AUZERAIS v. NAGLEE.

Items of Account Stated are prima facie correct, and can only be questioned for fraud, error or mistake, put in issue by pleadings.

Approved in *Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 803, 804, 96 Pac. 578, *Johnson v. Gallatin Valley Milling Co.*, 38 Mont. 89, 98 Pac. 885, and *Martin v. Heinze*, 31 Mont. 73, 77 Pac. 428, all following rule; *Vance v. Supreme Lodge F. B.*, 15 Cal. App. 182, 114 Pac. 85, applying rule to monthly statements of commissions due employee, rendered by him to employer, and accepted by latter as correct; *Brown & Manzanares Co. v. Gise*, 14 N. M. 287, 91 Pac. 717, applying rule to items of interest in account stated.

Effect of Balances Struck in pass-books. See note, 134 Am. St. Rep. 1024.

Accounts Stated. See note, 136 Am. St. Rep. 44.

Under Section 360, Code of Civil Procedure, an open account already barred by statute of limitations cannot be revived by oral settlement.

Reaffirmed in *Rounthwaite v. Rounthwaite* (Cal.), 68 Pac. 305.

Oral Evidence is Admissible to Explain ambiguity on face of instrument.

Approved in *Fireman's Fund Ins. Co. v. Aachen-Munich Fire Ins. Co.*, 2 Cal. App. 697, 84 Pac. 255, word "warehouse" may be shown not to include elevator where contained in an insurance policy based on rate-book which established different rates for wheat stored in certain warehouse and elevator; *Lomax v. Colorado Nat. Bank*, 46 Colo. 237, 104 Pac. 88, "settlement" may be shown to mean "payment."

Where Original Demand is not Barred, statute begins to run from date of account stated, although verbal.

Approved in *Brown & Manzanares Co. v. Gise*, 14 N. M. 286, 91 Pac. 717, balances carried forward from year to year into account for current year became item of current account.

Under Section 360, Code of Civil Procedure, written acknowledgment by debtor need not be subscribed.

Approved in *Wiener v. H. Graff & Co.*, 7 Cal. App. 584, 95 Pac. 169, where lease provides for additional term provided written notice of exercise of option be given, notice is sufficient which identifies lessee, although not signed, where lessor does not object for six months.

Parties are Presumed to Contract with reference to known customs of merchants.

Approved in *Penn. R. R. Co. v. Naive*, 112 Tenn. 254, 79 S. W. 127, 64 L. R. A. 443, admitting evidence of custom to suspend business on Fourth of July.

When Balance of Account is adjusted and assented to, it becomes account stated, and balance is at once subject to statute of limitations.

Approved in *Visher v. Wilbur*, 5 Cal. App. 569, 90 Pac. 1067, applying rule to letters written by supposed debtor to single heir of estate.

What Constitutes an Account Stated. See note, 27 L. R. A. 812.

Effect of Retaining Statement of Account to render it an account stated. See note, 29 L. R. A. (n. s.) 335.

74 Cal. 81-84, 15 Pac. 444, **PEOPLE v. GUTIERREZ.**

Under Information Which Charges prior conviction, plea of not guilty of offense charged puts in issue prior conviction as well as principal offense.

Reaffirmed in *State v. Gordon*, 35 Mont. 464, 90 Pac. 175.

74 Cal. 85-94, 15 Pac. 439, TRIPP v. DUANE.

Defendant cannot, on Appeal, Complain of judgment against codefendants, where he is not prejudiced and others do not appeal.

Approved in *People v. Rea*, 2 Cal. App. 111, 83 Pac. 165, applying rule to judgment in quo warranto, whereby appealing defendants were ousted from office.

74 Cal. 94-98, 15 Pac. 384, PEOPLE v. SCOTT.

Under Section 786, Penal Code, where burglary is committed in one county and property carried into another, superior court of latter county has jurisdiction.

Reaffirmed in *State v. De Wolfe*, 29 Mont. 422, 74 Pac. 1086.

In Case of Larceny, Taking in first county need not be averred.

Approved in *State v. De Wolfe*, 29 Mont. 421, 74 Pac. 1086, holding such taking merely evidentiary.

74 Cal. 98-104, 15 Pac. 445, IN RE STEWART.

Where Will Shows Intention of Testator to dispose of entire community property as his own; wife is put to election between provision of will and rights as surviving wife.

Approved in *Gilroy v. Richards*, 26 Tex. Civ. 359, 63 S. W. 667, following rule; *Couts v. Holland*, 48 Tex. Civ. 482, 107 S. W. 915, such construction by trustees held not obviously erroneous.

Widow's Election Between Will and Dower or community property. See note, 92 Am. St. Rep. 705.

74 Cal. 106-108, 15 Pac. 448, McMANN v. SUPERIOR COURT.

Docketing Judgments. See note, 87 Am. St. Rep. 666.

74 Cal. 113-125, 15 Pac. 380, SAN FRANCISCO v. LIVERPOOL ETC. INS. CO.

Under Section 12, Article XI of Constitution, legislature may not impose taxes on inhabitants of municipal corporation for municipal purposes.

Approved in *Aachen & Munich Fire Ins. Co. v. Omaha*, 72 Neb. 532, 101 N. W. 9, holding void tax on premiums of insurance company in Omaha, imposed for municipal purposes, not under authority of city ordinance, but under general law.

Statutes. See note, 125 Am. St. Rep. 827.

After Foreign Corporation is Permitted to do business in state, state cannot impose conditions not imposed on citizen.

Cited in *Southern Ry. Co. v. Greene*, 160 Ala. 417, 49 So. 410, holding question one for federal supreme court.

Restrictions on Business of Foreign insurance companies. See note, 24 L. R. A. 300.

Foreign Corporation, by Continuing to do business after passage of act imposing unconstitutional restriction on right to do business, does not waive right to object to unconstitutionality.

Approved in *The King v. Lau Kiu*, 7 Haw. 492, person taking license to do business is not estopped to allege, on criminal prosecution for violation of its terms, that license law is unconstitutional.

Estoppel. See note, 104 Am. St. Rep. 790.

Taxation of Corporate Franchises. See note, 57 L. R. A. 97.

Validity of Tax on Insurance Companies for benefit of firemen. See note, 13 L. R. A. (n. s.) 1148.

74 Cal. 125-141, 15 Pac. 455, ESTATE OF ZEILE.

Legacies Given by Codicil Held Cumulative, and not advancements within meaning of term as used in will.

Approved in *In re Estate of Zeile* (Cal.), 15 Pac. 462, and *In re Estate of Zeile* (Cal.), 15 Pac. 462, both reaffirming rule.

Bequest of Stocks, Bonds or Notes as general or specific. See note, 11 L. R. A. (n. s.) 60.

74 Cal. 141-153, 15 Pac. 451, MAYNARD v. POLHEMUS.

Condition in Restraint of Alienation is void.

Distinguished in *Totten v. Pocahontas Coal & Coke Co.*, 67 W. Va. 643, 68 S. E. 375, holding rule inapplicable to deed in which grantor reserves power to himself to alienate fee.

Liability of Grantee on Covenants and conditions in deed. See note, 126 Am. St. Rep. 372, 376.

Validity of Conditions and Restrictions in deeds. See note, 95 Am. St. Rep. 217.

74 Cal. 144-147, 5 Am. St. Rep. 443, 15 Pac. 453, ESTATE OF SHILLABER.

Where There is Reference to Any Writing described as then existing in such terms as that it is capable of being ascertained, parol is admissible to ascertain it.

Approved in *Estate of Plumel*, 151 Cal. 82, 121 Am. St. Rep. 100, 90 Pac. 194, holding codicil written on reverse side of paper, obverse side of which contained a will, referred to latter though it makes no specific reference thereto.

Incorporation of Extrinsic Papers into wills. See notes, 107 Am. St. Rep. 39, 73; 68 L. R. A. 379.

74 Cal. 151-156, 13 Pac. 313, 15 Pac. 451, PHILLIPS v. GOLDTREE.

Under Civil Code Section 2466, Only Penalty Attached to failure to file names of members of partnership doing business under fictitious name is legal incapacity to maintain action.

Approved in *In re Farmers' Supply Co.*, 170 Fed. 504, applying rule under Revised Statutes of Ohio, sections 3170-1 to 3170-7.

Under Section 434, Code of Civil Procedure, objection to legal capacity of plaintiffs to sue must be taken by demurrer or answer.

Approved in *Wilson v. Yegen Bros.*, 38 Mont. 509, 100 Pac. 615, applying rule under sections 6538, 6539, Revised Codes.

Distinguished in *Valley Lumber Co. v. Driessel*, 13 Idaho, 672, 673, 93 Pac. 768, 769, 15 L. R. A. (n. s.) 299, where complaint on face shows plaintiff's want of capacity to sue, question of want of capacity cannot be raised by general demurrer.

74 Cal. 156-164, 15 Pac. 622, PFEIFFER v. REGENTS OF UNIVERSITY.

Tenant in Common cannot Create an easement or servitude in common land.

Distinguished in *Smith v. Roath*, 238 Ill. 253, 128 Am. St. Rep. 123, 87 N. E. 417, holding that easement is not extinguished by fact that one tenant in common of servient estate becomes sole owner of dominant estate.

Creation and Conveyance of Easements appurtenant. See note, 136 Am. St. Rep. 688.

74 Cal. 164-167, 15 Pac. 619, EX PARTE DIMMIG.

Under Section 812, Penal Code, original information, if verified, and containing positive evidence of facts tending to show guilt, is sufficient to support warrant.

Approved in *In re Mills Sing*, 13 Cal. App. 740, 110 Pac. 695, holding such deposition must be taken by magistrate, not clerk.

Under Sections 811, 812, 813, Penal Code, mere affidavit on information and belief is insufficient to support a warrant for arrest.

Approved in *Salter v. State*, 2 Okl. Cr. 475, 139 Am. St. Rep. 935, 102 Pac. 724, reaffirming rule; *State v. McGahey*, 12 N. D. 547, 97 N. W. 869, and *Dupree v. State*, 102 Tex. 463, 119 S. W. 304, both holding such affidavit insufficient to support search-warrant.

Complaint or Information on Information and belief as basis for warrant or examination preliminary thereto. See note, 25 L. R. A. (n. s.) 61.

Distinguished in *Ex parte Blake*, 155 Cal. 588, 591, 102 Pac. 270, 271, holding affidavit on information and belief sufficient where warrant is issued by magistrate for offense originally triable in justice's or police court; *Modern Loan Co. v. Police Court*, 12 Cal. App. 584, 108 Pac. 57, holding rule inapplicable where affidavit for search-warrant is made positively; *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 478, 107 Pac. 716, and *People v. Gregory*, 8 Cal. App. 741, 97 Pac. 914, both holding insufficiency of evidence to support warrant cannot be inquired into by motion to set aside information; *Lee v. Van Pelt*, 57 Fla. 98, 48 So. 634, holding that after commitment in proper form, question of insufficiency of affidavit for arrest cannot be raised on habeas corpus.

74 Cal. 167-175, 15 Pac. 670, MOORE v. BOYD.

Under Section 359, Code of Civil Procedure, stockholder's liability must be sued on within three years after discovery of facts upon which liability was created.

Reaffirmed in *O'Neill v. Quarnstrom*, 6 Cal. App. 472, 92 Pac. 392.

Statute of Limitations in Actions against corporate officers and stockholders. See note, 96 Am. St. Rep. 973, 980.

Time of Accrual of Right of Action as to stockholder's liability. See note, 10 L. R. A. (n. s.) 905.

For the Purposes of Statute of Limitations, if the means of knowledge exist, and circumstances are such as to put party on inquiry, he must be held to have had knowledge.

Approved in *Burling v. Newlands (Cal.)*, 39 Pac. 52, holding party chargeable with knowledge of fraud, where he could have learned facts from public records or by inquiry from friends; *Williamson v. Beardsley*, 137 Fed. 470, 69 C. C. A. 615, holding knowledge imputable where matters were of record, and parties had notice of pendency of administration proceedings.

Admission Made to Stranger Does not Operate as estoppel in favor of plaintiff.

Approved in *Dye v. Crary*, 13 N. M. 460, 85 Pac. 1041, 9 L. R. A. (n. s.) 1136, reaffirming rule.

74 Cal. 175-179, 15 Pac. 620, GARFIELD v. WILSON.

Under Sections 3441, 3443, 3445, Political Code, no application to purchase swamp land can be made until six months after segregation.

Approved in *Ross v. Kennedy* (Cal.), 26 Pac. 599, reaffirming rule.

Under Sections 3414, 3415, Political Code, when contest to determine right to purchase swamp land is referred to superior court, that court acquires jurisdiction to determine rights of parties.

Approved in *Blakeley v. Kingsbury*, 6 Cal. App. 710, 93 Pac. 131, during pendency of such contest, surveyor general cannot issue patent.

In Contest to Determine Right to purchase swamp land, each party must allege and prove his own case.

Distinguished in *Bieber v. Lambert*, 152 Cal. 564, 93 Pac. 97, where defendant, in contest to determine right to purchase vacant, non-agricultural school land, has a certificate of purchase regular on its face, he need not offer evidence in support of his claim.

Party Who has No Right to Purchase swamp land may contest right of another to purchase.

Approved in *Jacobs v. Walker* (Cal.), 33 Pac. 91, reaffirming rule.

74 Cal. 183-187, 15 Pac. 751, CARIT v. WILLIAMS.

Judgment is Original Debt in new form.

Reaffirmed in *Woehrle v. Canclini*, 158 Cal. 108, 109 Pac. 889.

74 Cal. 191-199, 15 Pac. 765, KAMM v. BANK OF CALIFORNIA.

Where Complaint States Cause of Action, and does not appear on its face to be barred by statute of limitations, objection on ground that statute has run cannot be taken by demurrer.

Approved in *Columbia Savings Assn. v. Clause*, 13 Wyo. 176, 78 Pac. 710, it is not permissible to look outside petition to process to ascertain when action was commenced.

74 Cal. 199-216, 15 Pac. 753, ESTATE OF SANDERSON.

Coexecutors are not Liable to Each Other, but each is liable to cestui que trust to full extent of funds received.

Reaffirmed in *Hewlett v. Beede*, 2 Cal. App. 564, 83 Pac. 1087.

Liability of Coexecutor for Default of one permitted to manage estate. See note, 11 L. R. A. (n. s.) 300, 312, 328, 334, 336, 342.

Exceptions to Account of Executor do not create "issues of fact" such as must be submitted to jury on demand of party in interest.

Approved in *Carter v. Waste*, 159 Cal. 26, 112 Pac. 728, motion for new trial is authorized in proceedings for distribution of an estate.

Under Section 1631, Code of Civil Procedure, court has power to examine executor concerning all items of his account, and to reject or reduce such as appear unjust, notwithstanding no specific objections are filed by any interested person.

Approved in *Estate of Hite*, 155 Cal. 453, 101 Pac. 450, and *In re More's Estate* (Cal.), 54 Pac. 150, both reaffirming rule.

Right of Court to Surcharge Account before it in absence of objection to the account, or upon objection by *amicus curiae*. See note, 18 L. R. A. (n. s.) 285.

Under Section 624, Code of Civil Procedure, special verdict must pass on all issues by presenting conclusions of fact bearing on all.

Distinguished in *Weinke v. Bibby*, 15 Cal. App. 56, 113 Pac. 878, holding rule inapplicable where general verdict is also rendered.

Under Section 1314, Code of Civil Procedure, in will contests, issues must be such that determination of them will leave to court nothing but entry of judgment admitting or rejecting probate.

Approved in *In re Hobbins' Estate*, 41 Mont. 50, 108 Pac. 9, holding question of validity of specific bequest to be improper issue in will contest.

Liability of Executors and Trustees for compound interest. See note, 29 L. R. A. 634.

Special Contracts and Obligations to make payment in gold or silver. See note, 29 L. R. A. 523.

74 Cal. 219-222, 15 Pac. 731, LITTLE v. SUPERIOR COURT.

Where New Trial is Ordered by appellate court, only persons made parties to appeal are affected.

Approved in *St. John v. Andrews Institute*, 192 N. Y. 386, 85 N. E. 144, holding rule applicable to reversals and modifications of judgments generally.

Reversal of Judgments. See note, 96 Am. St. Rep. 127.

74 Cal. 222-223, 15 Pac. 772, SANTA CRUZ WATER CO. v. KRON.

Under Section 323, Political Code, statute, unless otherwise provided therein, does not take effect until sixty days after passage.

Approved in *Harrison v. Colgan*, 148 Cal. 76, 82 Pac. 677, holding incumbent justices of district court of appeals not entitled to salary of eight thousand dollars under act of 1905.

74 Cal. 224-249, 15 Pac. 732, BATES v. PORTER.

Word "Revenue" as Used in Act of 1858, incorporating city and county of Sacramento, means gross receipts derived from water rates, and not net receipts.

Distinguished in *Goodwin v. McGaughey*, 108 Minn. 253, 122 N. W. 8, holding word "income," as used in certain will, to mean net, not gross, income.

74 Cal. 250-257, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773, LOUGH-BOROUGH v. McNEVIN.

Lien of Pledgee is Extinguished by tender.

Approved in *Pittsburg Plate Glass Co. v. Leary*, 25 S. D. 263, 126 N. W. 274, applying rule to subcontractor's lien; *Thomas v. Seattle Brewing etc. Co.*, 48 Wash. 563, 125 Am. St. Rep. 945, 94 Pac. 117, 15 L. R. A. (n. s.) 1164, applying rule to chattel mortgage.

Liens. See note, 125 Am. St. Rep. 901.

Pledges. See note, 130 Am. St. Rep. 686.

Effect of Unaccepted Tender on lien of mortgage or pledge. See note, 33 L. R. A. 237.

Intervention. See note, 123 Am. St. Rep. 300.

74 Cal. 258-260, 15 Pac. 833, SHAW v. STATLER.

Under Article XI, Section 18, of Constitution, county revenue for given year must be applied to payment of indebtedness incurred during such year, before payment of previous indebtedness.

Approved in *County of Tehama v. Sisson*, 152 Cal. 172, 178, 92 Pac. 67, 69, reaffirming rule.

74 Cal. 261-263, 15 Pac. 774, PACIFIC COAST RY. CO. v. PORTER.

Section 1249, Code of Civil Procedure, providing method for ascertaining damages in condemnation proceedings, does not conflict with section 14 of article I of Constitution, under which compensation must be awarded irrespective of benefit to remaining land.

Reaffirmed in *Los Angeles v. Gager*, 10 Cal. App. 381, 102 Pac. 19.

Right to Set Off Benefits Against Damages on condemnation. See note, 9 L. R. A. (n. s.) 828.

74 Cal. 266-268, 5 Am. St. Rep. 440, 15 Pac. 831, WAGGLE v. WORTHY.

Homestead Declaration, Filed While Claimant has another homestead duly selected and never legally abandoned, is void.

Reaffirmed in *Hair v. Davenport*, 74 Neb. 119, 103 N. W. 1043.

Distinguished in *Estate of Clavo*, 6 Cal. App. 776, 93 Pac. 295, holding that new declaration may be made where surviving husband marries second wife.

Homesteads. See notes, 99 Am. St. Rep. 224; 90 Am. St. Rep. 460.

Abandonment of Homestead. See note, 102 Am. St. Rep. 390.

74 Cal. 273-280, 20 Pac. 573, ROYLANCE v. SAN LUIS HOTEL CO.

Materialmen's Lien, Filed Before Completion of building, is premature, and cannot be enforced.

Approved in *Baker v. Lake Land Canal etc. Co.*, 7 Cal. App. 484, 94 Pac. 774, *Santa Monica Lumber etc. Co. v. Hege* (Cal.), 48 Pac. 70, *Schallert & Ganahl Lumber Co. v. Sheldon* (Cal.), 32 Pac. 236, and *Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 117, 75 Pac. 153, all reaffirming rule.

74 Cal. 287-297, 15 Pac. 839, CALIFORNIA ANNUAL CONFERENCE OF THE M. E. CHURCH v. SEITZ.

Appraisers are not Subject to Rules governing arbitration.

Approved in *Omaha v. Omaha Water Co.*, 218 U. S. 198, 30 Sup. Ct. 618, 54 L. Ed. 999, and *Omaha Water Co. v. Omaha*, 162 Fed. 234, 89 C. C. A. 205, both reaffirming rule.

Agreements to Arbitrate. See note, 15 L. R. A. 143.

Where a Lease of Land on which are buildings belonging to lessee gives lessee option of removing buildings at end of term or compelling purchase by lessor, contract is entire, and assignment by lessee, gives assignee right to compel lessor to purchase.

Approved in *Tollner v. McGinnis*, 55 Wash. 436, 104 Pac. 644, 24 L. R. A. (n. s.) 1082, holding stipulation by lessor to purchase buildings is dependent upon payment of rent.

Covenant of Lessor to Pay for Repairs or improvements as one running with land. See note, 4 L. R. A. (n. s.) 468.

74 Cal. 298-301, 15 Pac. 844, LOVELAND v. GARNER.

Judgment for Plaintiff on Pleadings may be rendered where material averments of complaint are not denied by answer.

Reaffirmed in *St. Mary's Hospital v. Perry*, 152 Cal. 343, 92 Pac. 866.

Where Facts Alleged in Complaint are presumably within knowledge of defendant, denial upon information and belief is insufficient.

Approved in *Zany v. Rawhide Gold Min. Co.*, 15 Cal. App. 375, 114 Pac. 1027, reaffirming rule; *Peacock v. United States*, 125 Fed. 587, 60 C. C. A. 389, applying rule to facts which are matters of record.

As to When Denials on Information and belief are permissible. See note, 133 Am. St. Rep. 116.

Denials upon Information and Belief, or on knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 773.

74 Cal. 301-306, 15 Pac. 845, BREEN v. DONNELLY.

Statute of Limitations Does not Begin to Run against right of action for correction of deed, in absence of negligence, until discovery of mistake.

Reaffirmed in *Hart v. Walton*, 9 Cal. App. 508, 99 Pac. 721, and *Isaacks v. Wright*, 50 Tex. Civ. 316, 110 S. W. 972.

74 Cal. 311-312, 15 Pac. 847, ESTATE OF LETELLIER.

Under Section 1658, Code of Civil Procedure, court has no power to decree partial distribution of estate of decedent upon petition of executor.

Approved in *Alcorn v. Gieske*, 158 Cal. 401, 111 Pac. 101, and *In re Letellier's Estate (Cal.)*, 15 Pac. 849, both reaffirming rule.

74 Cal. 313-315, 16 Pac. 5, DURKEE v. COTA.

Where Complaint Sets Out Contract which is ambiguous, pleader must put some definite construction on it by averment.

Approved in *Hill v. McCoy*, 1 Cal. App. 161, 81 Pac. 1016, holding in action for commission for sale of land under written memorandum but describing property by name and acreage only, complaint, after setting out contract in haec verba, properly made averments to locate property; *Johnson v. Kindred State Bank*, 12 N. D. 341, 96 N. W. 589, denying right to allege parol agreement for rewriting insurance where written contract set forth in complaint purports on face to set up whole contract; *Linton v. Brownsville etc. Irr. Co.*, 46 Tex. Civ. 288, 102 S. W. 435, applying where contract for rental of land guaranteed certain crop.

74 Cal. 332-337, 5 Am. St. Rep. 442, 16 Pac. 7, SUTRO v. PETTIT.

Purchaser of County Bonds is Charged with knowledge of limits of powers of supervisors.

Approved in *Fountain v. Sacramento*, 1 Cal. App. 466, 82 Pac. 639, holding one who furnishes materials to city to be charged with knowledge of charter provisions.

What Constitutes "Indebtedness" of Municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 403.

74 Cal. 338-341, 16 Pac. 233, ESTATE OF GARBER.

Public Administrator has Prior Right as against appointee of foreign executor who has renounced his right to letters in this state and is neither surviving husband or wife of deceased.

Approved in *Estate of Carlson*, 2 Cal. Prob. 279, where executor dies pending administration, public administrator is entitled to letters as against executor of first executor who is not next of kin.

74 Cal. 341-345, 15 Pac. 849, WEIMMER v. SUTHERLAND.

Powers of Justices' Courts are to be Determined by provisions of code expressly applicable to them, and not by provisions expressly applicable to courts of record.

Approved in *Hubbard v. Superior Court*, 9 Cal. App. 169, 98 Pac. 395, section 581, Code of Civil Procedure, relative to dismissal of action, is inapplicable to justices' courts.

74 Cal. 345-351, 16 Pac. 189, TOLMAN v. SMITH.

Under Sections 1186, 1187, Civil Code, mortgage executed by married woman is void unless acknowledged by her after examination separate and apart from husband.

Approved in *Cordano v. Wright*, 159 Cal. 614, 115 Pac. 229, holding rule applicable to deed executed August 16, 1879.

74 Cal. 351-353, 16 Pac. 187, MILLER v. THAYER.

Where Mortgage is in Form of absolute deed, proper form of release is by conveyance.

Approved in *Grogan v. Valley Trading Co.*, 30 Mont. 234, 76 Pac. 213, reaffirming rule.

74 Cal. 356-361, 16 Pac. 17, WALSH v. McMENOMY.

Under Mechanic's Lien Law, Owner is liable to extent of contract price prematurely paid.

Distinguished in *Hoffman-Marks Co. v. Spires*, 154 Cal. 115, 97 Pac. 153, under section 1200, Code of Civil Procedure, if no balance remains, lien claimants must look to contractor for payment.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 562.

74 Cal. 362-365, 16 Pac. 19, MACHADO v. FERNANDEZ.

Indorser of Promissory Note Payable with interest at sight or on demand is not exonerated by mere failure of presentment for payment.

Denied in *Wills v. Booth*, 6 Cal. App. 202, 91 Pac. 760, 761, indorsee of note, after maturity, from payee, must make demand on maker within time provided by Civil Code, section 3135, or show excuse for failure, before he can charge indorser.

Rights Inter Se of Accommodation Parties to commercial paper. See note, 28 L. R. A. (n. s.) 1043.

74 Cal. 365-373, 16 Pac. 13, ESTATE OF REINHARDT.

Gift by Implication cannot be Inferred from fact that will is silent on subject.

Approved in *Bond v. Moore*, 236 Ill. 580, 86 N. E. 388, 19 L. R. A. (n. s.) 540, reaffirming rule; *Estate of Clancy*, 3 Cof. Prob. 351, construing will as passing contingent interest; *Griffin v. Fairmont Coal Co.*, 59 W. Va. 582, 53 S. E. 66, applying rule to implied reservation in deed.

Devise or Bequest by Implication. See note, 15 L. R. A. (n. s.) 75.

74 Cal. 373-376, 16 Pac. 192, PEOPLE v. STACY.

Sureties Unconditionally Signing Official Bond are jointly and severally liable.

Approved in *Baker County v. Huntington*, 48 Or. 601, 87 Pac. 1040, holding liability not limited as to obligee by memoranda opposite signature of sureties.

Conditional Execution of Contract under parol agreement that it shall not take effect until others sign. See note, 45 L. R. A. 326, 338.

Effect of Delivery of Bond Unsigned by principal obligor. See note, 12 L. R. A. (n. s.) 1119.

74 Cal. 376-380, 16 Pac. 194, **CALLENDER v. McLEOD.**

Sales of Property not then in existence. See note, 81 Am. St. Rep. 44.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 33, 55.

74 Cal. 384-386, 16 Pac. 206, **ESTATE OF MAXWELL.**

Probate of Will is Conclusive unless contested within year.

Approved in *Hanley v. Hanley*, 4 Cal. Prob. 480, denying right to collaterally attack order of probate homestead.

Miscellaneous.—Cited in *Estate of Byrne*, 3 Cal. Prob. 70, allegations of fraud confer no jurisdiction on probate court to vacate order settling account on motion.

74 Cal. 389-397, 16 Pac. 201, **PEOPLE v. OHING HING CHANG.**

Section 2052, Code of Civil Procedure, applies to criminal proceedings, and when testimony of witness on preliminary examination is used to impeach witness, it must be read and shown to witness on demand.

Approved in *People v. Dillwood* (Cal.), 39 Pac. 439, reaffirming rule; *Keane v. Pittsburg Lead etc. Co.*, 17 Idaho, 189, 105 Pac. 64, applying rule under section 6083, Revised Codes.

74 Cal. 400-406, 5 Am. St. Rep. 448, 16 Pac. 197, **PEOPLE v. GREENE.**

Motion to Set Aside Judgment is direct, not collateral, attack on judgment.

Distinguished in *Estate of Davis*, 151 Cal. 324, 121 Am. St. Rep. 105, 86 Pac. 185, holding rule inapplicable where setting aside judgment is merely part of relief sought in different proceeding.

Judgment Void on Its Face may be set aside at any time after entry, provisions of section 473, Code of Civil Procedure, limiting time for motion to set aside judgment being inapplicable.

Approved in *People v. Greene* (Cal.), 16 Pac. 200, reaffirming rule; *In re Estate of Bouyssou*, 3 Cal. App. 41, 84 Pac. 460, applying rule to order made without jurisdiction; *Kerns v. Morgan*, 11 Idaho, 580, 83 Pac. 957, applying rule under Revised Statutes, section 4229; *Multnomah Co. v. Portland C. Co.*, 49 Or. 351, 90 Pac. 157, applying rule to case of forged entry.

Distinguished in *Tuffree v. Stearns Ranchos Co.* (Cal.), 54 Pac. 827, *National Metal Co. v. Greene etc. Co.*, 9 Ariz. 196, 80 Pac. 398, and *State v. District Court*, 38 Mont. 171, 129 Am. St. Rep. 636, 99 Pac. 294, all holding rule inapplicable where judgment is valid on its face.

Relief from Judgments Rendered on publication of process. See note, 16 L. R. A. 361.

74 Cal. 407-409, 16 Pac. 200, **PEOPLE v. LEYBA.**

What Weapons may be Considered Deadly under law of homicide and assault. See note, 21 L. R. A. (n. s.) 502.

74 Cal. 409-413, 16 Pac. 226, WALDRIP v. BLACK.

Surety upon Promissory Note by Payment becomes equitable assignee and entitled to enforce it as holder and to foreclose mortgage given as security.

Reaffirmed in *Stanley v. McElrath* (Cal.), 22 Pac. 676.

Right of Subrogation. See note, 99 Am. St. Rep. 511.

Distinguished in *Crystal v. Hutton*, 1 Cal. App. 254, 255, 81 Pac. 1115, 1116, holding that payment extinguishes note and surety's remedy against principal is upon implied obligation for reimbursement.

74 Cal. 413-418, 16 Pac. 22, WELCH v. STROTHER.

Act of February 27, 1875, Providing that no demand against treasury of San Francisco, which exceeds one-twelfth of amount permitted to be expended in fiscal year, shall be allowed in any one month, is inapplicable to payment of salaries of officers whose salaries are fixed by law.

Approved in *Harrison v. Horton*, 5 Cal. App. 418, 90 Pac. 717, provision of San Francisco charter forbidding auditor to draw warrants except upon unexhausted specific appropriation has no application to salary of officer fixed in valid ordinance.

What Constitutes "Indebtedness" of Municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 405.

74 Cal. 421-425, 16 Pac. 229, ESTATE OF RAYNOR.

Superior Court of County of Which Minor is an inhabitant or resident has jurisdiction to appoint a guardian for him.

Approved in *Guardianship of Deisen*, 2 Cal. Prob. 466, where minor is brought here for theatrical performances and then taken to another state for same purpose, superior court may appoint guardian.

Miscellaneous.—Cited in *Guardianship of Treadwell*, 3 Cal. Prob. 317, to point that minor fourteen years of age may change his residence though he cannot by his own act change his domicile.

74 Cal. 425-429, 16 Pac. 231, BENNETT v. GREEN.

Where Evidence is Objected to on insufficient grounds, proper objection is deemed to be waived and cannot be raised on appeal.

Approved in *Enid & Anadarko Ry. Co. v. Wiley*, 14 Okl. 315, 78 Pac. 98, objection that evidence is "incompetent," without stating specific grounds, is insufficient.

74 Cal. 430-432, 16 Pac. 228, JOHNSON v. MALLOY.

Courts Should not Render Judgments which cannot be enforced.

Approved in *Board of Education v. San Diego*, 1 Cal. App. 312, 82 Pac. 89, dismissing appeal from judgment sustaining demurrer to petition for mandamus to enforce levy of school tax which could not be enforced under charter when appeal taken.

74 Cal. 432-435, 16 Pac. 235, SCHWARTZ v. KNIGHT.

Filing of Materialman's Lien prior to completion of building is premature and cannot be enforced.

Approved in *Santa Monica Lumber etc. Co. v. Hege* (Cal.), 48 Pac. 70, following rule.

Distinguished in *California Powder Works v. Blue Tent etc. Gold Mines* (Cal.), 22 Pac. 392, 393, holding rule inapplicable to mine which is in continuous operation.

Building Erected in Part Only is completed within Code of Civil Procedure, section 1187, where owner having proceeded to erect it abandoned his design of finishing it.

Approved in California etc. *Cement Co. v. Wentworth Co.*, 16 Cal. App. 712, 118 Pac. 111, where contractor furnished laundry machinery to hotel but did not file notice of lien till after owner's notice that work on building had ceased and that building had been accepted had been recorded, claim of lien was too late.

74 Cal. 435-444, 16 Pac. 236, O'CONNOR v. IRVINE.

Under Section 389, Code of Civil Procedure, if necessary parties are not before court, it is duty of court to order them brought in, and failure so to do is fatal to judgment.

Reaffirmed in *Mitan v. Roddan*, 149 Cal. 8, 9, 84 Pac. 147, 148, 6 L. R. A. (n. s.) 275, and *Hurley v. O'Neill*, 31 Mont. 601, 78 Pac. 244.

Distinguished in *Sloan v. Byers*, 37 Mont. 513, 97 Pac. 858, holding power permissive and not mandatory.

Assignee of Cause of Action to enforce trust is real party in interest.

Approved in *Dryden v. Sewell*, 2 Alaska, 188, holding real party in interest to be one who would be entitled to benefits of action if successful.

As to Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 604, 613.

74 Cal. 444-447, 16 Pac. 242, GASSEN v. HENDRICK.

Where There is Evidence Tending to establish absence of notice and no evidence to contrary, party is purchaser in good faith.

Reaffirmed in *Froman v. Madden*, 13 Idaho, 142, 88 Pac. 895.

Conveyance in Consideration of Cancellation of pre-existing indebtedness is conveyance for valuable consideration.

Reaffirmed in *Harris v. Evans*, 134 Ga. 162, 67 S. E. 881.

Pre-existing Debt as Consideration for bona fide purchase of property not negotiable. See note, 36 L. R. A. 163, 164.

Discharge of Antecedent Debt as Consideration entitling bona fide purchaser or encumbrancer to protection of recording acts. See note, 27 L. R. A. (n. s.) 622.

74 Cal. 448-457, 13 Pac. 681, 16 Pac. 241, PHELAN v. POYORENO.

Titles to Land in California Perfect under Mexican government need not be confirmed by United States land commissioner.

Reaffirmed in *Bottiller v. Dominguez* (Cal.), 13 Pac. 685.

74 Cal. 459-461, 16 Pac. 243, SCHROEDER v. SCHMIDT.

Motion for Nonsuit Raises question of law.

Approved in *Non-Refillable Bottle Co. v. Robertson*, 8 Cal. App. 105, 96 Pac. 325, and *Archibald Estate v. Matteson*, 5 Cal. App. 445, 90 Pac. 725, both holding that if evidence makes prima facie case, motion must be denied.

Error in Granting Nonsuit cannot be reviewed on appeal from order refusing new trial, unless excepted to and specified as error.

Distinguished in *Whitney v. Dewey*, 10 Idaho, 644, 80 Pac. 1118, 69 L. R. A. 572, holding appellate court will examine errors assigned and specified on motion for new trial and contained in transcript, even though not specified in brief.

74 Cal. 463-467, 16 Pac. 250, SAN JOSE RANCH CO. v. BROOKS.

Private Individual cannot Maintain Action to abate public nuisance where injury to him is same in kind, although of greater degree, as suffered by public in general.

Approved in Reynolds v. Presidio etc. R. R. Co., 1 Cal. App. 234, 81 Pac. 1119, following rule.

Right of One Prevented by Unlawful Obstruction from using highway to maintain action. See note, 28 L. R. A. (n. s.) 1053.

Distinguished in Cushing-Wetmore Co. v. Gray, 152 Cal. 121, 125 Am. St. Rep. 47, 92 Pac. 71, and Stricker v. Hillis, 15 Idaho, 715, 99 Pac. 833, both holding that action may be maintained where obstruction in highway entirely prevents ingress and egress to private land.

74 Cal. 468-474, 5 Am. St. Rep. 455, 16 Pac. 223, DE SEPULVEDA v. BAUGH.

Judgment or Deed Referring for Description of land to maps on file is not void for uncertainty.

Approved in Murray v. Nixon, 10 Idaho, 617, 79 Pac. 646, reaffirming rule; Williams v. Bisagno (Cal.), 34 Pac. 641, upholding sufficiency of resolution to pave street which refers by number to certain ordinances for manner in which work is to be done; Staples v. May (Cal.), 23 Pac. 712, holding that mortgage of all mineral lands of mortgagor in particular county is sufficient description; Carter v. Smith, 151 Ala. 612, 44 So. 424, in absence of information as to what proof was made before trial court, it will be presumed on appeal that description of land was sufficient.

74 Cal. 475-477, 16 Pac. 239, EDWARDS v. FRESNO COUNTY.

District Attorney cannot Charge County compensation for conviction for misdemeanor in justice's court in cases in which he rendered no services either personally or by deputy.

Approved in Tilden v. Esmeralda Co., 32 Nev. 325, 107 Pac. 882, applying rule under vagrancy act of 1877.

74 Cal. 478-481, 16 Pac. 252, OAKS v. SCHEIFFERLY.

Sheriff cannot Recover on Bond of indemnity against loss until he has actually paid damages.

Approved in Cousins v. Paxton & Gallagher Co., 122 Iowa, 469, 98 N. W. 279, reaffirming rule.

74 Cal. 482-488, 16 Pac. 244, PEOPLE v. THORNTON.

Hearsay Evidence is Inadmissible in action for libel.

Approved in Salem News Pub. Co. v. Caliga, 144 Fed. 967, 75 C. C. A. 673, reaffirming rule.

Under Subdivision 3, Section 1181, Penal Code, separation of jury after submission of case vitiates verdict.

Reaffirmed in Bilton v. Territory, 1 Okl. Cr. 574, 99 Pac. 166.

Effect of Separation of Jury. See note, 103 Am. St. Rep. 162.

Misconduct of Jurors, other than their separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1051.

74 Cal. 493-502, 16 Pac. 380, HYDE v. BEDDING.

Under Section 738, Code of Civil Procedure, action to quiet title may be maintained by holder of legal title against defendant in possession.

. Approved in *Bryan v. Tormey* (Cal.), 21 Pac. 726, reaffirming rule.

Laches is No Defense to Action to quiet title where plaintiff is in possession.

Reaffirmed in *Harris v. Defenbaugh*, 82 Kan. 769, 109 Pac. 682.

Effect of Legal Remedy upon Equitable jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 74.

74 Cal. 502-508, 16 Pac. 313, HALL v. COUNTY OF LOS ANGELES.

Miscellaneous.—Cited in *Williar v. Nagle*, 109 Md. 80, 71 Atl. 429, there can be no recovery by architect of compensation for plans for building to cost specified sum where building cannot be erected except at cost materially in excess of specified amount.

74 Cal. 512-519, 16 Pac. 307, BARNARD v. WILSON.

Claim Adverse to Ancestor is not Barred by decree of distribution, although claimant fails to appear and ask for decree to himself.

Approved in *Jenner v. Murphy*, 6 Cal. App. 439, 92 Pac. 407, holding that fraudulent deed made by heir is fed by decree of distribution to grantee.

Distinguished in *Cooley v. Miller & Lux*, 156 Cal. 515, 105 Pac. 983, holding that decree of distribution to devisee does not divest rights of prior grantee of devisee.

74 Cal. 523-526, 5 Am. St. Rep. 464, 16 Pac. 315, ESTATE OF ROWLAND.

Decree of Distribution is Final as to Heirs, legatees, and devisees unless appealed from.

Reaffirmed in *Goldtree v. Thompson* (Cal.), 20 Pac. 414.

Surviving Husband Who Claims Property in hands of wife's executor as community property cannot have claim determined upon proceeding for distribution of wife's estate.

Distinguished in *Estate of Learned*, 156 Cal. 311, 104 Pac. 315, holding where husband and wife executed mutual will, court may distribute community property to husband in administration of wife's estate; In *re Burdick's Estate* (Cal.), 40 Pac. 36, holding probate court may declare property to be community property and distribute it to wife who is not devisee.

Distribution of Community Property as part of wife's estate. See note, 82 Am. St. Rep. 365.

Nature and Elements of Estoppel. See note, 130 Am. St. Rep. 140.

74 Cal. 530-532, 16 Pac. 385, SILVA v. HOLLAND.

Motion for Nonsuit must State Grounds on which it is made.

Approved in *Johnson v. Center*, 4 Cal. App. 618, 88 Pac. 728, appellate court cannot examine alleged error in denying motion for nonsuit where record fails to show grounds on which motion was made.

74 Cal. 532-536, 16 Pac. 325, RAPP v. SPRING VALLEY GOLD CO.

Under Section 1195, Code of Civil Procedure, reasonable attorney's fee is necessary incident to judgment for plaintiff in action to foreclose mechanic's lien.

Approved in *Chivell v. Spring Valley Gold Co.* (Cal.), 16 Pac. 328, *Genest v. Las Vegas etc. Assn.*, 11 N. M. 271, 67 Pac. 748, all reaffirming rule; *Thompson v. Wise Boy etc. Co.*, 9 Idaho, 370, 74 Pac. 961, and *Peckham v. Fox*, 1 Cal. App. 308, 82 Pac. 92, holding that section

1195 is constitutional, and attorney's fees are lien; *Hewett v. Dean* (Cal.), 25 Pac. 756, holding reasonable attorney's fee may be recovered according to agreement in action to foreclose mortgage; *Pittsburg etc. Ry. Co. v. Taber*, 168 Ind. 422, 77 N. E. 742, upholding provision for recovery of plaintiff's attorneys' fees, in cases for collection of street assessments; *Pyramid Land etc. Co. v. Pierce*, 30 Nev. 246, 95 Pac. 213, upholding act of 1893, providing for attorney's fee in favor of party recovering damages against one herding stock on his land; *Armijo v. Mountain Elec. Co.*, 11 N. M. 249, 67 Pac. 730, holding fees may be fixed by court.

Constitutionality of Statutes Allowing attorney's fees. See note, 79 Am. St. Rep. 181.

74 Cal. 536-540, 5 Am. St. Rep. 466, 16 Pac. 321, **ESTATE OF RADOVICH.**

Executor Who Sells Personal Property without order of court is liable to estate for its value with interest.

Reaffirmed in *Estate of Scott*, 1 Cal. App. 745, 83 Pac. 87.

74 Cal. 540-544, 16 Pac. 317, **MORGAN v. HECKER.**

Attacks by Creditors on Conveyances made by husbands to wives. See note, 90 Am. St. Rep. 503, 515, 516.

74 Cal. 544-547, 16 Pac. 392, **WEST v. RUSSELL.**

Under Section 343, Code of Civil Procedure, action for accounting is barred in four years.

Approved in *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 234, 90 Pac. 41, reaffirming rule.

74 Cal. 547-549, 16 Pac. 394, **PEOPLE v. HOWARD.**

Application for New Trial in criminal case, on ground of newly discovered evidence, should be regarded with distrust.

Reaffirmed in *People v. Weber*, 149 Cal. 350, 86 Pac. 681.

74 Cal. 549-557, 16 Pac. 490, **PEOPLE v. PARVIN.**

When Title of Statute Embraces only one subject, and what may be included thereunder. See note, 79 Am. St. Rep. 481, 483, 484.

Power of Legislature to Enact or Amend a code or compilation of laws by a single statute. See note, 55 L. R. A. 836, 843.

74 Cal. 557-565, 5 Am. St. Rep. 470, 16 Pac. 386, **KELLY v. CENTRAL PACIFIC R. R. CO.**

Equity will not Enforce Harsh and unjust contract, though valid. .

Approved in *White v. Sage*, 149 Cal. 615, 87 Pac. 194, holding burden to be on plaintiff to show reasonableness of contract for sale of land; *Gottfried v. Bray*, 208 Mo. 661, 106 S. W. 642, refusing to enforce contract for sale of land.

Specific Performance will not be Decreed where defendant was induced to enter into contract by means of fraudulent misrepresentations.

Approved in dissenting opinion in *Sonnesyn v. Akin*, 14 N. D. 272, 104 N. W. 1036, majority denying damages for false statements inducing contract to sell land.

Distinguished in *Cushing v. Heuston*, 53 Wash. 389, 102 Pac. 33, holding fraud no defense where it was not inducement to contract.

Where Vendor has Special Motives for selling to one person, equity will not enforce sale to another although he offers same price.

Reaffirmed in *Booth v. Dingley*, 148 Mich. 203, 111 N. W. 853.

Refusal of Specific Performance of valid contract for other reason than that property is of a particular class. See note, 128 Am. St. Rep. 390.

74 Cal. 565-566, 16 Pac. 390, **KELLY v. CENTRAL PACIFIC R. R. CO.**

Appellate Court may Modify Judgment in respect to costs.

Reaffirmed in *White v. Gaffney*, 1 Cal. App. 717, 82 Pac. 1088.

Under Section 1022, Code of Civil Procedure, where specific performance is refused, costs should be awarded to defendant.

Reaffirmed in *Hoyt v. Hart*, 149 Cal. 731, 87 Pac. 572.

74 Cal. 567-569, 16 Pac. 396, **ESTATE OF GLENN.**

Allowed Claim Against Estate is judgment.

Distinguished in *Thompson v. Bank of California*, 4 Cal. App. 669, 88 Pac. 990, holding that allowance of contingent claim of estate of beneficiary against estate of payee of note is not judgment on which payment can be ordered.

Claim Against Estate of Deceased Person draws interest from time of its allowance and approval.

Approved in *Estate of Mallon*, 3 Cal. Prob. 126, reaffirming rule.

Allowance to Administrator for Interest on disbursements. See note, 5 Cal. Prob. 395.

74 Cal. 569-570, 16 Pac. 489, **PEOPLE v. YUT LING.**

The Fact That in Making View some of jurors were occasionally out of sight of others does not constitute separation.

Approved in *People v. Cord*, 157 Cal. 571, 108 Pac. 515, there is no objectionable separation where one juror visited sick wife in charge of officer, and all were kept inaccessible to approach about case.

Failure of Judge to Accompany Jury on view will justify new trial.

Distinguished in *People v. White*, 5 Cal. App. 338, 90 Pac. 476, holding that right to new trial is waived where defendant does not object and second view is had in presence of judge; *Elias v. Territory*, 9 Ariz. 11, 12, 76 Pac. 609, holding absence of judge, defendant, and counsel at view is not prejudicial error where defendant consents.

View by Jury. See note, 42 L. R. A. 377, 381.

Absence of Judge during trial. See note, 122 Am. St. Rep. 727.

74 Cal. 571-574, 16 Pac. 397, **McFADDEN v. LOS ANGELES COUNTY.**

Under Article XIV, Section 1, of Constitution, corporation may appropriate waters for exclusive use on land of stockholders, and by so doing is not engaged in public service.

Approved in *Barton v. Riverside Water Co.*, 155 Cal. 518, 101 Pac. 93, 23 L. R. A. (n. s.) 331, reaffirming rule; *Waterbury v. Temescal Water Co.*, 11 Cal. App. 635, 105 Pac. 941, fact that water company organized to distribute water to stockholders and expenses met by assessments does not preclude it from passing by-laws prescribing number of shares required as qualification for its directors under Civil Code, section 308.

Distinguished in *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 90, 106 Pac. 407, holding that where corporation appropriates water for public distribution, it cannot discriminate between consumers.

Stockholders of Corporation are Bound by by-laws.

Approved in *Smoot v. Bankers' Life Assn.*, 138 Mo. App. 465, 120 S. W. 728, reaffirming rule.

State Regulation of Rates of irrigation company. See note, 12 L. R. A. (n. s.) 714.

74 Cal. 575-577, 16 Pac. 391, PEOPLE v. OLIVE.

Weight to be Given Evidence that defendant was in possession of stolen property is one of fact for jury.

Approved in *People v. Abbott* (Cal.), 34 Pac. 502, it is error to charge that possession must be explained by defendant.

Under Section 1382, Penal Code, defendant is not entitled to discharge where delay of trial was granted at his request.

Approved in *State v. Larson*, 12 N. D. 478, 97 N. W. 538, applying rule under section 8679, Revised Codes of 1899.

Right to Speedy Trial. See note, 85 Am. St. Rep. 195.

Delay of Prosecution as Ground for discharge. See note, 56 L. R. A. 535, 543.

74 Cal. 578-579, 16 Pac. 395, PEOPLE v. RUSSELL.

Under Section 26 of County Government Act of 1883, county ordinance does not take effect until published in entirety.

Distinguished in *County of Mono v. Depauli*, 9 Cal. App. 707, 100 Pac. 718, holding substantial adherence to rule is sufficient.

74 Cal. 579-583, 16 Pac. 499, BYRD v. REICHERT.

Where Contest to Determine Right to purchase state land has been referred to court, its jurisdiction is limited to questions contained in order of reference.

Distinguished in *Kleinsorge v. Burgbacher*, 6 Cal. App. 353, 92 Pac. 202, holding court may examine facts stipulated which took place in surveyor general's office, whether made matter of record therein or not.

74 Cal. 583-586, 16 Pac. 504, BANCROFT v. COSBY.

Under Section 3047, Civil Code, transfer by vendor of land of note given for purchase price does not destroy his lien, if he is compelled to take up note by reason of nonpayment by vendee.

Approved in *Nolan v. Nolan*, 155 Cal. 480, 132 Am. St. Rep. 99, 101 Pac. 522, lien of vendor for unpaid purchase money evidenced by vendee's unsecured long-time note is not waived by vendor's transfer of note for collection, where vendor after nonpayment resumed control of note.

74 Cal. 590-593, 16 Pac. 496, BURGESS v. RICE.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 80, 98.

Nature and Elements of Unlawful Detainer. See note, 120 Am. St. Rep. 58.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 485.

74 Cal. 603-608, 5 Am. St. Rep. 476, 16 Pac. 507, **NATIONAL BANK OF D. O. MILLS & CO. v. HEROLD.**

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 37, 53.

74 Cal. 608-614, 16 Pac. 518, **HAGLE v. HAGLE.**

Court cannot Compel Husband to support wife while she is living apart from him, against his will and consent, without any statutory ground for absolute divorce or excuse for absence.

Approved in *Reade v. Reade* (Cal.), 22 Pac. 284, following rule; *Roby v. Roby*, 10 Idaho, 146, 77 Pac. 215, where wife without good cause refuses to live with husband, she cannot obtain divorce on grounds of nonsupport.

74 Cal. 614-617, 16 Pac. 509, **McKINNIE v. SHAFFER.**

Owner of Any Interest in Real Estate, however slight, may maintain action to quiet title.

Approved in *German-American Sav. Bank v. Gollmer*, 155 Cal. 687, 102 Pac. 933, 24 L. R. A. (n. s.) 1066, lessee may maintain quiet title action against owner of fee; *Pollack Min. & Mill. Co. v. Davenport*, 31 Mont. 453, 78 Pac. 768, holding "claims to be owner" sufficient allegation of interest to support quiet title action.

Where Husband Dies Leaving no minor children, probate homestead set apart to widow out of community property vests in her in fee.

Approved in *Estate of Hayes*, 1 Cal. Prob. 554, reaffirming rule; *Estate of Hessler*, 2 Cal. Prob. 359, setting apart homestead to widow where there are no minor children.

74 Cal. 617-618, 16 Pac. 510, **BERNIAUD v. BEECHER.**

Miscellaneous.—Cited in *Field v. Andrada* (Cal.), 37 Pac. 180.

74 Cal. 619-624, 5 Am. St. Rep. 479, 16 Pac. 501, **RICE v. WHITMORE.**

Under Sections 1044, 1045, Civil Code, property of every kind, except mere possibility not coupled with interest, may be transferred.

Approved in *New Liverpool etc. Co. v. Western etc. Co.*, 151 Cal. 483, 91 Pac. 154, holding bailor may transfer title to thing bailed after its conversion by bailor; *Simpson v. Miller*, 7 Cal. App. 253, 94 Pac. 254, where deed in escrow vests title in grantee, latter's interest is transferable.

Under Contract for Lease, Landlord is bound to put tenant in possession.

Approved in *Herpolsheimer v. Christopher*, 76 Neb. 358, 111 N. W. 360, 9 L. R. A. (n. s.) 1127, and *Hammond v. Jones*, 41 Ind. App. 37, 83 N. E. 259, both reaffirming rule.

Landlord's Duty to Put Tenant in possession. See note, 134 Am. St. Rep. 922.

In Action for Breach of Contract for lease of agricultural land, measure of tenant's damages is value of crop that might have been raised by average farmer, less cost of raising it.

Approved in *Kjelsberg v. Chilberg*, 177 Fed. 111, 100 C. C. A. 529, applying rule to breach of contract to lease mine; *Hunt v. St. Louis etc. R. R. Co.*, 126 Mo. App. 267, 103 S. W. 134, applying same measure of damages for destruction of growing crop.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 100.

74 Cal. 625-627, 16 Pac. 516, SOUTHERN CALIFORNIA LUMBER CO. v. SCHMITT.

Materialman Who has Furnished Materials to contractor, but has not filed claim of lien, is not entitled to personal judgment against owner, although building contract has not been filed as required by section 1183, Code of Civil Procedure.

Approved in Stockton Lumber Co. v. Schuler, 155 Cal. 413, 101 Pac. 308, Merced Lumber Co. v. Bruschi, 152 Cal. 375, 92 Pac. 846, Hubbard v. Lee, 6 Cal. App. 606, 92 Pac. 745, Gnekow v. Confer (Cal.), 48 Pac. 332, and Santa Clara Valley Mill & Lumber Co. v. Williams (Cal.), 31 Pac. 1129, all reaffirming rule.

Right of Subcontractor or Materialman to personal judgment against owner. See note, 14 L. R. A. (n. s.) 1038.

Distinguished in D. T. Nofziger Lumber Co. v. Waters, 10 Cal. App. 92, 101 Pac. 39, if contract is not filed, materialman has lien for entire value of materials, provided he files lien under section 1187, Code of Civil Procedure.

74 Cal. 642-646, 16 Pac. 510, PEOPLE v. GIANCOLI.

Flight is Circumstance to be Weighed by jury as tending to prove consciousness of guilt.

Reaffirmed in People v. Fisher, 16 Cal. App. 276, 116 Pac. 689.

Where Defendant is Committed for manslaughter, district attorney may file information for murder.

Reaffirmed in Republic of Hawaii v. Nenchiro, 12 Haw. 199.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 75 CALIFORNIA.

75 Cal. 1-78, 16 Pac. 345, **SHARON v. SHARON**; S. C., 79 Cal. 684, 685, 22 Pac. 41, 42.

Headnote to Chapter in Code is part of statute.

Approved in *Bettencourt v. Sheehy*, 157 Cal. 702, 109 Pac. 91, *Dungan v. Superior Court*, 149 Cal. 102, 84 Pac. 769, and *In re Wisner*, 36 Mont. 308, 92 Pac. 960, all following rule; dissenting opinion in *Bates v. Gregory* (Cal.), 22 Pac. 685, *arguendo*.

In Divorce Suit on Application for temporary alimony, *prima facie* showing of marriage must be made.

Approved in *Hite v. Hite* (Cal.), 55 Pac. 900, showing of marriage held sufficient to support order for alimony; dissenting opinion in *Hite v. Hite*, 124 Cal. 403, 71 Am. St. Rep. 82, 57 Pac. 229, 45 L. R. A. 793, majority holding *prima facie* showing not sufficient when marriage was contested.

Alimony Pendente Lite or Counsel Fees when marriage is denied. See note, 25 L. R. A. (n. s.) 390.

Discretion of Court in Allowing Alimony pendente lite is reasonable discretion, to be reasonably exercised.

Approved in *Bordeaux v. Bordeaux*, 30 Mont. 40, 75 Pac. 526, holding lower court abused discretion in allowing too small sum for wife to prepare defense.

Attack of Decree of Divorce after death of one of the parties. See notes, 125 Am. St. Rep. 243; 57 L. R. A. 604.

Present Consent to Marriage Followed by consummation is sufficient to constitute marriage without public assumption of marital rights and duties.

Cited in *Estate of Blythe*, 4 Cal. Prob. 165, discussing question of marriage by consent.

Common-law Marriages. See notes, 124 Am. St. Rep. 118; 3 Cal. Prob. 210.

What Marriages are Void. See note, 79 Am. St. Rep. 362.

Pendency of Actions in Both State and federal courts sitting in same state. See note, 42 L. R. A. 456, 458.

75 Cal. 78-86, 16 Pac. 513, CHAMPION MINING CO. v. CONSOLIDATED ETC. MIN. CO.

When Veins Located by Two Persons unite, prior locator has prior right, and his location must be conceded to have been as of date of patent, where patent does not show date of location.

Approved in *Hickey v. Anaconda Copper Min. Co.*, 33 Mont. 64, 81 Pac. 811, reaffirming rule; *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed. 566, 9 C. C. A. 613, in such case where patent issued to one party is silent as to date of location it may be proved by evidence aliunde.

What Cross or Intersecting Lodes are included in mineral patents and rights therein. See note, 83 Am. St. Rep. 44.

Veins Intersecting, Crossing, or Uniting. See note, 50 L. R. A. 212.

75 Cal. 86-91, 16 Pac. 521, BELL v. BEAN.

Void, Invalid, or Unfounded Claim as subject of valid compromise. See note, 15 L. R. A. 440; 25 L. R. A. (n. s.) 295.

Extent of Recovery by Pledgee on negotiable paper uncollectable by pledgor. See note, 44 L. R. A. 246.

Miscellaneous.—Cited in *Bean v. Proseus* (Cal.), 31 Pac. 49, referring historically to principal case.

75 Cal. 91-93, 7 Am. St. Rep. 123, 16 Pac. 531, SEARS v. STARBIRD.

Abuse of Judge of Trial Court in brief filed in appellate court is contempt of latter court.

Approved in *First Nat. Bank v. Superior Court*, 12 Cal. App. 348, 107 Pac. 328, reaffirming rule; *In re Breen*, 30 Nev. 182, 93 Pac. 1002, 17 L. R. A. (n. s.) 572, disbaring attorney for unwarranted criticisms of supreme court, made while acting as district judge but not in judicial proceeding; *Christensen v. Floriston Pulp etc. Co.*, 29 Nev. 577, 92 Pac. 219, compelling counsel to expunge from brief scurrilous reflections on trial judge; *In re Chartz*, 29 Nev. 117, 124 Am. St. Rep. 915, 85 Pac. 355, 5 L. R. A. (n. s.) 916, statement in petition for rehearing criticising court held to amount to contempt.

75 Cal. 98-102, 16 Pac. 544, PEOPLE v. RILEY.

Where Information Alleges Robbery was Accomplished by force and fear, allegation that it was accomplished "against the will" of person robbed is unnecessary.

Approved in *People v. Howard*, 3 Cal. App. 37, 84 Pac. 462, indictment for robbery need not state assault was made nor what kind of fear was used; *State v. Parr*, 54 Or. 320, 103 Pac. 436, upholding indictment for robbery which did not charge pistols carried by defendants were loaded; *State v. La Chall*, 28 Utah, 83, 77 Pac. 4, words "against his will" held unnecessary in indictment for robbery.

Identity of Person is Presumed from identity of name.

Reaffirmed in *People v. Mullen*, 7 Cal. App. 548, 94 Pac. 867.

Presumption of Identity of Person from identity of name. See notes, 17 L. R. A. 824; 4 L. R. A. (n. s.) 540.

Stenographer Appointed by Magistrate to take down testimony on preliminary examination need not be sworn to faithfully discharge his duty.

Reaffirmed in *People v. Mullaley*, 16 Cal. App. 47, 116 Pac. 90.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 367.

Admissibility in Criminal Trial of testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 876.

75 Cal. 108-114, 16 Pac. 537, PEOPLE v. DYE.

Witness cannot be Impeached by contradicting him on collateral matters.

Approved in *Moody v. Peirano*, 4 Cal. App. 416, 88 Pac. 381, witness may be impeached on collateral matter when relevant to issue.

Mere Declaration of Party is not Proof that he is agent of another.

Approved in *Kast v. Miller & Lux*, 159 Cal. 724, 115 Pac. 933, and *Parker v. Brown*, 131 N. C. 264, 42 S. E. 606, both following rule.

Instruction That Killing is Justifiable "if necessary for his own protection" is inaccurate, and should be "if actually or apparently necessary."

Approved in dissenting opinion in *People v. Bruggy* (Cal.), 26 Pac. 758, majority holding instruction in regard to self-defense not to be fatally erroneous.

Miscellaneous.—Cited in *Heilbron v. Emigrant Ditch Co.* (Cal.), 17 Pac. 68, *Lower King's River Water Ditch Co. v. Heilbron et al.* (Cal.), 17 Pac. 69, and *Heilbron v. People's Ditch Co.* (Cal.), 17 Pac. 69, all companion cases.

75 Cal. 114-115, 16 Pac. 547, SCOTT v. SUPERIOR COURT.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 902.

75 Cal. 117-124, 17 Pac. 65, HEILBRON v. LAST CHANCE WATER DITCH CO.

Adverse User of Water for Five Years bars action to restrain its diversion.

Approved in *Hubbs etc. Ditch Co. v. Pioneer Water Co.*, 148 Cal. 417, 83 Pac. 257, following rule.

Owner of Land may Maintain Action against one who diverts water from stream running through his land.

Distinguished in *Turner v. James Canal Co.*, 155 Cal. 94, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, common-law right of flow held modified by right to reasonable use.

75 Cal. 124-128, 16 Pac. 705, CHIN KEM YOU v. AH JOAN.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 609, 613.

75 Cal. 128-134, 7 Am. St. Rep. 125, 19 Pac. 178, MONTGOMERY v. KEPPEL.

Mortgagee, Having Readily Accessible Means of knowing fact affecting title of mortgaged property, which he might have found by inquiry, is charged with notice of such fact.

Approved in *Austin v. Pulschen* (Cal.), 39 Pac. 800, following rule; *Lakeman v. North Mo. Trust Co.*, 147 Mo. App. 63, 126 S. W. 552, discussing question of discharge of surety by release of other surety.

75 Cal. 134-147, 7 Am. St. Rep. 129, 16 Pac. 753, JOHNSTON v. SAN FRANCISCO SAVINGS UNION.

Probate Administration of Estate of Deceased Wife was unnecessary under act of 1850, and husband had control of property as survivor of marital partnership for purpose of settling up its affairs.

Approved in *Enriquez v. Go-Tiongeo*, 220 U. S. 310, 31 Sup. Ct. 425, 55 L. Ed. 477, surviving husband entitled to settle affairs of community and on his death his executor has same power.

Mortgagor Seeking to Quiet Title against mortgage deed must pay debt secured as condition for relief.

Approved in *Tracy v. Wheeler*, 15 N. D. 250, 107 N. W. 69, 6 L. R. A. (n. s.) 516, following rule.

Liability of Community Property for debts. See note, 19 L. R. A. 234.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

75 Cal. 154-159, 16 Pac. 764, MEEKER v. DALTON.

Facts Set Up, and not Designation Given, determine whether pleading is answer or cross-complaint.

Approved in *Haight v. Tryon* (Cal.), 34 Pac. 714, pleading termed cross-complaint held to be answer; *Brown v. Massey*, 19 Okl. 487, 92 Pac. 248, pleading designated answer held to be cross-petition.

Equitable Title Coupled With Right of possession in defendant is good defense against legal title in ejectment.

Approved in *Cassin v. Nicholson*, 154 Cal. 500, 98 Pac. 191, and *King v. Dugan*, 150 Cal. 263, 88 Pac. 927, both following rule; *Jacob v. Carter* (Cal.), 36 Pac. 382, possession under contract of purchase held good defense in ejectment.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 782.

75 Cal. 159-163, 7 Am. St. Rep. 138, 16 Pac. 762, QUINN v. DRESBACH.

Want of Possession of Note by agent is only circumstance to be considered in determining his authority to collect.

Approved in *Union Trust Co. v. McKeon*, 76 Conn. 514, 57 Atl. 111, fact agent did not have possession of note held not to show he did not have apparent authority to collect; *Fowler v. Outcalt*, 64 Kan. 358, 67 Pac. 891, owner of note permitting another to collect payments thereon held bound by such payments; *Campbell v. Gowans*, 35 Utah, 278, 100 Pac. 401, holding agent had apparent authority to collect note though mortgagee had possession of securities.

Effect of Agent's Nonpossession of security upon question of authority to receive payment. See note, 23 L. R. A. (n. s.) 416.

Agency and Authority of Agents. See note, 97 Am. St. Rep. 267.

75 Cal. 166-171, 16 Pac. 766, HELLMAN v. MESSMER.

One Who Advances Purchase Money and takes title to himself, wholly upon account of credit of another, holds estate upon resulting trust for such other.

Approved in *Levy v. Ryland*, 32 Nev. 466, 467, 468, 109 Pac. 907, 908, reaffirming rule; *Prefumo v. Russell*, 148 Cal. 457, 83 Pac. 812, holding party advancing purchase price for another who went into possession but took title to himself held only mortgage on land.

Statute of Frauds as Affecting equitable relief for breach of agreement to purchase land for and in name of complainant. See note, 5 L. R. A. (n. s.) 118.

75 Cal. 172-174, 16 Pac. 771, MODOC COUNTY v. CHURCHILL.

In Action by County to Recover State and county taxes, assessment-roll is prima facie evidence of right to recover.

Reaffirmed in *City of Escondido v. Wohlford*, 153 Cal. 41, 94 Pac. 233.

75 Cal. 182-184, 16 Pac. 775, McALLISTER v. CLEMENT.

Liability of Notaries. See note, 82 Am. St. Rep. 384.

75 Cal. 185-188, 16 Pac. 778, CERF v. PHILLIPS.

Effect of Insolvency Statutes upon mortgage or sale preferring creditors. See note, 37 L. R. A. 466.

75 Cal. 192-194, 7 Am. St. Rep. 141, 16 Pac. 779, KAHN v. EDWARDS.

Oral Statement of Open Account before items are barred starts limitations against it from date of statement.

Approved in *Rounthwaite v. Rounthwaite* (Cal.), 68 Pac. 306, account stated after barred by statute held not acknowledged when party charged declined to sign it.

75 Cal. 194-199, 7 Am. St. Rep. 143, 16 Pac. 780, CHICAGO QUARTZ MIN. CO. v. OLIVER.

United States Patent may be Shown to be void on collateral attack when land was not subject to patent.

Approved in *United Land Assn. v. Knight* (Cal.), 23 Pac. 271, holding void, on ground of lack of jurisdiction to issue, patent of defendant in ejectment.

Person Claiming Land Patented to railroad under subsequent mineral patent may, in suit to quiet title as against railroad's grantee, show land is mineral and excepted from railroad grant.

Reaffirmed in *Van Ness v. Rooney*, 160 Cal. 140, 116 Pac. 395.

75 Cal. 199-202, 16 Pac. 885, CHUCH v. GARRISON.

One Who Performs Work on or about threshing machine while engaged in threshing is entitled to lien thereon, though person for whom work was done was not owner of machine.

Reaffirmed in *Holt Mfg. Co. v. Collins*, 154 Cal. 270, 97 Pac. 517.

Distinguished in *Holt v. Achi*, 18 Haw. 174, in absence of statutory method, tax lien may be foreclosed in equity.

75 Cal. 203-204, 16 Pac. 782, ROBERTS v. DUNSMUIR.

Courts of State have Jurisdiction of action brought by one resident alien against another who is personally served, to recover damages for personal injuries inflicted in foreign county.

Approved in *Hodgkins v. Dunham*, 10 Cal. App. 700, 103 Pac. 356, applying rule to suit based on false representation made out of state; *Bradbury v. Chicago etc. Ry. Co.*, 149 Iowa, 59, 128 N. W. 4, upholding state court's jurisdiction over action against interstate railroad for injuries to brakeman.

Right of Nonresidents to Sue foreign corporations. See note, 70 L. R. A. 522.

75 Cal. 205-213, 16 Pac. 890, PATENT BRICK CO. v. MOORE.

Stipulation for Certain Sum as Liquidated damages for delay in completing building is not sufficient in itself to allow recovery of such sum in absence of showing of impracticability of determining actual damage.

Reaffirmed in *Sherman v. Gray*, 11 Cal. App. 351, 104 Pac. 1005.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 55.

In Action to Foreclose Lien of Materialman, complaint must aver materials were furnished to be used in building.

Distinguished in *Neihaus v. Morgan* (Cal.), 45 Pac. 257, recorded claim of lien need not state materials were furnished to be used in buildings.

When Motion for New Trial is made on ground of insufficiency of evidence to justify decision, and statement of case contains no specifications of error relating thereto, court will disregard ground of motion.

Approved in *Runner v. Woitke*, 2 Alaska, 470, following rule.

75 Cal. 213-221, 7 Am. St. Rep. 146, 16 Pac. 887, ESTATE OF NEWMAN.

After Judgment has Been Rendered in Divorce and before judgment-roll is made up, court may receive amended affidavit showing service by publication.

Approved in *Zahorka v. Geith*, 129 Wis. 504, 109 N. W. 555, following rule; *Call v. Rocky Mt. Bell Tel. Co.*, 16 Idaho, 556, 133 Am. St. Rep. 135, 102 Pac. 147, allowing amended return of service after default where valid service had been made.

It is Fact of Service and not Proof of service which gives court jurisdiction.

Reaffirmed in *Morrissey v. Gray*, 160 Cal. 395, 117 Pac. 440.

Affidavits of Service by Publication and recitals of service in judgment are conclusive upon collateral attack on judgment.

Approved in *Sacramento Bank v. Montgomery*, 146 Cal. 753, 81 Pac. 141, recitals in judgment as to service by publication held conclusive on collateral attack though inconsistent with record; *Boyer v. Pac. Mutual Life Ins. Co.*, 1 Cal. App. 56, 81 Pac. 672, affidavit and order of publication of summons not part of judgment-roll; *O'Neill v. Potvin*, 13 Idaho, 729, 93 Pac. 23, upholding decree in quiet title suit rendered on service by publication as against collateral attack where want of jurisdiction did not appear on judgment-roll; *Sodini v. Sodini*, 94 Minn. 303, 110 Am. St. Rep. 371, 102 N. W. 861, default judgment in divorce held not subject to collateral attack.

Validity of Decree of Divorce obtained on publication or service out of state where defendant did not appear. See note, 19 L. R. A. 819.

Service of Process. See note, 110 Am. St. Rep. 375.

Judgment by Default Entered Before Expiration of time to answer is erroneous merely and not subject to collateral attack.

Approved in *Harpold v. Doyle*, 16 Idaho, 691, 102 Pac. 163, judgment by default when default was not indorsed on complaint not subject to collateral attack.

Judgment Prematurely Entered. See note, 114 Am. St. Rep. 648.

Judgment in Divorce is Binding on parties as soon as rendered and before entry.

Approved in *Brownell v. Superior Court*, 157 Cal. 707, 109 Pac. 93, decree signed March 23d, but antedated March 15th, at which date oral decision was given, and entry made on rough minutes by clerk, was not "taken" until March 23d.

Entry or Record Necessary to Complete Judgment or order. See note, 28 L. R. A. 626.

Right of Adopted Children to inherit. See notes, 118 Am. St. Rep. 686; 3 Cof. Prob. 535.

Whether Terms "Child," "Children," "Issue," etc., in statutes of distribution include adopted children. See note, 30 L. R. A. (n. s.) 917.

Legal Status of Adopted Child. See note, 17 L. R. A. 435.

Miscellaneous.—Cited in *Hilton v. Stewart*, 15 Idaho, 165, 128 Am. St. Rep. 48, 96 Pac. 583, to point that marriage valid by law of state where contracted is valid everywhere.

75 Cal. 230-233, 17 Pac. 198, **REAGAN v. FITZGERALD.**

Enforcement of Default Judgment will not be restrained in equity on ground same was taken by inadvertence of judgment debtor, after motion made by him to be relieved on such ground has been denied.

Approved in *Miller v. Shute*, 55 Or. 609, 107 Pac. 469, one moving to set aside void judgment under B. & C. Comp., section 103, cannot sue in equity for same relief on same ground.

Distinguished in *Whitney v. Hazzard*, 18 S. D. 494, 101 N. W. 347, setting aside in equity at suit of stockholders decree foreclosing mortgage on property of corporation obtained by collusion of president and mortgagee, where plaintiffs' motion for relief was defeated by fraud of mortgagee.

Injunctions Against Judgments Obtained by fraud, accident, mistake, surprise, and duress. See note, 30 L. R. A. 800.

75 Cal. 237-239, 17 Pac. 197, **POWERS v. BRALY.**

Defendant Appearing Specially by Attorney to move to strike out amended complaint, and to ask extension of time in which to move or plead until determination of motion, does not make such appearance as waives service of summons.

Distinguished in *State v. District Court*, 40 Mont. 364, 135 Am. St. Rep. 622, 106 Pac. 1101, application of defendant for time to answer to merits after denial of motion to dismiss for want of jurisdiction of his person held to be general appearance.

75 Cal. 240-245, 7 Am. St. Rep. 151, 17 Pac. 193, **WARD v. DOUGHERTY.**

Possession of Deed by Grantee is prima facie evidence of delivery.

Approved in *Zhin v. Zhin*, 153 Cal. 407, 95 Pac. 868, *Towne v. Towne*, 6 Cal. App. 701, 703, 92 Pac. 1052, 1055, *Central Trust Co. v. Stoddard*, 4 Cal. App. 649, 88 Pac. 807, and *Morton v. Morton*, 82 Ark. 496, 102 S. W. 215, all following rule; *Gerke v. Cameron* (Cal.), 50 Pac. 436, and *Leonard v. Fleming*, 13 N. D. 634, 102 N. W. 309, both holding deed offered at trial by grantee presumed to have been delivered on day of date.

What Constitutes Delivery of a Deed. See note, 126 Am. St. Rep. 976.

Presumption of Identity of Person from identity of name. See note, 17 L. R. A. 824.

75 Cal. 250-253, 17 Pac. 69, QUINLAN v. NOBLE.

Upon Severance of Tenement, easements or servitudes are created corresponding to benefits or burdens existing at time of sale.

Approved in *McByrde Sugar Co. v. Koloa S. Co.*, 19 Haw. 121, reaffirming rule; *Tarpey v. Lynch*, 155 Cal. 409, 101 Pac. 11, sale of part of land supplied by ditch over remainder gave right to extend ditch over other portions of remainder when necessary; *Rubio Canyon etc. Assn. v. Everett*, 154 Cal. 32, 96 Pac. 813, grant of part of grantor's land with appurtenances held to convey easement over other land of grantor for pipe-line to pumping plant established on part granted; *Oliver v. Burnett*, 10 Cal. App. 408, 102 Pac. 225, sale of part of tenement on which was ditch supplying another part conveyed it subject to easement in favor of owner of other part.

Easements Created by Severance of Tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 316, 358.

75 Cal. 253-256, 17 Pac. 195, REAGAN v. JUSTICE'S COURT.

Right to Interpose Plea of Limitations is waived unless taken advantage of by demurrer or answer.

Approved in *Pryal v. Pryal* (Cal.), 71 Pac. 804, following rule.

75 Cal. 261-265, 17 Pac. 199, DAVIS v. HEIMBACH.

Application Under Code of Civil Procedure, section 709, by surety who has paid more than his share of judgment, for execution against his cosureties, must be upon notice.

Distinguished in *Mowry v. Heney* (Cal.), 24 Pac. 302, judgment against surety on appeal bond rendered more than thirty days after filing of remittitur is valid though surety had no notice of motion therefor.

75 Cal. 265-267, 17 Pac. 212, GWINN v. HAMILTON.

Decision upon Point Arising in Case on one appeal is law on that point on further appeals, although not necessary to disposition of appeal.

Approved in *People's Lumber Co. v. Gillard*, 5 Cal. App. 438, 90 Pac. 557, and *Westerfeld v. New York Life Ins. Co.*, 157 Cal. 345, 107 Pac. 701, both following rule; *Millsap v. Balfour*, 158 Cal. 714, 112 Pac. 451, doctrine of law of case does not to extend to obiter dicta.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 340, 344.

75 Cal. 268-270, 17 Pac. 204, STRICKLAND v. HOLBROOKE.

Instrument With Amount in Figures in margin but blank in body as to amount held to be a promissory note.

Distinguished in *Vinson v. Palmer*, 45 Fla. 636, 34 So. 278, holding instrument in form of note with blank space for amount and amount only given in figures on margin not to be note.

Effect of Marginal Letters or Figures in bill or note otherwise blank as to amount. See note, 2 L. R. A. (n. s.) 880.

75 Cal. 271-277, 17 Pac. 225, BOOTH v. HOSKINS.

Where Contract for Loan is Written, parol agreement to extend time of payment cannot change terms of contract.

Approved in *Bullion etc. Bank v. Spooner* (Cal.), 36 Pac. 122, excluding evidence of parol agreement that debt secured by mortgage

payable on or before three years was payable at any time within three years at option of vendor.

Deed Absolute in Form Given to secure debt is mortgage.

Approved in *Murdock v. Clarke* (Cal.), 24 Pac. 274, following rule.

Mortgagor cannot Quiet Title as Against mortgage barred by limitations without payment of mortgage debt.

Approved in *Burns v. Hiatt*, 149 Cal. 621, 117 Am. St. Rep. 157, 87 Pac. 197, *Pottkamp v. Buss* (Cal.), 31 Pac. 1122, *Murdock v. Clarke* (Cal.), 24 Pac. 274, *Cassel v. Lowry*, 164 Ind. 5, 72 N. E. 641, and *Tracy v. Wheeler*, 15 N. D. 249, 250, 107 N. W. 68, 69, 6 L. R. A. (n. s.) 516, all following rule; *Raggio v. Palmtag*, 155 Cal. 802, 103 Pac. 314, wife seeking to quiet title to mortgaged homestead sold at probate sale to mortgagee, whose claim on mortgage had been only partly allowed, must pay balance on mortgage; *Puckhaber v. Henry*, 152 Cal. 423, 125 Am. St. Rep. 75, 93 Pac. 116, pledgor of life insurance policy not entitled to possession without payment of debt; *Trippet v. State*, 149 Cal. 530, 86 Pac. 1037, 8 L. R. A. (n. s.) 1210, heir cannot quiet title against state without paying claim for collateral inheritance tax although state has no means for direct enforcement; *Fisk v. City of Keokuk*, 144 Iowa, 194, 122 N. W. 899, owner of property cannot attack sale for nonpayment of special assessment without paying assessment.

Distinguished in *Marshutz v. Seltzor*, 5 Cal. App. 143, 144, 89 Pac. 878, holding rule inapplicable where mortgage is by third party, and plaintiff's title originated from state subsequent to mortgage and was adverse thereto; *Cameron v. Ah Quong*, 8 Cal. App. 313, 316, 16 Pac. 1026, 1027, sustaining ejectment against intervening mortgagee when equities were not pleaded.

Quieting Title as Against Barred Encumbrance. See note, 6 L. R. A. (n. s.) 517.

Effect of Bar of Statute of limitations. See note, 95 Am. St. Rep. 666.

Effect of Statutory Bar of Principal Debt on right to foreclose mortgage or deed of trust. See note, 21 L. R. A. 555.

75 Cal. 277-282, 17 Pac. 201, **BYRNE v. REED.**

New Trial will not be Granted on ground of newly discovered evidence when evidence is such as not to render different result probable.

Approved in *Sirkus v. Central R. Co.* (Cal.), 30 Pac. 790, new trial not granted when newly discovered evidence merely cumulative.

Cumulative Evidence as Ground for new trial. See note, 14 L. R. A. 609.

75 Cal. 284-287, 17 Pac. 70, **PHARIS v. MULDOON.**

Where Mining Claim has Become Subject to relocation, resumption of work by original locator, after notice of relocation has been posted, but before relocater has marked boundaries, is sufficient.

Approved in *Knutson v. Fredlund*, 56 Wash. 639, 106 Pac. 202, following rule; *Willitt v. Baker*, 133 Fed. 947, where original locator of mining claim had not completed annual work on December 31st but worked that day, and began again January 1st, party locating during that night cannot be deemed new locator.

Abandonment and Forfeiture of mining claims. See note, 87 Am. St. Rep. 415.

Relocation of Mining Claim as abandoned or forfeited. See note, 68 L. R. A. 838.

75 Cal. 287-290, 17 Pac. 205, DIEMER v. HERBER.

In Action for Malicious Prosecution, fact that plaintiff, after examination by committing magistrate, was held to answer is *prima facie*, but not conclusive, evidence of probable cause.

Approved in *Johnson v. Southern Pacific Co.*, 157 Cal. 339, 107 Pac. 613, following rule; *Holliday v. Holliday* (Cal.), 53 Pac. 44, order requiring accused to give undertaking to keep peace not procured by fraud is conclusive as to probable cause.

75 Cal. 293-298, 17 Pac. 239, LEVISTAN v. RYAN.

Trial Court must Make Findings on every material issue.

Approved in *Fladung v. Dawson* (Cal.), 43 Pac. 1108, reversing for failure to find on material issue.

If No Evidence is Introduced on Issue, finding should be against party on whom rests burden of proof.

Approved in *Dieterle v. Bekin*, 143 Cal. 688, 77 Pac. 666, following rule; *Bryan v. Tormey* (Cal.), 21 Pac. 726, presumption as to ownership of land held to supply place of direct proof.

75 Cal. 301-306, 17 Pac. 214, PEOPLE v. GRUNDELL.

Objection That Witness was an Accomplice goes to effect of evidence and not to its admissibility.

Approved in *People v. Barnnovich*, 16 Cal. App. 430, 117 Pac. 573, actual commission of offense may be shown by uncorroborated testimony of accomplice.

Instance of Sufficient Corroboration of accomplice on charge of larceny.

Approved in *People v. Spadoni*, 11 Cal. App. 220, 104 Pac. 589, admissions made by defendant tending to connect him with larceny held sufficient corroboration of accomplice's testimony.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 170, 173.

Stenographers' Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 366, 367.

75 Cal. 306-308, 17 Pac. 211, PEOPLE v. WILLIAMS.

Condition of Mind of Slayer which reduces murder to manslaughter. See note, 134 Am. St. Rep. 730.

75 Cal. 308-316, 7 Am. St. Rep. 156, 17 Pac. 217, OLTO v. JOURNEY-MEN TAILORS' ETC. UNION.

Courts will Interfere for Purpose of protecting property rights of members of unincorporated associations.

Approved in *Thompson v. Grand etc. of Engineers*, 41 Tex. Civ. App. 185, 91 S. W. 837, unincorporated association must confine itself to powers vested in it, and cannot violate rights of any member.

Expulsion of Member of Association nominally for offense for which such punishment is proper, but in reality for offense punishable only by fine, is invalid.

Approved in *Thompson v. Grand etc. Engineers*, 41 Tex. Civ. App. 188, 91 S. W. 859, holding engineer improperly expelled from brotherhood.

Right of Corporation or Association to expel members. See note, 114 Am. St. Rep. 25.

Mandamus Lies to Compel Unincorporated Association to reinstate member improperly expelled.

Approved in *Lahiff v. St. Joseph's etc. Society*, 76 Conn. 652, 100 Am. St. Rep. 1012, 57 Atl. 694, 65 L. R. A. 92, and *State v. Corgiat*, 50 Wash. 99, 96 Pac. 691, both following rule.

Distinguished in *Doyle v. Burke*, 29 R. I. 127, 69 Atl. 363, denying mandamus against officers of unincorporated society to compel reinstatement of expelled member.

Conclusiveness of Decisions of Tribunals of associations or corporations. See note, 49 L. R. A. 355, 359, 371.

75 Cal. 317-319, 17 Pac. 221, **ESTATE OF WILLIAMSON.**

Will Construed and Held Half of community property to which wife would have been entitled had she survived testator not disposed of by will.

Cited in *Estate of Clancy*, 3 Cal. Prob. 351, *arguendo*.

75 Cal. 323-325, 17 Pac. 208, **PEOPLE v. SNYDER.**

In Prosecution for Rape, Evidence is admissible that prosecutrix made complaint of injury while it was recent.

Approved in *People v. Wilmot* (Cal.), 72 Pac. 839, evidence of complaint by prosecutrix limited to simple fact that it was made.

75 Cal. 325-329, 17 Pac. 235, **FISHER v. SLATTERY.**

Party Entering Under Lessee and Holding over after end of lessee's term held not to have so attorned to lessors as to be their lessee, but to be mere trespasser.

Approved in *Russell v. Banks*, 11 Cal. App. 460, 105 Pac. 265, party holding under lessee but paying rent to lessor only as requested by surviving partner of lessee held not to be estopped to deny relation of landlord and tenant between himself and lessor.

75 Cal. 332-337, 7 Am. St. Rep. 173, 17 Pac. 229, **STOCKTON BLDG. & LOAN ASSN. v. CHALMERS.**

Nature and Elements of Intervention. See note, 123 Am. St. Rep. 304.

75 Cal. 342-346, 17 Pac. 237, **SIMPSON v. APPELEGATE.**

Denial of Tenancy as Waiver of Notice to quit or demand of possession. See note, 25 L. R. A. (n. s.) 105.

When Case is Appealed, Title of case cannot be changed in transcript by transposing parties.

Approved in *Knock v. Bunnell* (Cal.), 21 Pac. 961, reaffirming rule.

75 Cal. 356-360, 17 Pac. 228, **BURKE v. KOCH.**

Judgment for Value Only in Claim and delivery is sufficient when property is so disposed of that return cannot be had.

Approved in *Donovan v. Aetna Indemnity Co.*, 10 Cal. App. 728, 729, 103 Pac. 366, 367, following rule.

75 Cal. 373-375, 17 Pac. 441, **BATCHELDER v. BRICKELL.**

Miscellaneous.—Cited in *Whelan v. Brickell* (Cal.), 33 Pac. 397, on another appeal.

75 Cal. 379-382, 17 Pac. 434, IN RE ROMERO.

There is No Presumption That Minors living with man not their father have been adopted by him.

Reaffirmed in *Henry v. Taylor*, 16 S. D. 428, 93 N. W. 642.

Rights of Minors in Probate Homestead. See note, 1 Cof. Prob. 556.

Rights of Children in Homestead of parent. See note, 56 L. R. A. 54, 55.

75 Cal. 383-388, 17 Pac. 431, PEOPLE v. MEYER.

To Constitute Larceny, Property must have been carried away from custody of owner and come into possession of thief.

Approved in *Clark v. State*, 59 Tex. Cr. 248, 128 S. W. 132, attempt to remove dress from lay figure in store held not to be larceny; *Herr v. State*, 52 Tex. Cr. 54, 105 S. W. 191, taking watch from pocket but which was still attached to vest by chain not larceny.

Larceny—What Constitutes Asportation. See notes, 88 Am. St. Rep. 585; 29 L. R. A. (n. s.) 40.

Where Defendant Testifies on His Own Behalf, he may be asked on cross-examination whether he has ever been convicted of felony.

Reaffirmed in *People v. Soeder*, 150 Cal. 21, 87 Pac. 1020.

Cross-examination as Proper Mode of proving conviction of crime for purposes of impeachment. See note, 30 L. R. A. (n. s.) 851.

Cross-examination of Defendant in criminal cases. See note, 15 L. R. A. 669.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 1005; 62 L. R. A. 346.

75 Cal. 388-406, 17 Pac. 522, PEOPLE v. SAN FRANCISCO.

United States Patent Issued upon confirmation of Mexican grant is conclusive evidence of land confirmed.

Approved in *Taylor v. McConigle*, 120 Cal. 126, 52 Pac. 160, following rule; *Valentine v. Sloss* (Cal.), 37 Cal. 329, upholding patent based on survey including land not within boundaries described in decree in confirmation; *United Land Assn. v. Knight* (Cal.), 23 Pac. 268, 270, holding recitals as to boundaries in decree confirming Mexican grant referred to in patent prevail over those in granting clause of patent.

Municipal Ownership of Tide Lands. See note, 64 L. R. A. 336.

75 Cal. 407-411, 17 Pac. 436, PEOPLE v. BENTLEY.

Conspiracy may be Proved by circumstantial evidence.

Approved in *More v. Finger* (Cal.), 58 Pac. 324, admitting circumstantial evidence to prove conspiracy with qualification that it be stricken out if conspiracy be not proven.

Evidence of Acts of Alleged Co-conspirator done before commission of crime, and tending to show connection therewith, is admissible to prove conspiracy as part of res gestae.

Approved in *People v. Bunkers*, 2 Cal. App. 206, 84 Pac. 368, evidence held sufficient to corroborate testimony of accomplice in prosecution of senator for accepting bribe.

Declarations as Part of Res Gestae. See note, 19 L. R. A. 745.

75 Cal. 422-425, 7 Am. St. Rep. 180, 17 Pac. 539, MALONEY v. HEFER.

Homestead Held not to Include two separate houses, one of which was occupied by tenant.

Approved in *Hohn v. Pauly*, 11 Cal. App. 730, 106 Pac. 268, holding use of house for hotel purposes as mere incident to dwelling did not invalidate homestead; *Hanley v. Hanley*, 4 Cal. Prob. 475, *arguendo*.

75 Cal. 426-434, 7 Am. St. Rep. 183, 17 Pac. 535, **HEILBRON v. FOWLER ETC. CANAL CO.**

Riparian Proprietor cannot, as Against lower proprietor, authorize corporation to take water from stream to be conducted to a distance and there sold.

Approved in *Turner v. James Canal Co.*, 155 Cal. 94, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, right of riparian owner to have stream flow through his land undiminished in quantity modified by rule of reasonable use of all riparian owners; *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 532, 89 Pac. 343, riparian proprietor entitled to judgment that defendant's right to withdraw water from lake for use at a distance is subject to riparian rights and all prior appropriations; *Anaheim Union Water Co. v. Fuller*, 150 Cal. 333, 88 Pac. 981, 11 L. R. A. (n. s.) 1062, enjoining use of water of stream beyond its watershed; *People v. Hulbert*, 131 Mich. 169, 100 Am. St. Rep. 588, 91 N. W. 217, 64 L. R. A. 265, holding city drawing water from lake could not prevent riparian owner from bathing in lake; *Lonsdale Co. v. City of Woonsocket*, 25 R. I. 431, 56 Atl. 449, city which is riparian owner has right as against lower owner to diminish water in stream for municipal user.

Right to Make Use, on Nonriparian, of water rights incident to riparian lands. See note, 22 L. R. A. (n. s.) 384.

Correlative Rights of Upper and lower proprietors as to use and flow of stream. See note, 41 L. R. A. 740, 756.

Flow of Water Which can be Counted on to occur annually for several months is not extraordinary flood.

Approved in *Miller & Lux v. Madera Canal etc. Co.*, 155 Cal. 76, 99 Pac. 508, 22 L. R. A. (n. s.) 391, following rule.

Action to Restrain Diversion of waters, asking damages, cannot be pleaded in abatement of subsequent action by same plaintiff and others against same defendant, not asking damages, charging actual diversion and threats to continue same, subsequent to bringing of first action.

Approved in *Schoonover v. Birnbaum*, 150 Cal. 736, 89 Pac. 1109, in partition suit, where plaintiff was found to be owner of undivided interest, fact that his title was being litigated in suit by third party is not ground for postponing sale of land under interlocutory decree.

Distinguished in *Josslyn v. Daly*, 15 Idaho, 146, 96 Pac. 571, decree in prior action determining rights in waters of stream for irrigation on particular ranches is not res adjudicata on plaintiff as to his right to use certain waters of same stream on another ranch as appurtenant thereto, which is purchased from stranger after decree in prior suit.

75 Cal. 443-452, 17 Pac. 241, **SWAMP LAND RECLAMATION DISTRICT v. WILCOX.**

Record on Minute-book of Board of Supervisors is prima facie evidence of facts stated.

Cited in *Westerman v. Cleland*, 12 Cal. App. 70, 106 Pac. 609, *arguendo*.

Clerical Error in Public Record may be altered to conform to truth.

Distinguished in *People v. Tomalty*, 14 Cal. App. 234, 111 Pac. 517, holding alterations of ledger in county treasurer's office to be willful falsification.

Miscellaneous.—Cited in *Swamp Land Reclamation Dist. No. 407 v. Ruble* (Cal.), 17 Pac. 246, companion case.

75 Cal. 459-464, 17 Pac. 531, ANDRADE v. SUPERIOR COURT.

Probate Court cannot settle and adjust accounts between surviving partner and representative of deceased.

Approved in *Franklin v. Trickey*, 9 Ariz. 285, 80 Pac. 353, administrator of partner first deceased may maintain suit for accounting against administrator of surviving partner, without having presented any demand against estate.

75 Cal. 502-506, 17 Pac. 449, SCHWARTZ v. WILSON.

County Debt Incurred in Any Given Year cannot be paid out of revenue for future year.

Approved in *County of Tehama v. Sisson*, 152 Cal. 172, 175, 178, 92 Pac. 67, 68, 69, following rule.

75 Cal. 506-507, 17 Pac. 542, McCORMICK v. CENTRAL R. R. CO.

New Trial cannot be Had on Ground of newly discovered evidence which is merely cumulative.

Approved in *James v. Oakland Traction Co.*, 10 Cal. App. 803, 103 Pac. 1090, following rule.

Cumulative Evidence as Ground for new trial. See note, 14 L. R. A. 609.

75 Cal. 508-509, 17 Pac. 543, SIMMONS v. OULLAHAN.

Receipt is not Conclusive of its recitals.

Approved in *Brown v. Crown Gold Milling Co.*, 150 Cal. 389, 89 Pac. 92, following rule; *Newsom v. Woollacott*, 5 Cal. App. 726, 91 Pac. 348, parol evidence is admissible to controvert memorandum on check.

75 Cal. 509-513, 17 Pac. 642, ZEIMER v. ANTISELL.

Broker, to be Entitled to Commission, must have produced purchaser ready and willing to buy on terms satisfactory to employer within time limited, by contract, and show that he was efficient procuring cause of sale.

Approved in *Logan v. McMullen*, 4 Cal. App. 156, 87 Pac. 286, reaffirming rule; *Brown v. Mason*, 155 Cal. 158, 159, 99 Pac. 868, 21 L. R. A. (n. s.) 328, broker held not entitled to commission where he merely introduced purchaser to owner, and sale was not made during life of broker's contract; *Hicks v. Post*, 154 Cal. 27, 96 Pac. 880, agent not entitled to commission when buyer was not found within time limited by contract; *Simmons v. Sweeney*, 13 Cal. App. 291, 109 Pac. 269, broker held not to have earned commission where he had dismissed prospective buyer; *Trickey v. Crowe*, 8 Ariz. 183, 71 Pac. 967, where broker had secured one to take option but taker had failed to make payment, broker's commission was not earned where taker, after broker's contract had expired, took land on different terms from representative of deceased principal; *Czarnowski v. Holland*, 5 Ariz. 122, 78 Pac. 891, holding commission earned when purchaser was produced within limit of broker's contract able, ready, and willing to try; *Loxely v. Studebaker*, 75 N. J. L. 606, 68 Atl. 100, commission not

earned when contract was closed after time limited in broker's contract.

Distinguished in *Hill v. McCoy*, 1 Cal. App. 163, 81 Pac. 1017, holding that commission was earned.

When Broker Earns Commission. See notes, 139 Am. St. Rep. 241, 245; 44 L. R. A. 321, 322, 593, 597, 603, 608, 609.

Necessity That Authority of Agent to purchase or sell realty be written to enable him to recover compensation. See note, 9 L. R. A. (n. s.) 935.

75 Cal. 513-518, 17 Pac. 675, METROPOLITAN LOAN ASSN. v. ESCHÉ.

Instrument not Read by Party binding himself will not be reformed on ground of mutual mistake, when party against whom reformation is sought knew of the insertion of clause objected to.

Distinguished in *Los Angeles etc. R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 25, 26, 87 Pac. 1030, 1031, correcting error in deed although party failed to read it.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 795.

Ignorance or Carelessness as Affecting Right to equitable relief from contract by which one has been overreached. See note, 5 L. R. A. (n. s.) 801.

75 Cal. 519-523, 17 Pac. 673, WALSH v. McKEEN.

Where Party on His Complaint is entitled to any relief of any kind, he cannot be sent out of court.

Approved in *Bedolla v. Williams*, 15 Cal. App. 742, 115 Pac. 748, complaint in accounting of alleged partnership held to show plaintiff entitled to some remedy, legal or equitable; *Hayden v. Collins*, 1 Cal. App. 261, 81 Pac. 1121, holding complaint stated cause of action in ejectment though designated forcible entry and detainer and demurrer overruled.

Court may Permit Pleadings to be Amended during trial when necessary for purposes of justice.

Approved in *Link v. Jarvis* (Cal.), 33 Pac. 207, following rule; *Cain v. Cody* (Cal.), 29 Pac. 779, amendments held properly allowed during trial.

Distinguished in *Bradley v. Parker* (Cal.), 34 Pac. 236, refusing amendment after trial which would raise new issues and probably require new trial.

75 Cal. 523-524, 17 Pac. 640, ESTATE OF FISHER.

On Appeal from Order Made on conflicting affidavits, affidavits of prevailing party are presumed true.

Reaffirmed in *Doak v. Bruson*, 152 Cal. 19, 91 Pac. 1002.

75 Cal. 525-534, 7 Am. St. Rep. 189, 17 Pac. 689, BRISON v. BRISON.

Party Who Obtains Absolute Deed upon parol promise to reconvey but without intention to perform from one with whom he stands in confidential relation, and refuses to reconvey, is guilty of constructive fraud.

Approved in *Cooney v. Glynn*, 157 Cal. 587, 108 Pac. 508, applying rule to deed from mother to son; *Martin v. Lawrence*, 156 Cal. 194,

103 Pac. 914, promise made by grantee, without intention to perform, which formed substantial part of consideration of deed, is fraud warranting rescission; *Bollinger v. Bollinger*, 154 Cal. 699, 99 Pac. 198, where party obtained deed from father upon trust to divide land among children of deceased wife, and widow brought untenable suit to enforce trust, executor of deceased child made defendant could enforce it on cross-complaint; *Crabtree v. Potter*, 150 Cal. 713, 89 Pac. 972, applying rule to deed from parents to daughter; *Sanguinetti v. Rossen*, 12 Cal. App. 629, 107 Pac. 562, deed to attorney for benefit of clients held to create constructive trust; *Chamberlain v. Chamberlain*, 7 Cal. App. 639, 95 Pac. 661, deed obtained by false representations as to suit against plaintiff, on promise to reconvey, but without such intention, held to create constructive trust; *Nobles v. Hutton*, 7 Cal. App. 20, 93 Pac. 292, deed of aged parent to son living with her to exclusion of other children held to be presumptively fraudulent; *Fischer v. Fischer*, 245 Ill. 430, 92 N. E. 285, setting aside deed from husband to wife obtained under circumstances which showed she contemplated desertion of marital duties; *Crossman v. Keister*, 223 Ill. 82, 114 Am. St. Rep. 305, 79 N. E. 62, 8 L. R. A. (n. s.) 698, deed of father to daughter given with request to convey to certain person held to create constructive trust; *Hursen v. Hursen*, 212 Ill. 380, 381, 103 Am. St. Rep. 230, 72 N. E. 393, setting aside conveyance of husband to wife secured on threat of not living with him unless he gave deed, where wife shortly thereafter deserted husband; *Newis v. Topper*, 121 Iowa, 442, 96 N. W. 908, holding constructive trust created by grantor's conveyance of land while weak and helpless to stepfather for maintenance of her children, after her death, on ground of confidential relation; *Koefoed v. Thompson*, 73 Neb. 133, 102 N. W. 270, raising constructive trust from deed of owner to his co-owner under circumstances of confidence and trust; *Pollard v. McKenney*, 69 Neb. 750, 96 N. W. 682, constructive trust created when husband during fatal illness conveyed property to wife on her promise to make certain disposition of it but without intention to perform; *Hanson v. Svaraverud*, 18 N. D. 555, 120 N. W. 552, holding deed from parents to sons who promised to hold land to use of parents during their lives and to convey to heirs after death creates constructive trust; *Cardiff v. Marquis*, 17 N. D. 119, 114 N. W. 1091, holding oral trust enforceable when created by deed of father to daughter; *Brookings Land & Trust Co. v. Bertness*, 17 S. D. 303, 96 N. W. 99, holding purchase of land by agent in his wife's name while he was agent for purpose of purchasing it for plaintiff made him trustee for plaintiff, who had tendered purchase price and commission; *Fagan v. Lentz*, 156 Cal. 685, 105 Pac. 953, *arguendo*.

Distinguished in *Broaddus v. James*, 13 Cal. App. 473, 474, 110 Pac. 162, refusing to set aside deed of aged mother to daughter on ground it created merely constructive trust; *Schultz v. McLean* (Cal.), 25 Pac. 429, holding complaint did not show facts sufficient to establish parol trust on ground of fraud, upon conveyance of land; *Gregory v. Bowlsby*, 115 Iowa, 332, 88 N. W. 824, holding deed of adult children to father, on alleged sole consideration to use land for their benefit, though deed recited other consideration, did not create constructive trust; *Marvel v. Marvel*, 70 Neb. 500, 113 Am. St. Rep. 792, 97 N. W. 641, holding parol agreement, made upon conveyance, that grantee shall hold property in trust for grantor, did not create express trust, in

absence of fraud; *Mee v. Mee*, 113 Tenn. 456, 106 Am. St. Rep. 865, 82 S. W. 830, refusing to admit parol evidence to establish trust growing out of deed by husband to wife, which empowered her to dispose of property as she saw fit.

Constructive Trusts. See note, 105 Am. St. Rep. 107.

Creation of Trusts in Land by parol. See notes, 115 Am. St. Rep. 777, 786, 787, 788, 790, 792, 793, 795; 5 Cal. Prob. 248, 257, 258, 261, 262, 263.

Husband and Wife. See note, 135 Am. St. Rep. 584.

75 Cal. 534-539, 17 Pac. 678, **ONDERDONK v. SAN FRANCISCO.**

President of United States, by Executive Order, can reserve part of public domain for military reservation.

Approved in *Florida Town Improvement Co. v. Bigalsky*, 44 Fla. 776, 33 So. 451, following rule.

Entry of Record Necessary to complete judgment or order. See note, 28 L. R. A. 627.

75 Cal. 539-541, 17 Pac. 641, **MILLIKIN v. HOUGHTON.**

All Parties Against Whom Judgment is rendered are "adverse parties" to be served with notice of appeal.

Approved in *Ford v. Cannon*, 5 Cal. App. 188, 89 Pac. 1072, dismissing appeal of defendant for failure to serve notice upon codefendant whose interest would be affected by reversal of order appealed from; *De Arnaz v. Jaynes* (Cal.), 34 Pac. 224, dismissing appeal for failure to serve notice on party who would be injuriously affected by reversal.

75 Cal. 548-552, 17 Pac. 683, **DANIEL v. SMITH.**

To Constitute Gift Causa Mortis, donor must part with possession and all present control over subject.

Approved in *Thomas v. Lamb*, 11 Cal. App. 723, 106 Pac. 256, delivery of key of safe by brother to sister prior to his expected death with instructions as to disposal of money therein held to give present control and create valid trust; *Varley v. Sims*, 100 Minn. 337, 117 Am. St. Rep. 694, 111 N. W. 270, 8 L. R. A. (n. s.) 828, upholding delivery of check as gift causa mortis to person other than donee, but for his use and benefit with instructions to deliver to donee; *Foley v. Harrison*, 233 Mo. 545, 136 S. W. 380, gift of keys of safety deposit box, with words donating its contents, by old man on deathbed, held to be valid gift causa mortis of contents of box, including choses in action.

Gifts Causa Mortis. See note, 99 Am. St. Rep. 895.

75 Cal. 552-558, 17 Pac. 680, **FOORMAN v. WALLACE.**

Conveyance in Consideration of Cancellation of pre-existing debt is for valuable consideration, under section 1214, Civil Code.

Approved in *Virginia etc. Co. v. Glenwood Lumber Co.*, 5 Cal. App. 261, 90 Pac. 50, following rule.

Sheriff's Certificate of Sale is Evidence of Sale, whereby entire equitable title, subject to right of redemption, is conditionally vested in purchaser and, if not redeemed, of his right to deed which vests legal title in him.

Approved in *North Dakota etc. Cattle Co. v. Serumgard*, 17 N. D. 483, 138 Am. St. Rep. 717, 117 N. W. 460, certificate of sale given

on execution of power of sale contained in mortgage has same effect as certificate on foreclosure, and is only evidence of what transpired for purpose of record to protect purchasers, and show who may become entitled to deed.

Judgment Creditor Purchasing Land at execution sale without notice of prior unrecorded deed of judgment debtor is bona fide purchaser, if certificate of sale be first recorded.

Distinguished in *Robinson v. Muir*, 151 Cal. 122, 90 Pac. 523, where claimant of lien brought foreclosure with notice that one defendant in whose favor judgment was rendered was prior grantee of property under unrecorded deed, neither he nor purchaser at sale is bona fide purchaser as against such grantee; *Froman v. Madden*, 13 Idaho, 143, 88 Pac. 895, purchaser in good faith without notice of previous conveyance whose deed is first recorded may maintain ejectment against first purchaser who subsequently enters on land.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 33.

Sheriff's Certificate of Execution Sale is instrument within meaning of section 1107, Civil Code.

Approved in *De Wolfskill v. Smith*, 5 Cal. App. 184, 89 Pac. 1004, copy of notice of appropriation of water is not such instrument as requires acknowledgment as condition to being recorded.

75 Cal. 558-563, 17 Pac. 687, **McLENNAN v. OHMEN**.

Express Warranty is Created by Any Affirmation at time of sale as to quality or condition of thing sold if so intended and purchaser bought on faith of such affirmation.

Approved in *Lander v. Sheehan*, 32 Mont. 30, 79 Pac. 408, reaffirming rule; *Hodgkins v. Dunham*, 10 Cal. App. 705, 711, 103 Pac. 358, 360, holding affirmations on purchase of stallion as to reproductive potency amounted to warranty; *Cummins v. Ennis*, 4 Penne. 426, 56 Atl. 377, statement as to soundness of cow at time of sale held to amount to express warranty; *Ellis v. Riddick*, 34 Tex. Civ. 263, 78 S. W. 723, statement as to quality of cane to be grown on plantation and delivered at mill held to be express warranty of fitness for purposes for which it was sold.

Damages for Continuing Injury may be recovered up to date of judgment.

Approved in *McLain v. Nurnberg*, 16 N. D. 142, 112 N. W. 247, holding rents recoverable to date of final judgment on appeal in action to recover real property and for rent under forcible detainer act.

75 Cal. 563-566, 17 Pac. 685, **WATERS v. DUMAS**.

Verdict will not be Set Aside for failure to enter judgment within twenty-four hours of rendition.

Approved in *Hall v. Justice's Court*, 5 Cal. App. 138, 89 Pac. 871, delay of eight years in entering default judgment in justice's court held not to avoid judgment.

Extent of Trespasser's Liability for consequential injuries. See note, 53 L. R. A. 631, 632.

75 Cal. 566-570, 17 Pac. 702, **HENDY v. MARCH**.

Account Stated Becomes New Contract.

Approved in *Johnson v. Gallatin Valley Mill Co.*, 38 Mont. 89, 98 Pac. 885, following rule; *Tate v. Gairdner*, 119 Ga. 135, 46 S. E. 75,

party objecting to stated account must surcharge or falsify; *Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 804, 96 Pac. 578, account stated becomes contract where there is no averment of fraud or mistake or proof to support same; *Stagg v. St. Jean*, 29 Mont. 292, 74 Pac. 741, account stated is admission of indebtedness.

Assent to Account Necessary to Make it account stated may be implied.

Approved in *Shively v. Eureka Tellurium G. Min. Co.*, 5 Cal. App. 244, 89 Pac. 1076, following rule.

An Action upon an Account Stated is not founded on the original items, but upon the balance ascertained by mutual consent of parties.

Distinguished in *Kearney v. Bell*, 160 Cal. 669, 117 Pac. 928, where account stated is defended against on ground of fraud in procuring defendant's assent thereto, original items appearing on plaintiff's books may be gone into.

What Constitutes an Account Stated. See note, 27 L. R. A. 817.

Effect of Retaining Statement of Account to render it an account stated. See note, 29 L. R. A. (n. s.) 342.

Effect of Balances Struck in pass-books. See note, 134 Am. St. Rep. 1024.

Agreement Between Part Owners of ship to use it in joint enterprise and share profit and loss creates partnership in use of ship as distinguished from ship itself.

Approved in *Grant v. Bannister*, 160 Cal. 782, 118 Pac. 256, deed to partners individually prima facie vests in them undivided interests as tenants in common.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 1086.

75 Cal. 570-579, 17 Pac. 693, **PEOPLE v. STITES.**

Mere Intention to Commit Specific Crime does not itself amount to attempt as word is employed in criminal law.

Approved in *Ex parte Floyd*, 7 Cal. App. 591, 95 Pac. 176, following rule; *State v. Rodriguez*, 31 Nev. 344, 102 Pac. 863, intent to kill must be proven on trial on charge of assault with intent to kill; *State v. Hurley*, 79 Vt. 31, 118 Am. St. Rep. 934, 64 Atl. 78, 6 L. R. A. (n. s.) 804, mere fact that prisoner procured tools adapted to jail-breaking did not constitute attempt to break jail.

Street Railroad is Railroad Within Meaning of statute making it felony to maliciously obstruct railroad track.

Approved in dissenting opinion in *Sams v. St. Louis etc. Ry. Co.*, 174 Mo. 89, 73 S. W. 696, 61 L. R. A. 475, majority holding act making railroads liable for injuries to employee caused by fellow-employees did not apply to street railroads.

75 Cal. 580-584, 17 Pac. 698, **IN RE WILSON.**

Person in Jail for Contempt for Refusing to obey order directing him to pay alimony is entitled to his discharge upon proof of his inability to pay.

Approved in dissenting opinion in *Ex parte Karlson*, 160 Cal. 384, 117 Pac. 450, majority upholding power of court to order one imprisoned at rate of two dollars per day for fine of two hundred dollars imposed for civil contempt.

Contempt Proceedings to Compel Payment of alimony. See note, 24 L. R. A. 433, 437, 438, 439.

Constitutionality of Imprisonment for Debt. See note, 34 L. R. A. 665.

75 Cal. 584-590, 17 Pac. 705, GOODWIN v. McCABE.

Natural Barriers may be Sufficient to form inclosure for purposes of rule in reference to actual possession of real property.

Approved in Johnston v. Albuquerque, 12 N. M. 29, 72 Pac. 11, reaffirming rule; Dowdle v. Wheeler, 76 Ark. 533, 113 Am. St. Rep. 106, 89 S. W. 1004, natural barrier could be taken advantage of in inclosing land, provided natural with artificial barriers were sufficient to give notoriety to possession.

Homestead Entryman on Public Land has right of possession as against third person.

Approved in Thompson v. Basler, 148 Cal. 648, 113 Am. St. Rep. 321, 84 Pac. 162, homestead claimant with receiver's receipt has ample title to enable him to maintain ejectment against mining claimant; Smith v. Love, 49 Fla. 241, 38 So. 380, holding homestead entryman had superior right over party who obtained patent to land without residence thereon; Oldfather v. Ericson, 79 Neb. 4, 112 N. W. 357, receipt of receiver of land office, in full force, held good defense in ejectment except as against one having patent to same land.

Homestead Entry upon Land Actually in possession of another is invalid.

Approved in Gragg v. Cooper, 150 Cal. 586, 89 Pac. 346, following rule; Nash v. McNamara, 30 Nev. 134, 133 Am. St. Rep. 694, 93 Pac. 408, 16 L. R. A. (n. s.) 168, junior mining location on ground covered by valid existing location does not prevail over relocation on same ground after failure to do work on senior location.

Discovery of Mineral in Mining Claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 192.

75 Cal. 596-601, 19 Pac. 174, CARPENTER v. SUPERIOR COURT.

That an Order was Irregularly Made so as to take it from usual mode of review will not be presumed.

Approved in Murdock v. Clarke (Cal.), 24 Pac. 274, following rule.

Court may Appoint Attorneys for Minor defendants in probate proceedings.

Reaffirmed in State v. District Court, 34 Mont. 307, 87 Pac. 615.

Provisions in Relation to Guardians ad Litem for minor defendants in code chapter on parties to civil actions do not apply to probate proceedings.

Approved in Estate of Harris, 3 Cof. Prob. 3, discussing appointment of guardian ad litem for infants in will contest; State v. District Court, 34 Mont. 230, 85 Pac. 1023, holding there is no authority for appearance of minor by guardian ad litem in opposition to probate of will.

75 Cal. 601-604, 17 Pac. 703, MECHANICS' FOUNDRY v. RYALL.

To Authorize Injunction to Restrain Trespass, injury therefrom must appear to be irreparable.

Approved in Randall v. Freed, 154 Cal. 302, 97 Pac. 671, denying injunction to restrain trespass where threatened injury was not ir-

reparable but amounted to nuisance; *Bishop v. Owens*, 5 Cal. App. 87, 89, 89 Pac. 846, 847, refusing injunction to restrain trespass where complaint did not show irreparable injury; *Indian Land etc. Co. v. Shoenfelt*, 135 Fed. 486, 68 C. C. A. 196, averment of irreparable injury is futile in absence of allegations of facts from which court can see injury would probably be irreparable.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 741.

Injunction Against Repeated Trespass. See notes, 21 L. R. A. (n. s.) 418; 13 L. R. A. (n. s.) 178.

Injunction Against Strikes. See note, 28 L. R. A. 467.

75 Cal. 604-609, 17 Pac. 710, **HUMBOLDT COUNTY v. DINSMORE.**

Petition for Construction of Public Road need not allege petitioners are freeholders of road district in which proposed road is to be constructed.

Reaffirmed in *Hall v. McDonald*, 171 Ind. 13, 85 N. E. 708.

Order of Supervisors Recognizing Road Petition and accompanying bond as being such as is required by law, and ordering viewers to be appointed, constitutes approval of bond.

Approved in *County of Canyon v. Toole*, 8 Idaho, 509, 69 Pac. 322, holding bond approved by action of commissioner in appointing viewers and receiving their reports.

Order of Supervisors for View and survey of proposed new road is conclusive of regularity of previous proceedings unless contrary appears of record.

Approved in *County of Sacramento v. Glann*, 14 Cal. App. 786, 113 Pac. 362, finding of supervisors on report of viewers as to ownership of certain land sought to be condemned for road is within their jurisdiction; *County of Santa Barbara v. Yates*, 13 Cal. App. 46, 108 Pac. 727, jurisdiction to determine sufficiency of steps preliminary to bringing of condemnation suit for road is vested solely in board of supervisors; *Hampson v. Dysart*, 6 Ariz. 103, 53 Pac. 583, applying rule to order of board of equalization to assessor to enter on assessment-roll any property not assessed; *State v. Superior Court*, 47 Wash. 14, 91 Pac. 242, action of commissioners in passing on sufficiency of road petition is not subject to collateral attack.

75 Cal. 610-616, 17 Pac. 715, **WHITE v. SPRECKELS.**

Boundary Agreed upon by Adjacent Owners and recognized by them for period of limitation is binding upon them and their successors, although mistake was made in fixing line.

Approved in *Loustalot v. McKeel*, 157 Cal. 642, 643, 108 Pac. 710, 711, *Young v. Blakeman*, 153 Cal. 483, 95 Pac. 890, *Mann v. Mann*, 152 Cal. 27, 91 Pac. 996, and *Hoar v. Hennessy*, 29 Mont. 258, 74 Pac. 454, all following rule; *Bree v. Wheeler*, 4 Cal. App. 112, 87 Pac. 256, rule applies to executed oral agreement settling disputed water rights.

Adverse Possession Due to Ignorance or mistake as to boundary. See note, 21 L. R. A. 833.

What are Boundaries is Matter of Law, but where they are is matter of fact.

Approved in *County of Sierra v. County of Nevada*, 155 Cal. 6, 99 Pac. 373, court must determine actual location of disputed county boundary fixed by statute as question of fact.

Distinguished in *Lewis v. Ogram*, 149 Cal. 508, 509, 117 Am. St. Rep. 151, 87 Pac. 61, 62, 10 L. R. A. (n. s.) 610, where parties agreed to boundary line knowing it was not true line, and not to settle uncertainty in line, no title passed to any land thus conceded to adjacent owner.

75 Cal. 617-620, 17 Pac. 713, WUNDERLIN v. CADOGAN.

Right of Trial Court to Substitute other findings for those already signed and filed is questioned.

Cited in *Hanson v. Hanson* (Cal.), 20 Pac. 737, court could not review its own order setting aside judgment for want of service of summons, where order was regularly made after hearing and consideration.

A Judgment cannot be Presumed to have been unintentionally made so as to allow court to set it aside of its own motion, but such fact must be clearly made to appear.

Approved in *Murdock v. Clarke* (Cal.), 24 Pac. 274, following rule.

75 Cal. 620-627, 17 Pac. 920, HUNT v. STEESE.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 803.

75 Cal. 631-632, 17 Pac. 924, CRYSTAL LAKE ICE CO. v. MCAULAY.

Cumulative Evidence as Ground for new trial. See note, 14 L. R. A. 609.

75 Cal. 633-639, 17 Pac. 925, BLASINGAME v. HOME INS. CO.

Objection to Complaint That Specific Allegation therein is contradicted by exhibit to which reference is made cannot be taken advantage of by general demurrer.

Approved in *S. F. Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 698, 106 Pac. 112, following rule; *Larson v. First Nat. Bank of Pender*, 66 Neb. 597, 92 N. W. 730, in action on note, answer need only set up prima facie case of illegality.

Complaint on Fire Insurance Policy need not deny loss occurred from excepted risks.

Distinguished in *Friedman v. Atlas Assur. Co.*, 133 Mich. 219, 94 N. W. 760, burden is on insurer to prove loss occurred from excepted risk; dissenting opinion in *Davis v. Connecticut Fire Ins. Co.*, 158 Cal. 774, 112 Pac. 553, majority holding insurer liable for destruction of building by fire started before fall caused by earthquake, when policy contained clause releasing company from liability when any part of building fell except as result of fire.

75 Cal. 642-649, 17 Pac. 928, HODGDON v. SOUTHERN PACIFIC R. R. CO.

Probate Decree Appointing Guardian for Minor, regular on face and rendered by court having jurisdiction of matter, is not collaterally attackable.

Cited in *Guardianship of Treadwell*, 3 Cof. Prob. 316, arguendo.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 76 CALIFORNIA.

76 Cal. 1-6, 18 Pac. 115, **BUTTE COUNTY v. MORGAN.**

Actions for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 555.

76 Cal. 6-8, 18 Pac. 81, **WRISTEN v. CURTISS.**

Release of One of Several Jointly Liable on note, who are not mere guarantors, does not release the other obligors.

Approved in Enscoe v. Fletcher, 1 Cal. App. 665, 82 Pac. 1078, where notes, after death of payee, were distributed to one joint maker as heir of payee, such distributee was entitled to enforce one-half of liability against estate of deceased comaker.

76 Cal. 8-10, 17 Pac. 933, **HEILBRON v. CENTERVILLE ETC. DITCH CO.**

Statement on Motion for New Trial must contain a specification of particulars in which the evidence is insufficient.

Approved in Schilling v. Curran, 30 Mont. 377, 76 Pac. 1001, where specification in statement was wholly insufficient as a specification of an error of law, and could not be construed as a specification of insufficiency of the evidence, statement must be disregarded.

Alleged Error of Rendering Judgment on insufficient complaint cannot be reviewed on appeal from order denying new trial.

Reaffirmed in Raskin v. Robarts (Cal.), 35 Pac. 764.

Riparian Owner on a Stream may enjoin unlawful diversion above him of water on the stream.

Reaffirmed in California Pastoral etc. Co. v. Enterprise Canal etc. Co., 127 Fed. 742.

Miscellaneous.—Cited in Heilbron v. Kings River etc. Canal Co., 76 Cal. 15, 17 Pac. 936.

76 Cal. 11-18, 17 Pac. 933, **HEILBRON v. KINGS RIVER ETC. CANAL CO.**

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 758.

76 Cal. 18-23, 17 Pac. 942, **SAN FRANCISCO v. HOLLADAY.**

Who are Bound by Judgment for or against municipality or other governmental body or its officers. See note, 105 Am. St. Rep. 208.

76 Cal. 24-26, 17 Pac. 940, **BURHAM v. SAN FRANCISCO FUSE ETC. CO.**

Forfeiture of Corporate Stock. See note, 27 L. R. A. 313.

76 Cal. 26-28, 17 Pac. 939, **BURHAM v. SAN FRANCISCO FUSE ETC. CO.**

Relief in Equity from Forfeitures. See note, 86 Am. St. Rep. 60.

Forfeiture of Corporate Stock. See note, 27 L. R. A. 313.

76 Cal. 29-43, 18 Pac. 90, **PEOPLE v. CENTRAL PACIFIC R. R. CO.**

"Require" Means Demand or Request, rather than merely need.

Approved in Duhamel v. Port Angeles Stone Co., 59 Wash. 177, 109 Pac. 600, contract for sale of stone, providing stone shall be delivered in "quantities required," does not require seller to deliver stone except on demand specifying quantities.

The Effect of Statement of Penalty in a contract is to limit the recovery of actual damages.

Distinguished in Sherman v. Gray, 11 Cal. App. 352, 104 Pac. 1005, in action for breach of contract to remove sand, where penalty fixed by contract is not sued on it would not limit recovery.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 58.

76 Cal. 44-50, 18 Pac. 98, **NOONAN v. NUNAN.**

Allegata and Probata must agree.

Approved in Osborn v. Hamilton, 16 Cal. App. 636, 117 Pac. 786, where answer in action on note admitted its execution but denied delivery to plaintiff or that he was legal holder, finding that certain deed was delivered in escrow to secure payment of note, but before suit was returned to and accepted by defendant, was not responsive; Hartman v. Belden, 38 Wash. 661, 80 Pac. 807, in action for accounting where complaint alleged contract between plaintiff and defendants jointly, and proof showed contract between one of the defendants and plaintiff and another defendant, there was a failure of proof.

Partner cannot Transfer an Individual Interest in any specific article belonging to the firm.

Approved in Simmons v. Rowe, 4 Cal. App. 759, 89 Pac. 624, applying rule where partner heavily indebted to firm conveyed real property to one not a creditor of firm.

Rights of Partners Inter Se in partnership realty. See note, 28 L. R. A. 99.

Right to Purchase One Partner's Interest in partnership realty without consent of others. See note, 18 L. R. A. (n. s.) 1180.

76 Cal. 50-55, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117, **MINK v. HOME INS. CO.**

Insurance Company cannot Take Advantage of defective statements in application made out by its agent.

Approved in Lyon v. United Moderns, 148 Cal. 476, 113 Am. St. Rep. 291, 83 Pac. 807, 4 L. R. A. (n. s.) 247, upholding rule where insured had no actual knowledge of contents of report, had not been asked to read same, or do anything but sign it; Smith v. Mutual Cash. Guar. Fire Ins. Co., 21 S. D. 439, 113 N. W. 96, where agent

fills out blank and advises as to character of answers, his act is act of company.

In Absence of Fraud, Courts will refuse to enforce forfeiture condition in favor of insurer who has knowledge of condition broken when delivering policy.

Approved in *Bayley v. Employers' etc. Assur. Corp.* (Cal.), 56 Pac. 638, where accident insurer had knowledge of accident compensation paid insured in 1892, but no knowledge of such compensation paid in 1886, it did not waive false statement that insured had never before received compensation for any accident; *Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 246, 117 Am. St. Rep. 382, 76 N. E. 979, 3 L. R. A. (n. s.) 966, applying rule where insurance company accepted premium on fire policy providing it should be void if building be occupied by a tenant, with knowledge building was so occupied; *Graham v. American Fire Ins. Co.*, 48 S. C. 223, 59 Am. St. Rep. 707, 26 S. E. 334, company's knowledge of extent of insured's interest in the property waived condition in policy that he must be sole owner.

Waiver of Provisions of Nonwaiver or written waiver of conditions and forfeitures in policies. See note, 107 Am. St. Rep. 109.

Effect of Knowledge by Insurer's Agent of falsity of statements in application. See note, 16 L. R. A. 34, 36.

Insurance Agent as Agent of Assured. See note, 20 L. R. A. 278.

Parol Evidence Rule as to Varying or contradicting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies. See note, 16 L. R. A. (n. s.) 1228.

Location of Movable Property as affecting fire insurance. See note, 26 L. R. A. 238.

76 Cal. 57-59, 17 Pac. 941, PEOPLE v. CURTIS.

Larceny is not Included in the crime of burglary.

Approved in *State v. Hooker*, 145 N. C. 584, 59 S. E. 867, prosecution for larceny, was no bar to subsequent prosecution for breaking and entering with intent to commit larceny.

Discharge of Jury After Rendering void verdict without consent of defendant operates as acquittal.

Distinguished in *People v. Ham Tong*, 155 Cal. 580, 132 Am. St. Rep. 110, 102 Pac. 264, 24 L. R. A. (n. s.) 481, where defendant was tried for robbery on erroneous theory that the information charged that crime, upon reversal of judgment of conviction he was not entitled to discharge as having been once in jeopardy.

Trial Under Erroneous Theory as to crime as former jeopardy. See note, 24 L. R. A. (n. s.) 482.

76 Cal. 60-84, 9 Am. St. Rep. 164, 18 Pac. 100, COX v. McLAUGHLIN.

Mere Failure to Pay Installment when due does not constitute prevention, so as to authorize suit for entire contract price.

Approved in *Carlson v. Sheehan*, 157 Cal. 696, 109 Pac. 30, where building, before completion, was damaged by landslide and owner cleared away earth and requested contractor to proceed with work, contractor was not justified in rescinding contract on ground of prevention.

Distinguished in *Alderson v. Houston*, 154 Cal. 13, 96 Pac. 888, where principal was under obligation to agents to clear lots from

street assessments as sales were made, failure to do so was breach of condition precedent entitling agents to sue for entire damage resulting therefrom.

Interest is not Allowable on unliquidated damages prior to verdict or judgment.

Approved in *Erickson v. Stockton etc. R. R. Co.*, 148 Cal. 208, 82 Pac. 961, in action on open account where liability for claim and value and amount thereof was denied, interest was recoverable only from date balance was ascertained; *Granger's Union v. Ashe*, 12 Cal. App. 759, 108 Pac. 534, in action on open account for goods sold, allowance of interest on amount of claim from date it was found to be due was error; *Krasilnikoff v. Dundon*, 8 Cal. App. 412, 97 Pac. 174, in action for damages for breach of warranty as to efficiency of two boilers to be set up in Siberia, the damages being unliquidated until judgment, no interest should be allowed on amount found; *Farnham v. California etc. Trust Co.*, 8 Cal. App. 273, 96 Pac. 791, claim upon quantum meruit for reasonable value of services was not entitled to bear interest prior to judgment.

Distinguished in *Courteney v. Standard Box Co.*, 16 Cal. App. 613, 615, 117 Pac. 784, allowing interest in action on contract for price of goods.

Disapproved in *Parkins v. Missouri etc. R. R. Co.*, 76 Neb. 257, 107 N. W. 266, in action for breach of contract of sale, where vendee refused to accept goods procured by vendor from third parties, interest was allowable from date of accrual of action.

Complaint Seeking to Recover Contract Price of services performed may be amended so as to aver claim as upon a quantum meruit.

Approved in *Limerick v. Lee*, 17 Okl. 171, 87 Pac. 861, reaffirming rule; *Castagnino v. Balletta (Cal.)*, 21 Pac. 1099, after reversal of judgment in mechanic's lien suit, plaintiff had right to amend his complaint and sue in assumpsit.

Nonpayment of Installments of Contract Price as they fall due authorizes rescission and suit as on quantum meruit.

Approved in *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, 158 Cal. 273, 110 Pac. 955, leaving question open as to whether rule applies to failure to make payments on contract for sale of goods by installments; *Beck v. Schmidt*, 13 Cal. App. 451, 110 Pac. 456, where building contract was orally modified as to payments, and owner neither complied with original contract nor oral modification, contractor was justified in refusing to proceed and suing upon quantum meruit; dissenting opinion in *Wilmington v. Bryan*, 141 N. C. 685, 54 S. E. 550, majority holding where city attorney and his subagents were employed to collect back taxes, on a percentage of taxes collected, they were not entitled, on termination of contract, to recover on quantum meruit for services in preparing claims for suit.

Right of Contractor to Sue on Quantum Meruit upon breach of construction contract by other party. See note, 13 L. R. A. (n. s.) 448.

76 Cal. 87-90, 18 Pac. 122, **KERNS v. McKEAN.**

Admissibility in Evidence of Books of account. See notes, 138 Am. St. Rep. 444, 449, 469, 470; 52 L. R. A. 595.

What Provable by Books of Account. See note, 52 L. R. A. 714, 720.

76 Cal. 92-96, 18 Pac. 118, SAN LUIS OBISPO COUNTY v. DARKE.

Salary Attached to a Public Office is an incident, not to the office, but its occupation and exercise.

Approved in *Tout v. Blair*, 3 Cal. App. 182, 84 Pac. 672, one elected supervisor who discharged duties of office during pendency of contest and was ousted as result thereof was entitled to salary of office until judgment became final.

Want of Uniformity in Provisions Respecting Several Classes does not affect validity of law.

Approved in *Johnson v. Gunn*, 148 Cal. 751, 84 Pac. 667, upholding power of legislature to prescribe different standards of compensation for township officers in different counties.

76 Cal. 96-102, 18 Pac. 131, TUGGLE v. MINOR.

Account Becomes Stated Only as to Those Items considered and agreed upon by the parties.

Reaffirmed in *Ingle v. Angell*, 111 Minn. 65, 137 Am. St. Rep. 533, 126 N. W. 400.

What Constitutes an Account Stated. See note, 27 L. R. A. 816, 817.

Effect of Dispute as to Certain Items of account upon assent to others. See note, 7 L. R. A. (n. s.) 924.

76 Cal. 103-106, 18 Pac. 124, PARKER v. REAY.

Specifications of Particulars must specify in what particular the evidence fails or is insufficient.

Approved in *Porter v. Counts*, 6 Cal. App. 551, 92 Pac. 655, upholding specifications of particulars where, after challenging each of the findings, appellant proceeded to state what "the evidence shows"; *Love v. Anchor Raisin Vineyard Co. (Cal.)*, 45 Pac. 1046, specification of insufficiency stating that the evidence clearly showed the total amount due was a certain sum was clearly insufficient; *Sponberg v. First Nat. Bank of Montpelier*, 18 Idaho, 528, 110 Pac. 717, specifications which purported to set out what the evidence did show were sufficient to authorize court to examine the evidence on appeal.

Street Assessment Levied on Lot not chargeable therewith is void.

Distinguished in *Bates v. Hadamson*, 2 Cal. App. 578, 84 Pac. 53, where assessment was properly made on lot chargeable therewith, the fact that such lot was assessed for more than it should have been was an error to be corrected by appeal to city council; *Parker v. Roper (Cal.)*, 18 Pac. 125, corner lot was properly assessed for gutterways and macadamizing roadways.

76 Cal. 106-108, 18 Pac. 137, BAGNALL v. ROACH.

New Trial will not be granted for newly discovered evidence which could, with reasonable diligence, have been produced.

Approved in *Nicholson v. Metcalf*, 31 Mont. 278, 78 Pac. 484, affidavit in support of motion must allege specifically what acts of diligence were performed.

Burden of Proving Allegations of Complaint devolves upon the plaintiff.

Distinguished in *Dirks v. California Safe Deposit etc. Co.*, 136 Cal. 88, 68 Pac. 488, allegation of want of consent to withdrawal of money is supported by absence of proof showing consent.

76 Cal. 109-113, 9 Am. St. Rep. 173, 18 Pac. 125, HOGINS v. SUPREME COUNCIL ETC. RED CROSS.

Where By-law of Benevolent Society Makes Breach of any requirement punishable by expulsion, certificate is forfeited upon happening of such breach.

Approved in *Modern Woodmen v. Breckenridge*, 75 Kan. 375, 89 Pac. 661, condition in fraternal benefit certificate providing for its forfeiture for excessive use of drugs was self-executing; *Smith v. Woodmen of the World*, 179 Mo. 135, 77 S. W. 867, nonpayment of dues worked forfeiture without action of lodge thereon, notwithstanding member was delirious and unconscious when dues became due.

Distinguished in *Osterman v. District Grand Lodge (Cal.)*, 43 Pac. 415, 416, under laws of mutual endowment association providing formal method for suspension in case of nonpayment of dues, assured, who was secretary and failed to report his own delinquency, did not lose his membership.

Statements Contained in or Made Part of policy of insurance become warranties.

Approved in *Caldwell v. Grand Lodge*, 148 Cal. 199, 113 Am. St. Rep. 219, 82 Pac. 783, 2 L. R. A. (n. s.) 653, 7 Ann. Cas. 356, where, after change in by-laws requiring beneficiary named by member to be a person dependent on him, a member took out new certificate designating his former beneficiary, representation that she was dependent on him amounted to a warranty.

Life Insurance. See note, 130 Am. St. Rep. 1015.

Provisions in Insurance Policies forbidding use of intoxicants. See note, 15 L. R. A. (n. s.) 211.

76 Cal. 113-116, 18 Pac. 135, SWINNERTON v. MONTEREY COUNTY.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 177.

76 Cal. 116-118, 18 Pac. 136, HOOKER v. BANNER.

Covenant in Renewal Lease to Return premises in original condition refers to condition under first lease.

Distinguished in *Herboth v. American Radiator Co.*, 145 Mo. App. 497, 123 S. W. 538, where lease for fixed term required lessee to surrender premises in condition received, under renewal lease made after alteration of buildings, lessee was not required to return premises in original condition.

76 Cal. 119-121, 18 Pac. 127, HARBIN v. BURGHART.

Applicant for Purchase of School Land must not only set out in his affidavit all facts required by statute, but must prove same.

Approved in *Waters v. Pool*, 149 Cal. 800, 87 Pac. 620, applying rule where applications conflicted as to land covered by same and by statute affiant was required to state he knew of no legal or equitable claim other than his own; *Davidson v. Cucamonga Fruit etc. Co.*, 78 Cal. 8, 20 Pac. 154, certificate of purchase issued to applicant who was not actual settler as set out in his affidavit conferred upon

him no right to maintain action to annul patent issued to another; *Kleinsorge v. Burgbacher*, 6 Cal. App. 352, 92 Pac. 202, assignee of certificate of purchase of timber lands acquired no rights because of false statement in affidavit that they were not timber lands.

76 Cal. 121-125, 18 Pac. 139, PEOPLE v. VAN NESS.

Action by State to Recover Sums collected by a public officer becomes barred in three years.

Approved in *Bannock County v. Bell*, 8 Idaho, 4, 101 Am. St. Rep. 140, 65 Pac. 711, statute of limitations applies to action by county against ex-clerk of district court for illegal fees collected during his term of office.

Distinguished in dissenting opinion in *Bannock County v. Bell*, 8 Idaho, 9, 101 Am. St. Rep. 140, 65 Pac. 713, majority holding statute of limitations applies to action by county against ex-clerk of district court for illegal fees collected by him during his term of office.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 185.

76 Cal. 125-127, 18 Pac. 138, DENGLER v. MICHELSEN.

Duty of Landlord to Put Tenant in possession. See note, 134 Am. St. Rep. 922.

Liability of Assignee of Leasehold for rent. See note, 14 L. R. A. 154.

76 Cal. 127-131, 17 Pac. 937, LEEKE v. HANCOCK.

The Same Cause of Action may be Stated in different counts.

Approved in *Remy v. Olds* (Cal.), 34 Pac. 217, upholding complaint in action for breach of contract containing two counts, one for damages on the contract and the other for materials furnished, money expended and labor performed under the contract; *Willard v. Carrigan*, 8 Ariz. 72, 69 Pac. 539, plaintiff could not be compelled to elect between his counts in action for real estate broker's commissions, where complaint had one count on an express contract and another on a quantum meruit; *Oberndorfer v. Moyer*, 30 Utah, 332, 84 Pac. 1105, motion to compel election between two counts, one on an open account and the other on an account stated, was properly denied.

One of Two Joint Makers may be surety only as between himself and his copromisor, but principal as to payee.

Approved in *National Bank of Commerce v. Schrim*, 3 Cal. App. 699, 86 Pac. 983, parol evidence was admissible by maker of note who appeared to be a principal, to show he was in fact a surety.

Rights Inter Se of Accommodation Parties to commercial paper. See note, 28 L. R. A. (n. s.) 1040.

76 Cal. 131-134, 18 Pac. 144, TIVNEN v. MONAHAN.

Right to Civil Action for Forcible entry and detainer. See note, 121 Am. St. Rep. 403.

76 Cal. 136-144, 9 Am. St. Rep. 177, 18 Pac. 146, OGLESBY v. HOL-LISTER.

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 610, 616.

Invalid Tax Deed as Color of Title within general statutes of limitations. See note, 11 L. R. A. (n. s.) 779.

76 Cal. 153-155, 9 Am. St. Rep. 187, 18 Pac. 153, **THOMPSON v. WILLIAMS**.

Assessment upon Capital Stock of Corporation can be levied only at regular meeting or special meeting regularly called.

Approved in *Cheney v. Canfield*, 158 Cal. 345, 111 Pac. 93, where regular meeting of board fell on a holiday and board met on following day without notice, such meeting was neither a regular meeting nor a valid special meeting; *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 669, 95 Pac. 663, as minority of board of directors were without power to adjourn regular meeting, assessment levied at such adjourned meeting was void.

76 Cal. 156-163, 18 Pac. 141, **PEOPLE v. PARK MTO. R. R. CO.**

Whether or not an Encroachment on a private right is a nuisance is a question of fact.

Approved in *Leitchfield Mercantile Co. v. Commonwealth*, 143 Ky. 168, 136 S. W. 642, where connection between two buildings over public alley has been erected without legal permit, it is a purpresture, which may or may not be a public nuisance; *Whittaker v. Stangvick*, 100 Minn. 391, 117 Am. St. Rep. 703, 111 N. W. 297, 10 L. R. A. (n. s.) 921, whether act of defendants in proposing to erect blinds in front of narrow duck pass for purpose of making several to themselves shooting privileges belonging to many was a nuisance, not determined; *Twenty-second Corporation etc. v. Oregon etc. R. R. Co.*, 36 Utah, 252, 103 Pac. 249, whether excessive noises caused by operation of railroad train constitutes a nuisance is a question of fact.

What are Public Nuisances. See note, 107 Am. St. Rep. 204.

What Use of Squares, Parks or Commons is consistent with purpose of dedication. See note, 25 L. R. A. (n. s.) 981.

76 Cal. 173-174, 18 Pac. 260, **SIEBER v. BLANC**.

Lessor who Covenants to Repair is only required to do so after notice.

Approved in *Tyson v. Weil*, 169 Ala. 565, 53 So. 915, plea by tenant setting up as setoff to action for rent breach of covenant to keep in repair during term must aver notice or knowledge by landlord of defect; *Marcheck v. Klute*, 133 Mo. App. 293, 113 S. W. 659, where landlord who rented part of stable loft agreed to keep hay chute in repair, tenant's child could recover for injuries resulting from failure to make such repairs.

Tenant has Right to Make Repairs on breach of landlord's covenant to do so.

Approved in *Augevine v. Knox-Goodrich* (Cal.), 31 Pac. 530, under Civil Code, section 1941, lessor who had no notice of defect was not liable to tenant for injury to health from defective sewer; *Brett v. Berger*, 3 Cal. App. 16, 87 Pac. 224, where landlord's agreement was to furnish materials for repairs and one man's labor when called upon to do so, lessee who took no action to protect his crops on landlord's failure to repair could not recover; *Bianchi v. Del Valli*, 117 La. 592, 42 So. 150, denying damages for injuries where tenant took no steps toward compelling owner to make repairs or make them himself.

Liability of Landlord for Injury to tenant from defect in premises. See note, 34 L. R. A. 826.

Implied Covenant in Lease as to Fitness of property for purpose intended. See note, 33 L. R. A. 450.

76 Cal. 175-177, 18 Pac. 129, JACOBS v. WALKER.

Certificate of Purchase of State Lands is not conclusive of rights of purchaser as against subsequent applicant.

Reaffirmed in *Boggs v. Ganeard*, 148 Cal. 717, 84 Pac. 198.

76 Cal. 177-181, 9 Am. St. Rep. 189, 18 Pac. 262, TURNER v. McDONALD.

Title to Land is not Perfect unless free from reasonable doubt and litigation.

Approved in *Crim v. Umbesen*, 155 Cal. 702, 132 Am. St. Rep. 127, 103 Pac. 180, upholding rule where, after destruction of public records in San Francisco, it was impossible for vendors within time limited in contract to give title fairly deducible from entire record of county; *Reed v. Sefton*, 11 Cal. App. 91, 92, 103 Pac. 1097, title was free from probable litigation notwithstanding abstract of title showed record of old bond for a deed; *Hool v. O'Callaghan*, 10 Cal. App. 570, 103 Pac. 175, purchaser was entitled to return of deposit made under contract of sale where vendor, by reason of destruction of public records, was unable to convey perfect title; *Whittier v. Gormley*, 3 Cal. App. 492, 86 Pac. 727, court had right, upon decreeing specific performance, to allow deduction from purchase money of very small sum necessary to remove defects; *Whelan v. Rossiter*, 1 Cal. App. 704, 82 Pac. 1083, recorded agreement imposing building restrictions on the land was an encumbrance justifying purchaser in declining to accept title; *Owen v. Pomona Land & Water Co. (Cal.)*, 61 Pac. 474, where land granted to one railroad company was subsequently granted to another purchaser from grantee of latter company was entitled to rescind his contract to purchase; *Bartlett v. McGee (Cal.)*, 45 Pac. 1031, vendee was entitled to recover deposit made on land, where at time of contracting to purchase an unrecorded contract of sale between vendor and another was in existence; *McCroskey v. Ladd (Cal.)*, 28 Pac. 217, where one of deeds in chain of title relied on by vendor was executed by president and secretary of corporation and attested by their individual seals, and recital of authority failed to show authority from board of directors, no good paper title was offered; *Henderson v. Beatty*, 124 Iowa, 167, 99 N. W. 718, reaffirming rule in construing contract by which one agreed to convey merely his interest in premises and also stipulated price should be paid on presentation of abstract showing good and perfect title in him; *Howe v. Coates*, 97 Minn. 399, 114 Am. St. Rep. 723, 107 N. W. 403, 4 L. R. A. (n. s.) 1170, where able lawyers, acting as arbitrators, were unable to agree upon questions of law involved in the title, such title was not marketable; *Wollenberg v. Rose*, 45 Or. 620, 78 Pac. 752, where both members of firm died before completion of firm's contract to convey, purchaser was not bound to accept deed from heir who had obtained title by conveyances from other heirs, while suits were pending to set aside such conveyances; dissenting opinion in *Barrett v. Whitney*, 36 Utah, 599, 103 Pac. 531, majority holding, where title depended on construction of a general law, after court had construed the law in favor of the title, such title was marketable.

What is a Marketable Title. See note, 132 Am. St. Rep. 1023, 1038.

76 Cal. 181-186, 18 Pac. 256, COPERTINI v. OPPERMANN.

Superior Court has Jurisdiction of Cases at law in which title or possession of real property is a material fact in the case.

Approved in *Dungan v. Clark*, 159 Cal. 32, 112 Pac. 719, where, in action on promissory note in justice's court, verified answer alleged note was in consideration of sale of one-half interest in pumping plant situated on certain land and in pipe-line extending therefrom, and that plaintiff did not own said half interest, justice was required to certify action to superior court; *Legum v. Blank*, 105 Md. 133, 65 Atl. 1074, justice of the peace had no jurisdiction of action to recover earnest-money and damages in less than one hundred dollars, based on breach of contract of sale.

76 Cal. 190-191, 18 Pac. 308, PEOPLE v. ANDERSON ETC. ROAD CO.

Corporation is Ipso Facto Dissolved when franchise expires without action on part of state.

Approved in *Clark v. American Cannel Coal Co.*, 165 Ind. 217, 112 Am. St. Rep. 217, 73 N. E. 1084, when corporate life is ended, no powers can thereafter be exercised except such as are given by statute for purpose of winding up affairs.

Period of Existence of Private Corporations. See note, 33 L. R. A. 581.

Right to Take Tolls Without Franchise. See note, 37 L. R. A. 717.

76 Cal. 192-197, 18 Pac. 318, COOKRILL v. HALL.

Exceptions to Oral Instructions must be specifically directed to some particular portion thereof.

Approved in *Love v. Anchor Raisin Vineyard Co. (Cal.)*, 45 Pac. 1046, and *Moore v. Moore (Cal.)*, 34 Pac. 92, both refusing to review on appeal oral instructions to which general exception had been taken.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 32.

76 Cal. 203-207, 9 Am. St. Rep. 193, 18 Pac. 320, HOBSON v. HASSETT.

Person Signing Note in His Own Name, adding thereto "president," but without disclosing his principal, is individually liable.

Approved in *Hall v. Jameson*, 151 Cal. 610, 121 Am. St. Rep. 137, 91 Pac. 519, 12 L. R. A. (n. s.) 1190, trustee who borrowed money for benefit of trust and executed note in the first person, adding "trustee" after his name, which note he secured by a mortgage on the trust property, was personally liable thereunder; *San Bernardino Nat. Bank v. Anderson (Cal.)*, 32 Pac. 168, persons signing note with their individual names, adding thereto "president" and "secretary," were personally liable thereon, notwithstanding resolution of corporation authorizing execution of the note was attached thereto; *Gavazza v. Plummer*, 53 Wash. 15, 101 Pac. 371, contract to repurchase stock signed "W. H. Plummer, Treas.," bound him personally notwithstanding body of contract recited name of company of which he was treasurer.

Personal Liability of Officers on Note made for corporation. See note, 19 L. R. A. 679.

Liability of Principal on Negotiable Paper executed by agent. See note, 21 L. R. A. (n. s.) 1052.

Contracts Signed by Agents. See note, 119 Am. St. Rep. 349.

Cancellation and Surrender of Old Note is sufficient consideration for new one.

Reaffirmed in *Zuendt v. Doerner*, 101 Mo. App. 536, 73 S. W. 875.

76 Cal. 208-212, 9 Am. St. Rep. 197, 18 Pac. 245, **SPARROW v. RHOADES.**

Under General Denial, in Action of ejectment, defendant has right to make any proof which would defeat plaintiff's title.

Approved in *Holmes v. Salamanca Gold Min. etc. Co.*, 5 Cal. App. 661, 91 Pac. 161, in action of ejectment, court properly permitted defendants to introduce testimony tending to vitiate two deeds affecting plaintiff's title to mining claim, where no question of fraud was raised by answer.

Pleading. See note, 91 Am. St. Rep. 335.

76 Cal. 212-221, 9 Am. St. Rep. 199, 18 Pac. 248, **BLACKWOOD v. CUTTING PACKING CO.**

If Time of Payment be Left Indefinite, the law implies payment is to be made on delivery of goods.

Approved in *Stum v. Hardrich*, 7 Cal. App. 243, 94 Pac. 83, where advance payment was made and no time was fixed for further payment by contract for sale of confectionery business, no delivery being made or tendered, vendee was not in default.

The Word "Sold" Does not Conclusively show a present conveyance.

Approved in *Walti v. Gaba*, 160 Cal. 327, 116 Pac. 964, reaffirming rule; *Christensen v. Cram*, 156 Cal. 634, 105 Pac. 950, in action to recover balance of purchase price of property sold, allegation in complaint that the property was "sold" for a stated sum implied sale was consummated; *Estate of Goetz*, 13 Cal. App. 202, 109 Pac. 146, agreement for sale of real property under which purchaser, on making deposit, was allowed to take possession of property and deed was placed in escrow to be delivered on payment of residue of price, was only an agreement to sell, and not a conveyance; *Grange Co. v. Farmers' Union etc. Co.*, 3 Cal. App. 524, 86 Pac. 617, where consignee became bankrupt before receipt of grain, circumstances of sale indicated intention to transfer title at time of shipment.

Words Showing Intention to Effect present transfer are not conclusive where other features of transaction show contrary intention.

Approved in *Potts Drug Co. v. Benedict*, 156 Cal. 329, 104 Pac. 435, 436, 25 L. R. A. (n. s.) 609, construing assignment of leasehold interest giving assignor right to occupy premises for a limited period, as a present transfer; *Powers v. Nowles*, 42 Colo. 449, 94 Pac. 349, where contract for sale of hay contained provisions tending to show it was an executory contract and others tending to show a completed sale, evidence touching intent of parties should have been received.

If Goods Sold are not Identified, title does not pass in absence of circumstances showing contrary intention.

Approved in *Walti v. Gaba*, 160 Cal. 328, 331, 116 Pac. 965, construing contract of sale of wool clip as not passing title to buyer at

time of destruction by fire; *O'Keefe v. Leistikow*, 14 N. D. 361, 104 N. W. 516, on sale of seventy bushels of flax mingled with more flax of same kind, the title passed notwithstanding part sold was not separated from part not sold.

What Constitutes Receipt and Acceptance of goods. See note, 140 Am. St. Rep. 819.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 6, 7, 12, 14, 15, 17.

The Word "Merchandise" Covers All Kinds of personal property ordinarily sold in the market.

Approved in *Gulfport v. Stratakos*, 90 Miss. 501, 43 So. 812, keeper of fruit-stand who sold fruit on Sunday was a merchant selling merchandise in violation of the Sunday law.

Where Terms are Cash on Delivery, title does not pass until payment is made.

Approved in *Masoner v. Bell*, 20 Okl. 623, 95 Pac. 241, 18 L. R. A. (n. s.) 166, reaffirming rule where on delivery of goods payment was refused but goods were appropriated by vendee; *Darden v. Callaghan*, (Cal.), 31 Pac. 263, in suit for conversion of goods, agreement under which goods were to remain with seller until a certain time and be paid for on delivery was not a contract of sale but an agreement to sell.

Sales of Property not Then in Existence. See note, 81 Am. St. Rep. 44, 45.

Implied Warranty of Quality. See notes, 102 Am. St. Rep. 612; 14 L. R. A. 492.

Sales. See note, 100 Am. St. Rep. 705.

76 Cal. 222-228, 18 Pac. 253, CITY OF NAPA v. EASTERBY.

Provision Relating to Style of enacting clause of ordinances is merely directory.

Approved in *Best v. Broadhead*, 18 Idaho, 20, 108 Pac. 336, upholding enacting clause of village ordinance not in the language prescribed by statute, but showing intention and declaration of village.

76 Cal. 230-234, 18 Pac. 386, HUGHES v. WHEELER.

Judgment will not be Reversed for Mere Error if party appealing was not injured thereby.

Approved in *Spear v. United Railroads*, 16 Cal. App. 665, 117 Pac. 969, applying rule in personal injury case; *Bechtel v. Chase*, 156 Cal. 712, 106 Pac. 83, where the judgment rendered, regardless of rulings complained of, was the only one that could have been properly rendered, alleged errors were not prejudicial; *Hamlin v. Pacific Ry. Co.*, 150 Cal. 783, 89 Pac. 1112, in action for personal injuries inflicted by car, where court would have been justified in instructing jury plaintiff was guilty of contributory negligence, he was not harmed by erroneous instruction as to degree of care required of him; *Neher v. Hansen*, 12 Cal. App. 374, 107 Pac. 566, refusing to reverse order denying new trial for error in instruction as to measure of damages for deceit in procuring purchase of stock, where verdict could not have been otherwise; *Compressed Air Co. v. West San Pablo Co.*, 9 Cal. App. 363, 99 Pac. 532, applying rule in action for claim and delivery, where, though jury disregarded instruction of court as to damages in case property could not be redelivered, its finding was

beneficial to appellant; *Greene v. Murdock*, 1 Cal. App. 139, 81 Pac. 994, in action for slander, plaintiff was not prejudiced by erroneous instructions where nonsuit should have been granted.

Manner of Pleading Any Particular Issue will not be reviewed on appeal if treated as properly made at the trial.

Approved in *Gervaise v. Brookins*, 156 Cal. 112, 103 Pac. 333, in action of ejectment where findings show case was tried on theory that the answer put in issue value of the rents and profits, sufficiency of the denials cannot be raised on appeal.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 679.

76 Cal. 235-239, 18 Pac. 267, SIERRA MILLING ETC. CO. v. HARTFORD FIRE INS. CO.

Warranty to Furnish Water Supply must be clearly provided for in policy.

Reaffirmed in *McEvoy v. Security Fire Ins. Co.*, 110 Md. 286, 132 Am. St. Rep. 428, 73 Atl. 162, 22 L. R. A. (n. s.) 964.

Warranty in Fire Insurance Policy to keep watchman on premises must be complied with.

Approved in *Rankin v. Amazon Ins. Co. (Cal.)*, 25 Pac. 262, evidence that watchman employed by insured habitually slept in building three hundred feet away from property showed failure to comply with condition of policy.

76 Cal. 240-242, 18 Pac. 269, OLEARY v. CITY R. R. CO.

Every Error is Presumptively Prejudicial to the party against whom it is made.

Approved in *Taggart v. Bosch (Cal.)*, 48 Pac. 1094, applying rule where court erred in excluding cross-examination and it did not appear from the record defendant was not injured thereby.

In Determining Measure of Damages for negligent killing, jury may consider mental anguish and suffering.

Approved in *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 535, 129 Am. St. Rep. 659, 100 Pac. 974, upholding instruction in action for death of husband that jury, in estimating damages, may consider pecuniary loss to widow by reason of being deprived of comfort, protection and society of husband.

Mental Suffering of Parent as Element of damages in action for death of child. See note, 2 L. R. A. (n. s.) 899.

76 Cal. 255-257, 18 Pac. 317, RANDALL v. HUNTER.

Assumption by Partnership of Partners' individual debts. See note, 29 L. R. A. 694.

76 Cal. 257-259, 18 Pac. 324, McDONALD v. SWETT.

Mistake in Name of a Natural Person may be corrected by amendment of pleading.

Approved in *Nisbet v. Clio Min. Co.*, 2 Cal. App. 441, 83 Pac. 1080, misnomer of a corporation in a pleading has the same legal effect as misnomer of an individual.

Whether Delay in Serving Summons justifies dismissal for want of prosecution rests in discretion of court.

Approved in *Luke v. Bennion*, 36 Utah, 64, 106 Pac. 713, under Compiled Laws of 1888, sections 35, 44 et seq., where summons was issued

within a year, it was not required to be served within that time, but within a reasonable time.

Default Entered Pending Motion to dismiss for want of prosecution is properly entered.

Approved in *Mantle v. Casey*, 31 Mont. 414, 78 Pac. 593, upholding default entered for failure to appear or answer pending motion to quash service of summons.

76 Cal. 260-263, 18 Pac. 372, GRIFFITH v. BROWN.

To Constitute Estoppel in Pais, Conduct must have been with express intent to deceive or such negligence as to amount to constructive fraud.

Approved in *Lindley v. Blumberg*, 7 Cal. App. 147, 93 Pac. 898, where husband prior to making lease of premises with option to purchase had executed unrecorded deed to his wife, she had not sufficient knowledge of her husband's acts to estop her from setting up her prior title.

76 Cal. 264-268, 18 Pac. 381, KNOX v. HIGBY.

Sale of Property for Taxes in excess of amount legally due and costs is void.

Approved in *Hotchkiss v. Hansberger*, 15 Cal. App. 606, 115 Pac. 958, applying rule where tax deed containing itemized statement of charges showed on its face the land was sold for one dollar and forty cents more than authorized by law; *Rimmer v. Hotchkiss*, 14 Cal. App. 562, tax sale for fifty-two cents in excess of proper amount was void.

76 Cal. 269-281, 18 Pac. 309, PEOPLE v. REIS.

Defective Verification to Complaint is waived by answering without objecting to its sufficiency.

Reaffirmed in *Moore v. Hupp*, 17 Idaho, 245, 105 Pac. 213.

Mandamus will not lie to compel public officer to pay money not in his official custody.

Approved in *Chicago v. People*, 210 Ill. 94, 71 N. E. 820, mandamus will not lie to compel payment of salary of patrolman where city makes no appropriation for that purpose, or when such an appropriation has been unlawfully exhausted; *State v. Spinney*, 166 Ind. 286, 76 N. E. 973, applying rule in action to compel county treasurer to pay town treasurer balance due on warrants issued by county auditor, where such county treasurer had no funds it was his duty to pay over.

Taxes may be Delinquent for a Fixed period of time before the penalty for such delinquency attaches.

Approved in *Ukiah Guaranty Co. v. Curry*, 148 Cal. 258, 82 Pac. 1049, under act providing for payment of annual license tax by corporations, while tax becomes delinquent on first Monday in August, penalty does not attach until list is turned over to the governor and he issues proclamation.

76 Cal. 281-286, 18 Pac. 332, PEOPLE v. COX.

Notes of Court Reporter and His Transcription of them are but prima facie evidence of matters therein contained.

Approved in *People v. Izlar*, 8 Cal. App. 604, 97 Pac. 686, uncertified excerpt from transcript of testimony taken by reporter which failed

to show defendant was informed of his right to counsel did not negative the fact that the court fully informed him of his right.

Stenographer's Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 359.

76 Cal. 291-294, 18 Pac. 325, MARYE v. HART.

Provisions of Constitution Should be Construed so as to give effect to every part if reasonably possible.

Approved in *Wheeler v. Herbert*, 152 Cal. 236, 92 Pac. 358, construing Statutes of 1907, page 260, chapter 214, providing for change of boundary line between King and Fresno counties as not in violation of Constitution, article IV, section 6.

Provision for Payment of Taxes on mortgaged property does not render void agreement for payment of interest on mortgage debt.

Approved in *Hewitt v. Dean* (Cal.), 25 Pac. 756, under provisions of mortgage and separate agreement mortgagor did not agree to pay taxes on money loaned.

76 Cal. 294-299, 18 Pac. 407, PEOPLE v. ROACH.

Proceeding Commenced Within Five Years after death of intestate to declare his estate has escheated to state is premature.

Distinguished in *State v. Miller*, 149 Cal. 210, 85 Pac. 610, resident heirs are not barred ipso facto by any statutory forfeiture; *Estate of Piper*, 147 Cal. 608, 82 Pac. 247, parties appealing on ground court had no jurisdiction did not show they were parties aggrieved where they had failed to attack finding that the property was separate property.

Alleged Fact, Impossible in Law, is not admitted by demurrer.

Approved in *State v. Miller*, 149 Cal. 209, 85 Pac. 610, applying rule to complaint alleging deceased left "no surviving wife or kindred," and "there are no heirs to take said estate."

It is a Presumption of Law that every intestate has left someone entitled to claim as his heir.

Approved in *State v. Superior Court*, 148 Cal. 57, 82 Pac. 673, 2 L. R. A. (n. s.) 643, a notice filed in probate proceedings that the state claims the property on the ground deceased left no surviving heirs is not an allegation of the fact that he left no such heirs.

Modified in *State v. Miller*, 149 Cal. 211, 85 Pac. 610, it is unnecessary in escheat proceedings to offer evidence in support of allegation that there are no heirs.

76 Cal. 299-303, 18 Pac. 394, SWAIN v. BURNETTE.

If Vendor has Any Interest in the property he contracts to convey, he may be compelled to perform the contract as far as he can.

Approved in *Farnum v. Clarke*, 148 Cal. 618, 84 Pac. 170, upholding right of vendee to maintain action for specific performance against vendor who had contracted to locate public land and procure title and who had filed locations and taken the steps required by law to procure good title.

Right of Vendee to Specific Performance with abatement from price where vendor unable to give clear title. See note, 10 L. R. A. (n. s.) 118.

76 Cal. 304-305, 18 Pac. 329, BUTE v. POTTS.

Degree of Care and Skill Which Physician or surgeon must exercise. See note, 37 L. R. A. 838.

76 Cal. 318-322, 18 Pac. 373, DIGGINS v. BROWN.

In Assessing Cost of Street Work to different pieces of property liable therefor, omission of one lot vitiates whole assessment.

Approved in *Pacific Paving Co. v. Verso*, 12 Cal. App. 369, 107 Pac. 593, where assessment was levied in manner not authorized by statute, owners were not required to appeal to board of supervisors to correct assessment; *Childers v. Holmes*, 95 Mo. App. 160, 68 S. W. 1048, where one property owner elected to do street work in front of his property by private contract, the fact that a portion of such work was included in city contract rendered latter contract wholly void.

Distinguished in *Dowling v. Altschul* (Cal.), 33 Pac. 496, assessment was not so totally void that it could not have been amended by order of city council under act of March 18, 1885, page 147, section 11.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 919.

Superiority of Lien of Local Assessment over prior lien. See note, 35 L. R. A. 375.

76 Cal. 323-324, 18 Pac. 396, LARKIN v. LARKIN.

An Appeal cannot be Taken from an order refusing to vacate an appealable order.

Approved in *Title Ins. etc. Co. v. California Dev. Co.*, 159 Cal. 487, 114 Pac. 839, order denying intervenor's motion to vacate order appointing receiver in action to foreclose lien of deed of trust is not an appealable order.

76 Cal. 328-353, 19 Pac. 161, PEOPLE v. GOLDENSON.

Indictment will not be Set Aside for mere irregularity in formation and impanelment of grand jury.

Approved in *People v. Hatch*, 13 Cal. App. 526, 109 Pac. 1099, upholding indictment where most of the grounds relied on by appellant were mere irregularities and the others were grounds of challenge that could only be relied on by one held to answer before finding of indictment; *Thomas v. Territory*, 11 Ariz. 187, 89 Pac. 592, where additional jurors summoned had not served as jurors on regular list within previous twelve months, failure of court to include such requirement in its order was a mere irregularity.

When Bias of Witness is Shown, the reason therefor is of no concern to the jury.

Approved in *State v. Stevens*, 16 S. D. 319, 92 N. W. 423, in prosecution of bank cashier for receiving money after bank's insolvency, a witness who admitted on cross-examination he was prejudiced against accused could not be interrogated by prosecution as to cause of hostility.

Statements in Bill of Exceptions must be taken by appellate court as absolute verity.

Approved in *People v. Izlar*, 8 Cal. App. 603, 97 Pac. 686, applying rule where defendant did not avail himself of remedy provided by law for party who claims trial judge refused to settle bill of exceptions in accordance with facts.

Consideration of Application for change of venue may be postponed until attempt is made to impanel jury, with leave to renew application.

Approved in *People v. Staples*, 140 Cal. 412, 86 Pac. 888, defendant's failure to renew his motion for change of venue where it was only temporarily denied was an abandonment and waiver of it.

Accused cannot Secure Continuance by employing counsel who at time of employment have engagements which will preclude their attendance.

Approved in *State v. Turner*, 122 La. 373, 47 So. 686, accused was not entitled to postponement of trial because of other professional engagements of his counsel which existed at time of employment.

Continuance in Criminal Cases for absence of witnesses. See note, 122 Am. St. Rep. 746.

Court may Appoint Attorneys for a defendant in a criminal action when counsel engaged by him are absent.

Approved in *State v. Kenny*, 77 S. C. 239, 57 S. E. 860, where, on date set for trial, counsel for defendant being sick, the court appointed counsel and continued case and on adjourned day original counsel appeared and tried case, no reversible error was committed.

It is Within the Discretion of the judge to determine whether or not leading questions should be allowed.

Approved in *People v. Gregory*, 8 Cal. App. 745, 97 Pac. 915, court did not abuse its discretion in allowing certain leading questions relating to revolting circumstance to be put to prosecutrix, a mere child.

Compelling a Prisoner to Stand up for identification is not invading his constitutional exemption from testifying against himself.

Approved in *Magee v. State*, 92 Miss. 875, 46 So. 532, compelling accused to put his foot in a track found near place where crime was alleged to have been committed was not objectionable; *State v. Ruck*, 194 Mo. 435, 92 S. W. 712, action of court in permitting two accomplices to be brought into court to see if witness could identify them as persons with defendant at time of assault was entirely proper; *State v. Gartrell*, 171 Mo. 510, 71 S. W. 1050, upholding action of court in permitting son of defendant, who was jointly indicted with him for murder, to be brought into court for identification as the person who was with defendant; *Thornton v. State*, 116 Wis. 343, 98 Am. St. Rep. 924, 93 N. W. 1109, in prosecution for assault with intent to commit rape, evidence of comparison of shoe of accused with tracks left in snow near place of assault was no invasion of personal rights.

Compelling Accused to Perform Acts and submit person to inspection and examination. See notes, 94 Am. St. Rep. 337; 28 L. R. A. 701.

Cumulative Evidence as Ground for new trial. See note, 14 L. R. A. 609.

Evidence and Instructions as to Character of accused. See note, 20 L. R. A. 616.

Sufficiency of Evidence Before Grand Jury to sustain indictment. See note, 28 L. R. A. 327.

Expert Opinions as to Sanity or insanity. See note, 39 L. R. A. 313.

Scientific Books and Treatises as evidence. See note, 40 L. R. A. 562.

76 Cal. 354-355, 18 Pac. 384, COON v. GRAND LODGE.

Time to Appeal from Judgment begins to run from time of the actual entry.

Approved in *Bunting v. Salz* (Cal.), 22 Pac. 1132, appeal from judgment taken more than one year after entry of judgment must be dismissed; *Stutsman v. Sharpless*, 125 Iowa, 338, 101 N. W. 106, appeal taken within six months from date judgment entered nunc pro tunc was actually recorded was in time.

Appeal Taken from Judgment prior to date of its actual entry will be dismissed as premature.

Reaffirmed in *Pedley v. Werdin* (Cal.), 99 Pac. 975.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 627.

76 Cal. 355-359, 18 Pac. 403, SHADBURNE v. DALY.

Forbearance to Take Legal Proceedings is a good consideration for promise to pay debt of another.

Approved in *Castle v. Smith*, 17 Haw. 37, where no definite time was fixed for duration of forbearance, it should be for a reasonable time.

Forbearance to Sue as Consideration for third person's promise to pay existing obligation. See note, 19 L. R. A. (n. s.) 844.

Specification of Particular Errors of law on which appellant relies need not be contained in bill of exceptions.

Approved in *Martin v. Southern Pacific Co.*, 150 Cal. 131, 88 Pac. 704, specification in notice of intention to move for new trial embodied in bill of exceptions, that motion would be made on account of errors in law occurring at the trial, was all that was necessary; *Humphrey v. Whitney*, 17 Idaho, 24, 103 Pac. 392, court cannot review the evidence for purpose of determining whether it supports the findings and judgment in absence of specifications of particulars in bill of exceptions, but bill of exceptions may be retained for purpose of presenting questions of law for review; *Nord v. Boston etc. Min. Co.*, 30 Mont. 56, 75 Pac. 683, where plaintiff saved his exception to ruling granting nonsuit, and settled his bill containing the testimony and his exceptions, he had right to urge the error in appellate court; *Smith Cable Co. v. Madsen*, 30 Utah, 300, 84 Pac. 886, applying rule where assignments of error were filed in appellate court, and not contained in bill of exceptions presented and settled in trial court.

76 Cal. 360-372, 18 Pac. 379, TURLOCK IRRIGATION DIST. v. WILLIAMS.

Laws Providing for the Organization and management of irrigation districts are constitutional.

Approved in *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 533, 85 Pac. 316, land owners within irrigation districts organized under irrigation district law (Laws 1901, p. 198, c. 87) were not deprived of their property without due process of law; *Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 484, 83 Pac. 503, upholding provisions of irrigation district act giving court jurisdiction to examine and determine all proceedings which may affect legality of bond issue; *Mound City Land & Stock Co. v. Miller*, 170 Mo. 251, 253, 94 Am. St. Rep. 727, 70 S. W. 724, 725, 60 L. R. A. 190, upholding Revised Statutes of

1899, section 8251, providing for the establishment of drainage districts.

Irrigation Districts are Quasi-public Corporations.

Approved in *People v. San Joaquin etc. Co.*, 151 Cal. 805, 91 Pac. 744, agricultural association incorporated under Statutes of 1880, page 62, chapter 69, is a public corporation; *Mound City Land & Stock Co. v. Miller*, 170 Mo. 255, 94 Am. St. Rep. 727, 70 S. W. 726, 60 L. R. A. 190, corporations organized under drainage laws to carry them into effect are public governmental agencies, and in no sense private corporations; *Little W. W. Irr. Dist. v. Preston*, 46 Or. 6, 78 Pac. 982, irrigation district law (Laws 1895, p. 13) providing for incorporation of irrigation districts does not authorize the corporation to regulate water rights belonging to private individuals.

General Method of Fixing Values and making assessments for general tax purposes does not apply to levies for local improvements.

Approved in *Oregon etc. R. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 608, 102 Pac. 915, upholding power of irrigation district to assess property of railroad corporation within its territory.

Legislature may Compel Land Owner by taxation to pay for benefits accruing from improvements affecting a community.

Approved in *Billings Sugar Co. v. Fish*, 40 Mont. 269, 106 Pac. 570, 26 L. R. A. (n. s.) 973, upholding special assessments for the construction of a drainage system levied on the land specially benefited.

Boards or Bodies to Which Power of taxation delegable. See note, 15 L. R. A. (n. s.) 65.

Miscellaneous.—Cited in *In re Madera Irr. Dist.*, 92 Cal. 341, 28 Pac. 284, 27 Am. St. Rep. 106, 14 L. R. A. 755.

76 Cal. 372-376, 18 Pac. 385, PAGE v. SUPERIOR COURT.

Dismissal of Action by Plaintiff is not complete until judgment of dismissal has been entered in judgment-book.

Approved in *Wood, Curtis & Co. v. Missouri etc. Ry. Co.*, 152 Cal. 347, 92 Pac. 869, under Code of Civil Procedure, section 581, as amended, entry of simple order of dismissal in minutes of court is all that is required; *State v. Hines*, 148 Mo. App. 307, 128 S. W. 253, where plaintiff has merely filed in open court a memorandum dismissing case, it is still pending and available under plea in abatement of second suit.

Distinguished in *Miller v. Northern Pac. Ry. Co.*, 30 Mont. 292, 294, 295, 76 Pac. 692, 693, 694, when plaintiff has filed praecipe with clerk for dismissal of action and clerk has entered dismissal on register of actions, court has no jurisdiction except for purpose of entering judgment for costs if defendant so demands.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 625.

76 Cal. 378-380, 18 Pac. 406, DRAGHICEVICH v. VULICEVICH.

Submission of Cause to Arbitration pending action thereon, operates as a dismissal of the action.

Approved in *Goodwin v. Merchants' & Bankers' Mut. Ins. Co.*, 118 Idaho, 605, 92 N. W. 895, plaintiff, having been induced to dismiss action on fire policy, by voluntary offer of defendant to set aside original award and rearbitrate, defendant could not refuse to so

arbitrate and fall back upon clause of policy limiting time to commence action to six months.

76 Cal. 381-384, 18 Pac. 399, THOMSON v. WHITE.

There can be but One Final Judgment in cause.

Approved in Doudell v. Shoo, 159 Cal. 454, 114 Pac. 582, in suit for partnership accounting, giving of bond to stay execution on "interlocutory decree" first entered did not prevent court from carrying such decree into effect by a further decree.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 346.

76 Cal. 387-394, 9 Am. St. Rep. 211, 18 Pac. 391, SANTA OLARA VALLEY MILL CO. v. HAYES.

Contracts Contrary to the Policy of express law are invalid.

Approved in Grogan v. Chaffee, 156 Cal. 613, 105 Pac. 747, 27 L. R. A. (n.s.) 395, contract by which retailer, buying olive oil from manufacturer, was required to maintain a standard selling price was not invalid; Benicia Agricultural Works v. Estes (Cal.), 32 Pac. 940, applying rule in action to foreclose mortgage given as security for the performance of an unlawful contract; Anderson v. Shawnee Com. Co., 17 Okl. 245, 87 Pac. 319, applying rule to lease by which one company engaged in compression of cotton leased their entire property to another company, and bound themselves not to engage in the compress business in a territory practically unlimited.

If Legal and Illegal Stipulations in a contract are indivisible, the whole contract must fall.

Approved in Lingle v. Snyder, 160 Fed. 630, 87 C. C. A. 529, where contract for leasing of grazing lands consisted of two writings executed at same time, embracing lands owned by plaintiff and public lands, action could not be maintained for breach of contract as to lands of which plaintiff was owner.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 497, 501.

Illegal Contracts. See notes, 80 Am. St. Rep. 80; 79 Am. St. Rep. 965.

Instance of Contract for Combination among lumber merchants held invalid as in restraint of trade.

Distinguished in California Raisin Growers' Assn. v. Abbott, 160 Cal. 608, 117 Pac. 771, in action by association organized to act as agent in handling and disposing of raisins and which had contracted with growers for sale of their crops, for accounting, answer that plaintiff was determined to secure contracts for eighty-five per cent of entire crop did not permit evidence that association organized to secure raisin monopoly.

Validity of Contract Giving Exclusive local right to handle goods. See note, 9 L. R. A. (n.s.) 503.

76 Cal. 394-395, 18 Pac. 598, BERNIAUD v. BEECHER.

Evidence of General Reputation as to ownership is inadmissible to prove title.

Approved in State v. McGinnis, 56 Or. 167, 108 Pac. 134, under statute, common reputation of accused's ownership of house alleged

to have been used as house of ill-fame is admissible to prove ownership thereof; *Terminal Co. v. Jacobs*, 109 Tenn. 739, 72 S. W. 957, 61 L. R. A. 188, it was error to permit witness to state that the engines which committed the nuisance complained of, belonged, by general reputation, to the company sued.

Miscellaneous.—Cited in *Berniaud v. Beecher* (Cal.), 22 Pac. 1151, on subsequent appeal.

76 Cal. 395-399, 18 Pac. 864, BURRIS v. FITCH.

Division Line Between Properties may become established by long-continued acquiescence and occupation according thereto.

Approved in *Deidrich v. Simmons*, 75 Ark. 405, 406, 87 S. W. 651, upholding rule where adjoining owners having agreed on fence as division line, one of them made valuable improvements relying thereon without his rights being questioned for thirteen years; *Steinhilber v. Holmes*, 68 Kan. 611, 75 Pac. 1021, agreement as to boundary lines, followed by possession, is not obnoxious to the statute of frauds; *Adams v. Child*, 28 Nev. 185, 88 Pac. 1088, applying rule where parties had acquiesced in location of line fence for forty years after location of true line was known.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 685.

Adverse Possession Due to Ignorance or mistake as to boundary. See note, 21 L. R. A. 834.

76 Cal. 400-401, 18 Pac. 424, PEOPLE v. PEARSON.

Motion to Set Aside a Judgment as void is a direct attack.

Distinguished in *Estate of Davis*, 151 Cal. 324, 121 Am. St. Rep. 105, 86 Pac. 185, attack on order appointing administrator made after lapse of time for appeal, and in answer to application for distribution of estate is a collateral attack on such order.

Judgment Rendered on Constructive Service by publication without affidavit or order of publication is void.

Approved in *Stoneman v. Bilby*, 43 Tex. Civ. App. 297, 96 S. W. 52, in suit to foreclose nonresident owner for delinquent taxes, citation by publication is unauthorized except on filing of proper affidavit.

Relief from Judgments Rendered on publication of process. See note, 16 L. R. A. 361.

76 Cal. 401-404, 18 Pac. 410, MAGUIRE v. DE FREMERY.

What is Community Property. See notes, 126 Am. St. Rep. 102; 4 Cof. Prob. 44.

76 Cal. 404-414, 18 Pac. 599, CALIFORNIA CENTRAL RY. CO. v. HOOPER.

Transferee of Subject Matter of Suit may continue action in name of original party, or request a substitution.

Approved in *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 601, 25 Sup. Ct. 150, 49 L. Ed. 332, 1 Ann. Cas. 533, telegraph company, as lessee of another telegraph company, cannot exercise the rights of eminent domain of its lessor; *Oregon-Washington R. & N. Co. v. Wilkinson*, 188 Fed. 367, transfer of railroad to another does not, under Washington code, abate condemnation proceedings instituted by transferring company; *Contra Costa Water Co. v. Van Rensselaer*, 155 Fed. 141, 142, where a corporation entitled to exercise the

rights of eminent domain succeeded to the ownership of the property of a like corporation which had commenced proceedings for that purpose, it had the right to continue such proceedings; *Sykes v. Beck*, 12 N. D. 252, 96 N. W. 846, denying motion to dismiss appeal in name of original defendant, where, after judgment and before appeal, he had assigned subject matter of action.

Condemnation of a Particular Route for railroad purposes is not rendered unnecessary by existence of another route equally good.

Approved in *American Tel. & Tel. Co. v. St. Louis Iron Mountain & S. Ry. Co.*, 202 Mo. 677, 101 S. W. 582, in proceedings by telephone company to condemn easement on right of way of railroad, the railroad could not question the good taste and propriety of plaintiff's selection of route.

Effect of Consolidation of Corporations. See note, 89 Am. St. Rep. 648.

76 Cal. 415-433, 9 Am. St. Rep. 216, 18 Pac. 758, **WHEATON v. NORTH BRITISH ETC. INS. CO.**

Clause in Policy That No Waiver of conditions can be made by agent except by indorsement does not refer to stipulations to be performed after loss has occurred.

Approved in *McCullough v. Home Ins. Co.*, 155 Cal. 664, 102 Pac. 816, where adjuster of company informed insured within sixty days after loss that sworn proofs were not actually necessary and he would settle just the same, the company waived the requirement of written and sworn proof of loss.

Waiver of Provisions of Nonwaiver or written waiver of conditions and forfeitures in policies. See note, 107 Am. St. Rep. 117, 132.

When Insured Acts in Good Faith, misstatements in application for insurance will not be fatal to policy.

Approved in *Lyon v. United Moderns*, 148 Cal. 476, 113 Am. St. Rep. 291, 83 Pac. 807, 4 L. R. A. (n. s.) 247, where report was made out by medical examiner of insurer, and insured was not asked to read it or do anything but sign it, company was estopped to assert falsity of answers; *Parrish v. Rosebud Min. & Milling Co. (Cal.)*, 71 Pac. 695, where, because insurance company's agent inserted false answers in application, such answers could be no defense to action on the policy, the falsity of such answers was a good defense to a policy issued by another company on same property, based on such application.

By Asking for and Receiving Proofs of loss, insurer does not waive its right to declare a forfeiture of the policy.

Approved in *Elhart v. Pacific Mutual Life Ins. Co.*, 47 Wash. 663, 92 Pac. 420, applying rule where insurer, after receiving an affidavit showing insured had met his death while engaged in occupation prohibited by policy, sent out second set of blanks on which to make proofs of death; *Burdick v. Modern Woodmen of Am.*, 47 Wash. 575, 92 Pac. 440, mutual benefit insurance society did not waive its right to avoid payment of claim because of false representations in application of assured, where, by mistake, clerk of society had sent out notice stating claim had been allowed and calling for payment of assessment.

Waiver of Proof of Loss. See note, 80 Am. St. Rep. 319.

Effect of Knowledge by Insurer's Agent of falsity of statements in application. See note, 16 L. R. A. 34.

Effect of Agent's Insertion in Application of false answers to questions correctly answered by insured. See note, 4 L. R. A. (n. s.) 608.

Life Insurance. See note, 80 Am. St. Rep. 171.

Warranty. See note, 140 Am. St. Rep. 884.

76 Cal. 434-436, 18 Pac. 412, HOLLAND v. WILSON.

Plans and Specifications Forming Part of building contract must be filed in office of county recorder.

Approved in *Burnett v. Glas*, 154 Cal. 255, 97 Pac. 425, where building contract referred to plans and specifications to be kept and remain in the office of the architect, the contract was void because of failure to file such plans and specifications with the contract.

76 Cal. 436-454, 18 Pac. 413, PEOPLE v. HENSHAW.

Laws Which Apply to but One Class are not for that reason obnoxious as special legislation.

Approved in *Clute v. Turner*, 157 Cal. 78, 106 Pac. 242, upholding act of 1889 for laying out, opening, etc., any street, square, alley, etc., within municipalities, and to condemn property for that purpose; *Johnson v. Gunn*, 148 Cal. 749, 84 Pac. 666, upholding County Government Act, section 184, subdivision 13 (Stats. 1897, p. 538, c. 177), as amended by Statutes of 1901, page 750, chapter 234, regulating compensation of justices of the peace in townships of twenty-seventh class of counties; *Ex parte Sohneke*, 148 Cal. 266, 113 Am. St. Rep. 236, 82 Pac. 958, 2 L. R. A. (n. s.) 813, act of March 20, 1905 (Stats. 1905, p. 422, c. 354), regulating interest on chattel loans is unconstitutional; *Title Insurance & Trust Co. v. Lusk*, 15 Cal. App. 362, 115 Pac. 56, procedure under act of 1909 (Stats. 1909, c. 684), regarding condemnation proceedings, may not be said to be special because it is peculiar to the character of action as to which it is prescribed; *Union Ice Co. v. Rose*, 11 Cal. App. 361, 104 Pac. 1008, upholding Statutes of 1901, page 95, chapter 81, section 2, creating police courts in cities of the one and one-half class, and giving them jurisdiction of all misdemeanors; *Johnson v. Gunn* (Cal. App.), 84 Pac. 373, County Government Act, section 184, subdivision 13, as amended by Statutes of 1901, page 750, chapter 234, regulating compensation of justices of the peace in townships of twenty-seventh class of counties, is unconstitutional as special legislation; *Ex parte Owens*, 148 Ala. 407, 121 Am. St. Rep. 67, 42 So. 677, 8 L. R. A. (n. s.) 888, upholding acts of 1903, page 117, providing for change of county seats and making provision for all of the counties according to their several needs; *State v. Thompson*, 142 Ala. 110, 38 So. 683, election law of 1903 (acts 1903, page 438) is a general law, even if it be admitted section 106 excepts out of its operation those localities which have special election laws as to certain officers.

76 Cal. 457-460, 18 Pac. 421, RUDDLE v. GIVENS.

Want of Continued Change of Possession avoids sale of personal property as against creditors.

Approved in *Kennedy v. Conroy* (Cal.), 44 Pac. 796, where stepfather continued to live on ranch with stepson after giving him bill of sale of hogs and sheep on ranch, together with lease of ranch which was never recorded, such bill of sale was void as to creditors.

76 Cal. 460-465, 9 Am. St. Rep. 238, 18 Pac. 425, PEOPLE v. HANSELMAN.

Mere Knowledge by Owner that his property is to be burglarized, followed by inaction on his part, is not consent.

Approved in *State v. Currie*, 13 N. D. 660, 112 Am. St. Rep. 687, 102 N. E. 877, 69 L. R. A. 405, applying rule where owner was informed by detective that his building would probably be burglarized by a person acting with the apparent assistance of himself.

Larceny—Effect of Owner's Conduct in intentionally facilitating taking. See note, 7 L. R. A. (n. s.) 757.

Instigation or Consent to Crime for purpose of detecting criminal as defense to prosecution. See note, 25 L. R. A. 341, 343.

Information for Larceny which fails to aver ownership of stolen property is fatally defective.

Approved in *People v. Cleary*, 1 Cal. App. 52, 53, 81 Pac. 753, 754, indictment charging the taking by force of money from the "person and possession" of the prosecutor was insufficient.

"**Inducement**" and "**Opportunity**" to Commit a crime are not equivalent terms.

Approved in *State v. Littooy*, 52 Wash. 95, 100 Pac. 173, upholding rule where party went to office of one practicing dentistry without a license, had him fill a cavity and paid him for the service.

Larceny. See note, 88 Am. St. Rep. 597, 598.

76 Cal. 465-469, 18 Pac. 645, WRIGHT v. MIX.

Performance of Obligation by or on Behalf of one from whom performance is due extinguishes it.

Approved in *Crystal v. Hutton*, 1 Cal. App. 254, 81 Pac. 1116, where surety after paying note accepted assignment thereof, he could only maintain action against maker for indemnity; *Yule v. Bishop* (Cal.), 62 Pac. 70, indorser of corporation's note, who, upon paying same, took an assignment thereof from payee, could not maintain action to enforce statutory liability of stockholders for such debt.

76 Cal. 469-472, 9 Am. St. Rep. 242, 18 Pac. 429, BARR v. O'DONNELL.

No Express Trust in Land conveyed by deed absolute can be created by parol agreement.

Approved in *Kinley v. Thelen*, 158 Cal. 183, 110 Pac. 516, where land was conveyed by deed absolute subject to parol trust, trustee was under no obligation to prevent sale of land for taxes.

Creation of Trusts in Land by parol. See notes, 115 Am. St. Rep. 778, 796; 5 Cof. Prob. 248, 249, 266.

76 Cal. 474-476, 18 Pac. 430, RYALL v. CENTRAL PACIFIC R. R. CO.

Plaintiff is not Relieved from obligation of showing he was exercising due care by fact that defendant was acting in violation of a statute.

Approved in *Darsam v. Kohlmann*, 123 La. 171, 48 So. 784, 20 L. R. A. (n. s.) 881, applying rule in action for injuries to boy, under prohibited age, employed in factory, who subjected himself to an obvious risk in violation of instructions.

76 Cal. 476-486, 18 Pac. 604, HELM v. WILSON.

Acquiescence in Division Line for Period necessary to acquire title by occupation under statute of limitations establishes the line.

Approved in *Lonstalot v. McKeel*, 157 Cal. 642, 108 Pac. 710, adjoining owners are estopped from questioning line established which may not be true line according to calls of their deeds; *Bree v. Wheeler*, 4 Cal. App. 112, 87 Pac. 256, applying rule where parties entered into an agreement settling disputed water rights and acquiesced in same for considerable period of time; *Hoar v. Hennessey*, 29 Mont. 258, 74 Pac. 454, verbal agreement between coterminous owners establishing division line was not within the statute of frauds.

Distinguished in *Mann v. Mann*, 152 Cal. 27, 91 Pac. 996, where true line was known, oral agreement having for its object transfer of land, and purporting to fix a boundary line agreed upon, was ineffective for such purpose; *Lewis v. Ogram*, 149 Cal. 508, 117 Am. St. Rep. 151, 87 Pac. 61, 10 L. R. A. (n. s.) 610, where there was no doubt so-called division line was not true line, agreement which did not purport to settle existing doubts as to line was not binding.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 687.

Effect of Compromise Locating Division Line at place known not to be true boundary. See note, 10 L. R. A. (n. s.) 612.

Mistake in Description may be Overlooked if land can be identified by monuments fixed thereon.

Approved in *Borchard v. Eastwood* (Cal.), 65 Pac. 1048, upholding deed describing township as "45" instead of "4," where land could be identified without the number of the township; *Beall v. Weir*, 11 Cal. App. 368, 105 Pac. 134, where section line had been staked and county granted thirty feet on both sides thereof for highway, one who bought land knowing it was located with reference to the conveyance to county could not infringe on unused portion of such highway.

It is not Necessary That There be a Dispute in order to make possession adverse or hostile.

Approved in *Webb v. Rhodes*, 28 Ind. App. 396, 61 N. E. 736, in action to quiet title, possession of one who cultivated strip of land between true line and fence supposed to mark boundary, erected buildings and made other improvements thereon, was hostile.

Adverse Possession Due to Ignorance or mistake as to boundary. See note, 21 L. R. A. 833.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 782.

76 Cal. 487-488, 18 Pac. 432, **CARPENTER v. EWING.**

Alleged Error as to Instructions cannot be considered where the evidence is not brought up in the record.

Approved in *Billups v. Utah Canal etc. Extension Co.*, 7 Ariz. 214, 63 Pac. 714, reaffirming rule; dissenting opinion in *Richmond Coal Co. v. Commercial Union Assur. Co.*, 169 Fed. 753, 75 C. C. A. 178, majority holding instruction given as to proximate cause of fire was erroneous.

If Case is Tried on Theory That Evidence is admissible under pleadings and evidence is received without objection, losing party cannot object to such evidence on appeal.

Approved in *Cargnani v. Cargnani*, 16 Cal. App. 101, 116 Pac. 308, in divorce, objections to testimony as to instance of cruelty other than alleged cannot be first raised on appeal.

76 Cal. 494-497, 18 Pac. 652, ORDER OF MUTUAL COMPANIONS v. GRIEST.

Life Insurance in Favor of Persons having no insurable interest. See note, 128 Am. St. Rep. 324.

Disposition of Fund in Benefit Society upon failure of beneficiary. See note, 17 L. R. A. (n. s.) 1084.

76 Cal. 499-508, 18 Pac. 438, McNEE v. DONAHUE.

Legal Title to Public Land remains in the state until patent issues.

Approved in *Miller v. Engle*, 3 Cal. App. 330, 85 Pac. 160, contest may arise in state land office as to rights of holder of a certificate of purchaser, at any time before such holder is entitled to call for his patent.

76 Cal. 508-511, 18 Pac. 435, WEITHOFF v. MURRAY.

Failure to File Notice of Lien within time prescribed by statute destroys lien.

Approved in *Provident etc. Assn. v. Shaffer*, 2 Cal. App. 218, 83 Pac. 275, applying rule in action to foreclose mortgage, where mortgagee sought to charge mortgagor with sum paid to discharge materialman's claim against the property mortgaged, without showing such claim was a lien.

Termination of Contract of Employment by death of party. See notes, 21 L. R. A. (n. s.) 919; 5 L. R. A. (n. s.) 1002.

76 Cal. 511-513, 18 Pac. 433, McCLOSKEY v. KRELING.

Ordinance Establishing Fire limits is valid.

Approved in *Commonwealth v. Maletsky*, 203 Mass. 245, 89 N. E. 246, 24 L. R. A. (n. s.) 1168, discussing validity of ordinance providing for materials and construction of buildings to be used for the business of picking, sorting or storing rags; *Fellows v. Charleston*, 62 W. Va. 670, 125 Am. St. Rep. 990, 59 S. E. 625, 13 L. R. A. (n. s.) 737, upholding city ordinance directing and regulating construction of buildings, and requiring permit from the city therefor.

"Constitutionality of Building Regulations." See note, 93 Am. St. Rep. 409.

To Maintain Action to Abate Public Nuisance, injury must be different in character as well as in degree from that sustained by public generally.

Approved in *City Store v. San Jose-Los Gatos etc. Ry. Co.*, 150 Cal. 279, 88 Pac. 978, complaint in action brought to permanently enjoin the construction, operation and maintenance of a double track street railroad in a public street was insufficient; *Donahue v. Stockton Gas etc. Co.*, 6 Cal. App. 280, 92 Pac. 198, applying rule in action to declare gasworks a public nuisance, where complaint alleged two causes of action, one based on general pollution of the atmosphere and the other on destruction of the productiveness of plaintiff's soil caused by seepage thereon.

Municipal Power Over Buildings and other structures as nuisances. See note, 38 L. R. A. 170.

76 Cal. 514-521, 18 Pac. 655, EX PARTE KIRBY.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 195.

Cumulative Sentences. See note, 7 L. R. A. (n. s.) 126.

76 Cal. 521-523, 18 Pac. 402, PEOPLE v. MADDEN.

Failure of Court to Instruct that defendant might be found guilty of simple assault, when evidence shows an assault with intent to commit murder, is not error.

Approved in *People v. Davis* (Cal.), 36 Pac. 98, upholding rule where one charged with assault to commit murder had assaulted and cut with a knife.

Uncontradicted Statement in Presence of accused as confession. See note, 25 L. R. A. (n. s.) 566.

76 Cal. 524-527, 18 Pac. 436, SCHUYLER v. BROUGHTON.

The Homestead Statute is a Remedial Measure, and should be liberally construed.

Approved in *Hohn v. Pauly*, 11 Cal. App. 730, 106 Pac. 268, in action by widow to enjoin sale of her homestead, the fact that she had used her home for hotel purposes in order to make a precarious living did not affect her homestead claim.

76 Cal. 527-532, 18 Pac. 650, BECK v. SOWARD.

Homestead Claimants must Strictly Comply with statutory requirements.

Approved in *Jones v. Gunn*, 149 Cal. 689, 87 Pac. 578, declaration of homestead by wife containing insufficient description of land claimed was invalid.

When Defects in Certificates of Acknowledgment are fatal. See note, 108 Am. St. Rep. 569.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 45.

76 Cal. 532-534, 18 Pac. 668, BUNDY v. MAGINESS.

Judgment is not Invalidated by reason of clerk's delay in entering same beyond statutory time.

Approved in *Kaleialii v. Grinbaum & Co.*, 9 Haw. 215, applying rule to judgment pleaded in bar to second suit which clerk had omitted to enter within time required by statute.

76 Cal. 535-537, 18 Pac. 401, BURNETT v. KULLAK.

Agreement, to be Capable of Specific Performance, must be certain and unequivocal in its terms.

Approved in *Meyer v. Lincoln Realty Co.*, 14 Cal. App. 758, 113 Pac. 333, receipt for deposit for a lease, calling for average monthly rental to be graduated, was too uncertain in its terms to be capable of specific enforcement; *Marsh v. Lott*, 8 Cal. App. 393, 97 Pac. 166, applying rule in action for specific performance, where only construction of which contract was susceptible was manifestly unjust, and viewed from any other point it was too uncertain in its terms; *Marks v. Gates*, 2 Alaska, 527, denying specific performance of contract to convey twenty per cent interest in all mining property acquired; *Elliott v. Elliott*, 3 Alaska, 363, applying rule in suit to recover one-half interest in copper mines by reason of alleged grub-stake contract with locator.

Party Seeking Specific Performance of contract must proceed without unreasonable delay.

Approved in *Eshleman v. Henrietta Vineyard Co.* (Cal.), 36 Pac. 778, delay of four years before suing for conveyance after accepting deed as full performance of agreement to convey was unreasonable, though error in deed was not discovered until within three years of commencing action.

Specific Performance of Contract to give security. See note, 6 L. R. A. (n. s.) 596.

76 Cal. 537-542, 9 Am. St. Rep. 245, 18 Pac. 658, TREGGAR v. ETIWANDA WATER CO.

Mortgagor is not a Necessary Party to action to compel transfer of stock under foreclosure.

Approved in *Spreckels v. Giffard*, 10 Haw. 381, previous holder of pledged stocks was not necessary party to suit to compel corporation to record transfer by way of pledge.

Mortgage of Personal Property Without Change of possession is valid between the parties and their purchasers with notice.

Approved in *Cortelyou v. Imperial Land Co.*, 156 Cal. 377, 104 Pac. 697, purchaser of stock which had been illegally issued, notwithstanding retention of the certificates by person to whom originally issued, is entitled to maintain action for issuance of new certificates to himself; *Bank of Ukiah v. Gibson* (Cal.), 39 Pac. 1070, chattel mortgage on sheep and neat cattle which was void at date of its execution as against purchasers in good faith, did not become valid by reason of its record after amendment of statute so as to include such articles in personal property mortgagable; In re *Standard Laundry Co.*, 116 Fed. 477, 53 C. C. A. 644, bankrupt who had acquired certain personal property subject to chattel mortgage, which he assumed and agreed to pay, could not afterward question its validity.

Transfer of Stock. See note, 102 Am. St. Rep. 118.

76 Cal. 543-544, 18 Pac. 678, IN RE FOOTE.

Court may Lose Jurisdiction to Punish for contempt by laches.

Distinguished in *Lamberson v. Superior Court*, 151 Cal. 460, 91 Pac. 100, 11 L. R. A. (n. s.) 619, where contempt consisted of the filing of contemptuous affidavits, the court had jurisdiction to proceed by citation to show cause.

76 Cal. 545-555, 9 Am. St. Rep. 249, 18 Pac. 766, WOOD v. STROTHER.

Mandamus Lies to Compel Judicial action where discretion is abused and a plain, legal right is denied.

Approved in *Matter of Ford*, 160 Cal. 347, 348, 116 Pac. 762, granting mandamus to relieve indicted person from prosecution where, without good cause, trial court arbitrarily postponed trial beyond statutory time; *Dadmun v. City of San Diego*, 9 Cal. App. 552, 99 Pac. 985, mandamus will not lie to compel auditing committee of city to allow a rejected claim, where petitioner did not show he was not indebted to the city; *Good v. Common Council*, 5 Cal. App. 271, 90 Pac. 47, mandamus will lie to compel city council to act upon a sufficient petition with reference to calling an election for the recall of elected officers; *Pipher v. Superior Court*, 3 Cal. App. 632, 86 Pac. 907, in proceedings to compel allowance of claim of re-

porter in criminal case, mandamus will not lie to compel court to find the facts as to extent of its order to the reporter in a particular way; *State v. District Court*, 30 Mont. 12, 75 Pac. 518, ordering that peremptory writ of mandate be issued to compel court to grant application for substitution of attorneys; *State v. Graves*, 66 Neb. 23, 92 N. W. 146, allowing mandamus to compel judge of district court to vacate injunctions granted by him without authority; *Goodell v. Woodbury*, 71 N. H. 380, 52 Atl. 856, mandamus lay, under city ordinance, to compel chief of police to prosecute persons for violation of statute relative to sale of liquor; *State v. Caruthers*, 1 Okl. Cr. 451, 98 Pac. 482, proof did not show laches on part of trial court in bringing prisoner to trial; *Mauldin v. Mathews*, 81 S. C. 417, 128 Am. St. Rep. 919, 62 S. E. 696, 22 L. R. A. (n. s.) 735, state board of pharmaceutical examiners had no discretion to arbitrarily refuse license to applicant.

Writ of Mandate must Issue where court's determination of question is not intended by law to be final, and there is no other adequate remedy.

Approved in *Williams v. Bagnelle* (Cal.), 70 Pac. 1058, where salary of teacher was withheld by superintendent of schools, writ of mandate directing him to draw requisition in her favor would not issue; *Stanley-Taylor Co. v. Board of Supervisors*, 135 Cal. 489, 67 Pac. 784, mandamus will not lie to compel board of supervisors to accept lowest bid for printing, where advertisement for proposals reserved right to reject any and all bids if public good required; *Van Vleck v. Board of Dental Examiners* (Cal.), 48 Pac. 225, in proceedings to compel issuance of certificate to practice dentistry, powers of state board of dental examiners under act of March 12, 1885 (Stats. 1885, p. 110), are judicial, and its action in refusing diploma is final; *Scott v. Shields*, 8 Cal. App. 19, 96 Pac. 389, applying rule where court improperly dismissed proceedings to compel witness to answer questions and complete his deposition before a notary; *Pipher v. Superior Court*, 3 Cal. App. 630, 86 Pac. 906, in proceedings to compel allowance of claim of reporter for fees and expenses in criminal case, if services were performed by order of judge, he can be compelled by mandate to direct auditor to issue warrant for amount due; *Thurston v. Ross*, 8 Haw. 152, refusal to audit bills concerning expenses of prison labor, presented to auditor general, was not subject to judicial control by mandamus; *State v. Caruthers*, 1 Okl. Cr. 437, 98 Pac. 477, prisoner demanding dismissal of criminal proceedings because his right to a speedy trial has been denied, has another plain and adequate remedy at law.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 870, 880.

Nature and Functions of Mandamus. See note, 82 Am. St. Rep. 196.

Duties, Performance of Which may be compelled by mandamus. See note, 125 Am. St. Rep. 503, 505.

76 Cal. 562-565, 18 Pac. 682, **LOVELAND v. ALVORD ETC. MIN. CO.**

Judgment in Favor of a Defendant dissolves an attachment.

Approved in *Primm v. Superior Court*, 3 Cal. App. 210, 84 Pac. 787, pending appeal by plaintiff from judgment in favor of defend-

ant, dissolution of attachment may be stayed by complying with requirements of section 946 of the Code of Civil Procedure.

76 Cal. 567-569, 18 Pac. 683, BERNHEIM v. CHRISTEL.

Participation in Fraud of Vendor which will invalidate transfer for good consideration as against creditors. See note, 32 L. R. A. 59.

76 Cal. 569-572, 18 Pac. 681, SCHEERER v. EDGAR.

In Drawing Warrants, Auditor cannot Substitute his own affirmative action for that of board of supervisors.

Approved in Cahill v. Colgan (Cal.), 31 Pac. 617, approval of claim by board of examiners and appropriation of money to pay it by legislature is conclusive of its validity against the controller.

76 Cal. 573-576, 18 Pac. 678, PEOPLE v. BROWN.

Sickness of Juror Which is not Prejudicial to defendant is not ground for new trial.

Approved in Republic of Hawaii v. Palea, 12 Haw. 163, upholding rule where juror, who was taken sick while court was delivering charge and was carried out of room, subsequently returned to jury-box and court proceeded with charge.

In Prosecution for Murder, Evidence of prior quarrel between accused and deceased is not inadmissible because remote.

Approved in People v. Piercy, 16 Cal. App. 16, 116 Pac. 323, applying rule in prosecution for assault with intent to murder.

Evidence of Threats of Accused, or of person injured or killed. See note, 17 L. R. A. 654, 663.

76 Cal. 578-587, 18 Pac. 772, MALONE v. BIG FLAT GRAVEL MIN. CO.

Omissions in Notice of Lien cannot be aided by averments in complaint.

Approved in Porteous Decorative Co. v. Fee, 29 Nev. 380, 91 Pac. 136, mechanic's lien claim for "outside work on house and painting of inside blinds, \$190," was insufficient.

Work upon Tools and Machinery used in mine is work upon the mine.

Approved in Thompson v. Wise Boy Min. etc. Co., 9 Idaho, 367, 74 Pac. 960, one performing services in a quartz-mill situated on a mine was entitled to a lien on the mine for such services.

In All Essential Particulars, the Statement in claims of lien must be true.

Approved in Star Mill & Lumber Co. v. Porter, 4 Cal. App. 475, 88 Pac. 499, where notice of lien incorrectly stated that the claim was based upon a quantum meruit instead of upon a special promise to pay a fixed amount, and the evidence showed the price fixed was the market price, the statement in the notice was substantially true; Nofziger Bros. Lumber Co. v. Shaffer, 2 Cal. App. 220, 83 Pac. 285, claim of lien for lumber furnished to contractor, which did not correctly state terms, time given and conditions of contract, could not be enforced.

Claim will not be Defeated because claimant has included too much in his notice.

Approved in *Harmon v. San Francisco & S. R. R. Co.* (Cal.), 23 Pac. 1025, reaffirming rule; *Lucas v. Rea* (Cal. App.), 101 Pac. 539, upholding sufficiency of notice of lien where it was for few dollars more than amount stated in complaint; *Lucas v. Rea*, 10 Cal. App. 651, 103 Pac. 158, upholding rule where complaint was for about fifty dollars less than amount alleged to be due in notice of lien; *Lucas v. Rea*, 10 Cal. App. 646, 102 Pac. 824, in absence of fraud, mistake in amount due in notice of lien was immaterial.

Effect of Filing Excessive Mechanic's Lien. See note, 29 L. R. A. (n. s.) 316.

Contract That Contractor shall Furnish so much labor and receive certain sum per man gives contractor lien for sum due.

Approved in *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 715, 118 Pac. 112, contract that contractor under architect's direction shall perform and furnish carpentry for building and that owner shall pay him net profits of work plus percentage, and that material shall be payable on presentation of bill from seller, is construction contract under Code of Civil Procedure, section 1183.

76 Cal. 589-590, 9 Am. St. Rep. 258, 18 Pac. 877, **VAN EMON v. SUPERIOR COURT.**

Cost of Erection of Monument at grave of a deceased person is a part of the funeral expenses.

Approved in *Estate of Hessler*, 2 Cal. Prob. 358, 362, reaffirming rule; *Estate of Koppikus*, 1 Cal. App. 87, 81 Pac. 733, subsequent removal and cremation of body of deceased did not defeat valid provision in her will for the erection of a monument over her grave; *Pease v. Christman*, 158 Ind. 645, 64 N. E. 91, widow who ordered and paid for monument before appointment of administrator is entitled to reimbursement out of assets of estate.

Liability of Decedent's Estate for funeral expenses. See note, 33 L. R. A. 666.

Executors and Administrators. See note, 117 Am. St. Rep. 652.

76 Cal. 590-594, 18 Pac. 862, **REQUA v. SNOW.**

Right to have Contract Specifically enforced may be lost by laches.

Approved in *Eshleman v. Henrietta Vineyard Co.* (Cal.), 36 Pac. 778, delay of more than four years before suing for conveyance of certain land after accepting deed in full performance of agreement to convey, which erroneously excepted such land, was unreasonable.

76 Cal. 594-596, 18 Pac. 685, **MELLOR v. CROUCH.**

When Statement on Motion for New Trial and amendments are delivered to the clerk for the judge, no notice of settlement is required to be given by moving party.

Approved in *Douglas v. Southern Pacific Co.*, 151 Cal. 246, 90 Pac. 540, and *Curtin v. Ingle*, 155 Cal. 56, 99 Pac. 481, both reaffirming rule.

76 Cal. 597-605, 16 Pac. 542, 18 Pac. 785, **BLISS v. JOHNSON.**

Owner of Land on a Natural Watercourse has a right to the usual flow of the water without obstruction.

Approved in *San Joaquin etc. Irr. Co. v. Fresno Flume & Irr. Co.*, 158 Cal. 629, 112 Pac. 183, maintenance of dam by upper riparian

owner, which does not diminish the flow of the water, will not be enjoined at instance of lower riparian owner as a nuisance.

Correlative Rights of Upper and Lower proprietors as to use and flow of stream. See note, 41 L. R. A. 746.

Photographs as Evidence. See notes, 35 L. R. A. 804, 809; 15 L. R. A. (n.s.) 1162.

76 Cal. 606-608, 18 Pac. 776, **PEOPLE v. BURKHART.**

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 551.

76 Cal. 608-609, 18 Pac. 775, **SCHULTZ v. McLEAN.**

It is Error to Render Final Judgment without finding either for or against each defendant.

Approved in McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 402, 403, 84 Pac. 351, applying rule in action against railway company and lumber company for joint negligence, where verdict of jury was in favor of plaintiff and judgment was entered only as against one defendant.

Miscellaneous.—Cited in Schultz etc. v. McLean (Cal.), 18 Pac. 776.

76 Cal. 610-615, 18 Pac. 777, **LIGARE v. CALIFORNIA SOUTHERN R. R. CO.**

Affidavit for Publication of Summons can refer to complaint and adopt its contents so as to make them part of the affidavit.

Approved in Peterson v. Nesbitt, 11 Cal. App. 372, 105 Pac. 136, affidavit for order of arrest was insufficient though complaint was set forth in the affidavit, where affiant did not make oath to the truth of the matter therein contained but merely alleged a good cause of action existed; Ex parte Howitz, 2 Cal. App. 755, 84 Pac. 230, where copy of complaint stating cause of action in indebitatus assumpsit was attached to affidavit for arrest, and affiant averred the allegations therein were true, such affidavit showed a cause of action existed.

Affixing by Clerk of Seal of Court to summons was sufficient adoption of his printed signature thereto.

Approved in Loughren v. Bonniwell, 125 Iowa, 521, 106 Am. St. Rep. 319, 101 N. W. 288, subscription by justice to original notice with stamp bearing fac-simile of his signature was sufficient.

Effect of Writ or Process issued without seal of court. See note, 20 L. R. A. 426.

Affidavit is not Required to State whether defendant's place of residence is known except in cases of absent or nonresident defendants.

Approved in Chapman v. Moore, 151 Cal. 513, 121 Am. St. Rep. 130, 91 Pac. 326, upholding affidavit for service by publication which failed to state what information affiant received concerning whereabouts of defendant from those of whom he inquired; Mills v. Smiley, 9 Idaho, 332, 76 Pac. 788, affidavit for publication of summons which failed to show the residence of any of the defendants or that they were nonresidents was insufficient.

Signing by Proxy. See note, 22 L. R. A. 301.

76 Cal. 616-618, 18 Pac. 758, ARMSTRONG v. LOWE.

Real Estate Brokers Employed "to Sell" Land have no authority to execute contract to convey.

Approved in *Stemler v. Bass*, 153 Cal. 795, 96 Pac. 811, reaffirming rule; *White v. Bank of Hanford*, 148 Cal. 553, 83 Pac. 698, declaring rights of parties under contract of sale which merely gave vendee option to purchase in consideration of cash payment to be forfeited if purchase was not consummated; *Bacon v. Davis*, 9 Cal. App. 91, 98 Pac. 74, under agreement by which owner authorized broker to sell for him, agent was authorized to execute contract of sale in owner's name; *Robertson v. Allen*, 184 Fed. 381, applying rule in action to cancel contract for sale of land executed by broker; *Belkema v. Searle*, 116 Iowa, 377, 89 N. W. 1088, where letters from owner to broker simply offered to sell at definite price, but left indefinite length of time deferred payments should run and disposition to be made of rent notes, agent's authority was only to produce a buyer; *Larson v. O'Hara*, 98 Minn. 74, 116 Am. St. Rep. 342, 107 N. W. 822, where an authorized contract executed by agent was unenforceable, owner was liable for amount paid on account of purchase price still in the hands of her agent; *Lichty v. Daggett*, 23 S. D. 390, 121 N. W. 866, letter from owner to broker merely stating net price of his land constituted no authority to execute contract of sale; *Donnan v. Adams*, 30 Tex. Civ. App. 619, 71 S. W. 582, owner of land who signed written description of land with a price and handed it to agent was not bound by contract of sale made by agent.

Power of Real Estate Broker to make contract of sale. See note, 17 L. R. A. (n.s.) 211.

When Broker Earns Commission. See notes, 139 Am. St. Rep. 239; 44 L. R. A. 593.

Escrows. See note, 130 Am. St. Rep. 962.

76 Cal. 621-623, 18 Pac. 796, WEBB v. TRESCONY.

Measure of Damages for Breach of contract of employment of attorney who is discharged before work completed is full contract price agreed upon.

Approved in *Hall v. Guntner*, 157 Ala. 379, 47 So. 156, upholding rule where attorney had agreement with client reserving right to full compensation if client compromised claims, where it was not shown claims were compromised in opposition to advice of attorney; *Philbrook v. Moxey*, 191 Mass. 36, 77 N. E. 521, where attorney was employed to settle cases and client, after agreeing to pay him stated sum, refused to allow settlement to be made, attorney was entitled to value of services actually rendered; *Scheimesohn v. Lemonek*, 84 Ohio, 435, 95 N. E. 915, where attorney accepts account for collection for percentage of amount collected and client without cause discharges him, attorney may recover rate fixed by contract and not on what is finally collected by someone else; *Sessions v. Warwick*, 46 Wash. 168, 89 Pac. 483, attorney who was discharged without cause while conducting litigation at an agreed compensation was entitled to unpaid balance of contract price.

Remedy of Wrongfully Discharged Servant by action for breach of contract. See note, 6 L. R. A. (n.s.) 92.

76 Cal. 626-631, 18 Pac. 781, **BANK OF CALIFORNIA v. TAAFFE**.
Right to Civil Action for forcible entry and detainer. See note, 121 Am. St. Rep. 400, 405.

76 Cal. 633-639, 18 Pac. 812, **PEOPLE v. FREESE**.
Miscellaneous.—Cited in *People v. Bulger* (Cal.), 18 Pac. 815.

76 Cal. 639-645, 18 Pac. 805, **ESTATE OF BURDICK**.
If Homestead is Selected from community property and is of less than five thousand dollars in value, it vests in surviving spouse irrespective of value at death of other spouse.

Reaffirmed in *Estate of Hessler*, 2 Cof. Prob. 359.

Revaluation or Reassignment of Homestead for appreciation or depreciation. See note, 44 L. R. A. 402.

76 Cal. 646-647, 18 Pac. 854, **FURNISH v. MULLAN**.
Affidavit for Publication need not show acts constituting due diligence where person to be served is nonresident.

Approved in *Hoffman v. Superior Court*, 151 Cal. 390, 90 Pac. 940, under provisions of so-called "McEnerney Act," positive statement of affiant that "he does not know and has never been informed of" any adverse claimants, is sufficient without giving reasons for statement.

76 Cal. 649-653, 18 Pac. 855, **HOLLISTER v. CORDERO**.
Coroner's Verdict is Inadmissible in civil action to show time and manner of death.

Approved in *Estate of Dolbeer*, 149 Cal. 246, 86 Pac. 704, upholding exclusion of verdict on coroner's inquisition upon body of suicide, where issue was that of testamentary capacity; *Grand Lodge etc. v. Banister*, 80 Ark. 196, 96 S. W. 744, in action of insurance certificate, coroner's verdict did not necessarily make out prima facie cause of death from cause stated in such verdict.

Where There is Nothing to Show which died first, and husband and wife perished in same calamity, both being between ages of fifteen and sixty, husband is presumed to have survived.

Cited in *Grand Lodge A. O. U. W. v. Miller*, 4 Cof. Prob. 325, where husband and wife perish in earthquake, both being between ages of fifteen and sixty, he is presumed to survive her.

Presumption of Death. See notes, 104 Am. St. Rep. 212; 2 Cof. Prob. 17.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 77 CALIFORNIA.

77 Cal. 1-7, 18 Pac. 800, PEOPLE v. FARMER.

Condition of Declarant's Mind as to Apprehension of approaching death at time of making dying declaration must be determined from all that was said and done.

Approved in State v. Phillips, 118 Iowa, 671, 92 N. W. 880, holding declarant to have recognized approach of death.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 644; 56 L. R. A. 411, 450.

77 Cal. 7-10, 11 Am. St. Rep. 225, 18 Pac. 799, PEOPLE v. BENTLEY.

Accused must Show Previous Trial, set up in bar, was for same offense.

Approved in Warren v. State, 79 Neb. 531, 113 N. W. 145, holding acquittal on murder charge not to bar prosecution for robbery of same person, at same time.

Conviction for Assault Does not Bar prosecution for robbery of same person, though evidence of both could not be separated.

Approved in United States v. MacAndrews etc. Co., 149 Fed. 838, where defendants were indicted in separate counts, one for combination and other for monopoly, such offenses were not identical.

Identity of Offenses on Plea of former jeopardy. See note, 92 Am. St. Rep. 139, 141.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 27.

Evidence and Instructions as to Character of accused. See note, 20 L. R. A. 616.

Assault and Battery. See note, 91 Am. St. Rep. 674.

77 Cal. 10-12, 11 Am. St. Rep. 229, 18 Pac. 803, MORITZ v. LA-VELLE.

In Action on Contract, Allegation "that plaintiff has performed all and singular his agreements and covenants with defendant" is sufficient as to performance of conditions on his part.

Approved in Wyman v. Hooker, 2 Cal. App. 38, 83 Pac. 80, upholding complaint averring full performance of contract in absence of

special demurrer for uncertainty in failing to allege work was done to satisfaction of architect.

Agreement to Locate and Develop mining claim for joint benefit of parties need not be in writing.

Approved in *Hendricks v. Morgan*, 167 Fed. 108, 92 C. C. A. 528, *Cascaden v. Dunbar*, 157 Fed. 65, 84 C. C. A. 566, *Shea v. Nilima*, 133 Fed. 213, 66 C. C. A. 263, *Elliott v. Elliott*, 3 Alaska, 362, *Cascaden v. Dunbar*, 2 Alaska, 413, *Thompson v. Burk*, 2 Alaska, 252, *Copper River Mining Co. v. McClellan*, 2 Alaska, 144, *Morrow v. Matthew*, 10 Idaho, 435, 79 Pac. 201, and *Doyle v. Burns*, 123 Iowa, 498, 99 N. W. 199, all following rule; *Broatch v. Boysen*, 175 Fed. 706, 99 C. C. A. 278, contract to secure coal lease, containing mutual covenants, but signed by defendant alone, held binding on parties not signing, who had accepted and stood at all times ready to fulfill their part; *Floyd v. Duffy*, 68 W. Va. 350, 69 S. E. 998, holding partnership agreement for purchase and resale of land not within statute of frauds.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 238.

In Action to Quiet Title to mining claim between individuals, plaintiff's citizenship need not be alleged.

Distinguished in *Allyn v. Schultz*, 5 Ariz. 159, 48 Pac. 962, citizenship must be alleged in action to contest right to patent under section 2326, United States Revised Statutes.

Cotenants in Mines. See note, 91 Am. St. Rep. 856.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 818.

Validity of Parol Partnership to deal in real property. See note, 4 L. R. A. (n. s.) 429.

77 Cal. 12-15, 18 Pac. 815, **PEOPLE v. AH BEAN.**

Essentials of Information for Perjury Defined.

Approved in *People v. Schweichler*, 16 Cal. App. 741, 117 Pac. 940, that accused testified falsely before election board, on examination as to his qualifications as voter, that he had worked for A for twenty days last past, was insufficient to sustain assignment of perjury; *People v. Collins*, 6 Cal. App. 500, 502, 92 Pac. 516, 517, upholding information for perjury; *People v. Rodley*, 131 Cal. 249, 63 Pac. 354, materiality of false testimony held to be sufficiently alleged; *Kizer v. People*, 211 Ill. 414, 71 N. E. 1038, indictment for forgery held defective in failing to allege crime, at trial for which alleged false testimony was given, was committed within jurisdiction of court trying cause.

Distinguished in *People v. Lanterman*, 9 Cal. App. 679, 100 Pac. 722, indictment for presenting false and fraudulent claim against county held insufficient in failing to directly allege authority of supervisors to allow claim.

Indictments for Perjury. See note, 124 Am. St. Rep. 657.

77 Cal. 16-18, 18 Pac. 795, **SMITH v. TALBOT.**

No Action Lies Under Section 2734, Political Code, at suit of road overseer to abate encroachment on road as nuisance unless it occurred after road was laid out and completed.

Approved in *Meservey v. Gulliford*, 14 Idaho, 158, 93 Pac. 789, road overseer had power to bring suit to abate encroachment on road which had become such by user.

77 Cal. 19-22, 11 Am. St. Rep. 231, 18 Pac. 788, WALLACE v. BENTLEY.

Agent is Liable on Contract signed by him without authority for damages sustained by reason of wrong in assuming to act, but not as principal on contract unless it contains words which bind him.

Approved in *Groeltz v. Armstrong*, 125 Iowa, 42, 99 N. W. 129, officer of corporation making contract without authority held liable for damage to other party; *Simmonds v. Long*, 80 Kan. 158, 159, 101 Pac. 1071, 23 L. R. A. (n. s.) 553, agent held liable for money paid on contract made without authority; *Le Roy v. Jacobsky*, 136 N. C. 448, 48 S. E. 797, 67 L. R. A. 977, guardian contracting to sell ward's estate without court authority held liable for damages to other party.

77 Cal. 22-27, 18 Pac. 791, NEWMAN v. SMITH.

Fraudulent Representations Inducing Contract, though made orally when contract was in writing, are ground for relief in equity.

Approved in *Hodgkins v. Dunham*, 10 Cal. App. 698, 699, 708, 103 Pac. 355, 359, sale of stallion held to be induced by fraudulent oral representations as to its potency; *Rockford v. Barrett*, 22 S. D. 86, 115 N. W. 524, admitting parol evidence to prove fraud in obtaining written contract.

In Action to Set Aside Contract for fraud, damages cannot be allowed for worry, anxiety, and expenses in caring for property contracted to be sold.

Distinguished in *Melone v. Sierra Ry. Co.*, 151 Cal. 116, 91 Pac. 523, damages for mental suffering of person injured are recoverable.

In Action by Vendor of Land to set aside contract for its sale, objection that complaint does not allege precise time at which plaintiff offered to return deposit must be taken by special demurrer.

Distinguished in *Schultz v. McLean* (Cal.), 25 Pac. 429, *arguendo*.

Right to Rely Upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 612.

Future Promise as Fraud. See note, 10 L. R. A. (n. s.) 647.

77 Cal. 30-34, 18 Pac. 856, PEOPLE v. O'LEARY.

Plea of Former Acquittal and Once in Jeopardy must be made and entered on minutes substantially in form prescribed in section 1017, Penal Code, and if not so made, jury need not find upon them.

Approved in *People v. Solani*, 6 Cal. App. 106, 91 Pac. 656, where defendant charged with murder was convicted of manslaughter, and on his appeal new trial was granted, if he failed before new trial to plead former conviction as once in jeopardy, he may be retried for murder and convicted in second degree.

Direction of Court That District Attorney file new information when demurrer to former one is sustained complies with section 1008, Penal Code, without rendering opinion that objection to former information could be overcome by filing another.

Distinguished in *In re Pierce*, 8 Idaho, 185, 67 Pac. 317, order of court sustaining demurrer to information and granting leave to file new one held to comply with sections 7745-7747, Revised Statutes.

77 Cal. 36-38, 18 Pac. 860, CAMPBELL v. COBURN.

Appellate Court cannot Consider Matter not made part of record by statute or by verification of judge.

Approved in *People v. Johnson*, 9 Cal. App. 235, 98 Pac. 683, appellate court cannot amend bill of exceptions by inserting therein additional testimony.

Where Written Findings Do not Appear in record, they will be deemed to have been waived.

Reaffirmed in *Kritzer v. Tracy Engineering Co.*, 16 Cal. App. 290, 116 Pac. 701.

77 Cal. 38-45, 18 Pac. 858, MALONE v. CRESCENT CITY MILL ETC. CO.

Averment That Corporation Made Agreement by its president is sufficient as against general demurrer.

Approved in *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 164, 89 Pac. 495, in suit on note, want of authority of corporation to execute it held matter of defense.

Contract Made for Benefit of third person, if adopted by him, is deemed to have been made by him, and he may sue thereon.

Approved in *Schoening v. Maple Valley Lumber Co.*, 61 Wash. 334, 112 Pac. 382, following rule; *Northup v. Altadena etc. Syndicate*, 6 Cal. App. 102, 91 Pac. 422, where business of maker of note was transferred to corporation which assumed all liabilities of maker, including note, promise of transferee was for benefit of plaintiff, and he may maintain action on note against corporation.

77 Cal. 45-50, 18 Pac. 869, PEOPLE v. OTTO.

Under-sheriff, Where Sheriff is Tax Collector, has same authority as collector.

Distinguished in *Remley v. Matthews*, 84 Ark. 602, 106 S. W. 483, sheriff held to become collector only when qualified as such.

Acts for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 550.

77 Cal. 52-54, 18 Pac. 878, IRVING v. CUNNINGHAM.

Persons in Possession Under Title adverse to that of all parties cannot be dispossessed by writ of possession.

Approved in *McDonald v. Kelson*, 79 Kan. 109, 98 Pac. 773, writ not available against holder of tax deed who had made valuable improvements, without satisfaction of his claim therefor; *Merrill v. Wright*, 65 Neb. 797, 101 Am. St. Rep. 645, 91 N. W. 699, party entering pendente lite in good faith, under void tax deed, not affected by writ of possession.

77 Cal. 54-63, 11 Am. St. Rep. 235, 18 Pac. 808, BULL v. COE.

Where Loan is Secured by Mortgage on several pieces of property, lender may foreclose on one only if he does not seek personal judgment against defendant.

Approved in *Kinsel v. Ballou*, 151 Cal. 761, 91 Pac. 623, personal judgment against mortgagor cannot be entered until mortgage security is exhausted; *Crisman v. Lanterman*, 149 Cal. 651, 117 Am. St. Rep. 167, 87 Pac. 90, where mortgage was released to effect sale under trust deed, without consent of estate of deceased mortgagor, such estate could not be made liable for deficiency arising from such sale.

Liability of Surety is not Affected by failure to present claim against estate of principal debtor, the debt of principal being only thus barred but not extinguished.

Approved in *Kinsel v. Ballou*, 151 Cal. 761, 91 Pac. 623, guarantor of note secured by mortgage may be sued on his obligation without foreclosure of mortgage; *North Avenue Sav. Bank v. Hayes*, 188 Mass. 138, 74 N. E. 312, where defendant's cosurety deposited collateral as security, which was surrendered in exchange for renewal note, defendant was not thereby released from liability in absence of showing of injury; *Seabury v. Sibley*, 183 Mass. 107, 66 N. E. 604, right of action against guarantor of note held not barred by limitations merely because payee's action against maker was barred.

Duty Owed by Creditor to Surety. See note, 115 Am. St. Rep. 86, 88.

Where Mortgage Covers Homestead upon separate property of wife, and creditor waives all claim against husband's estate, he need not present claim against such estate.

Approved in *First Nat. Bk. v. Glenn*, 10 Idaho, 237, 109 Am. St. Rep. 204, 77 Pac. 627, mortgage may be foreclosed against estate of mortgagor though claim has been presented and allowed.

Failure to Present Claim against estate of deceased or bankrupt principal, as releasing surety. See note, 25 L. R. A. (n. s.) 139.

Wife Who Mortgages Her Property to secure husband's contract is surety only.

Approved in *Browne v. Bixby*, 190 Mass. 71, 76 N. E. 454, in such case wife's property is entitled to be exonerated out of husband's estate.

Loan by One Partner to Another of money to be put into firm is not partnership transaction, and lender can sue without settlement of partnership affairs.

Approved in *Clapp v. Adams*, 143 Iowa, 702, 121 N. W. 46, notes given by defendant for price of half interest in property owned by plaintiff, for purpose of forming partnership, held not partnership debts; *Owen v. Meroney*, 136 N. C. 477, 103 Am. St. Rep. 952, 48 S. E. 821, one partner could maintain action against another for damages for failure to comply with agreement relating to partnership made before its formation.

Effect of Party's Ignorance of Contents of extraneous paper upon attempt to incorporate it into contract by reference. See note, 70 L. R. A. 108.

77 Cal. 64-66, 19 Pac. 2, CARTER v. PAIGE.

Failure to File Transcript Before Notice of motion to dismiss appeal may be excused by showing by affidavit circumstances which excuse delay.

Approved in *Esrey v. Southern Pac. Co. (Cal.)*, 35 Pac. 310, failure to file transcript before notice of motion to dismiss appeal held excused.

77 Cal. 66-68, 18 Pac. 879, GOULD v. STAFFORD.

In Action for Diversion of Watercourse, evidence that persons other than defendant also diverted water is only admissible on question of damages.

Approved in *Miller & Lux v. Rickey*, 146 Fed. 576, following rule.

Upper Riparian Proprietors cannot Take unreasonable amount of water from stream to deprivation of lower owners.

Approved in *Turner v. James Canal Co.*, 155 Cal. 95, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, common-law rule of riparian rights held to be modified by common right of reasonable use.

Upper Owner has No Right to Take Water for irrigation of non-riparian lands.

Approved in *Anderson v. Bassman*, 140 Fed. 23, reaffirming rule; *Carnes v. Dalton*, 56 Or. 605, 110 Pac. 174, where grantee of rights in irrigation ditch caused depletion of amount reserved for grantors, one grantor could sue alone to restrain depletion without joining others; *Clements v. Land etc. Co.*, 36 Tex. Civ. App. 346, 82 S. W. 669, use of water by upper owner for nonriparian lands is adverse to lower owner, although he receives all water necessary to irrigate his lands.

Right to Make Use, on Nonriparian, of water rights incident to riparian, lands. See note, 22 L. R. A. (n. s.) 384.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 740, 742, 758.

77 Cal. 69-73, 18 Pac. 886, **SOUTHERN PACIFIC R. R. CO. v. PURCELL.**

Failure of Corporation to File Articles in county where property is situated must be set up by defendant in ejectment suit brought by corporation.

Approved in *Valley Lumber etc. Co. v. Driessel*, 13 Idaho, 672, 673, 93 Pac. 768, 769, 15 L. R. A. (n. s.) 299, question whether foreign corporation has filed articles as required by law cannot be raised for first time on appeal.

Miscellaneous.—Cited in *Southern Pac. R. Co. v. Hackett* (Cal.), 18 Pac. 889, companion case.

77 Cal. 73-78, 18 Pac. 875, **CLEVELAND v. CHOATE.**

Where Deed Referred to Official Map and also to corner stakes, map may be shown to be inaccurate by parol.

Approved in *Spongberg v. First Nat. Bank*, 15 Idaho, 676, 99 Pac. 713, admitting oral evidence to identify property subject of lease; *Staub v. Hampton*, 117 Tenn. 731, 101 S. W. 782, admitting parol evidence to show true location of survey, corner of which was monument in description in deed in question.

77 Cal. 83-85, 19 Pac. 183, **PAGE v. PAGE.**

Court Loses Jurisdiction of Cause upon entry of judgment of dismissal, not upon mere entry of dismissal.

Approved in *Wolters v. Rossi* (Cal.), 57 Pac. 76, entry of judgment of dismissal held to divest court of jurisdiction.

Distinguished in *Miller v. Northern Pac. Ry. Co.*, 30 Mont. 292, 294, 295, 76 Pac. 692, 693, 694, entry of dismissal by clerk on register before trial held to divest court of jurisdiction.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 625.

77 Cal. 86-87, 19 Pac. 186, **PICO v. PHELAN.**

Action to Recover Rent Does not Lie against adverse occupant.

Distinguished in *Sheppard v. Coeur d'Alene Lumber Co.*, 62 Neb. 16, 112 Pac. 933, action for use and occupation of land against

tenant holding without consent held not to affect title to land and need not be brought in county where land is situated.

77 Cal. 91-94, 19 Pac. 177, THOMAS v. JAMESON.

Where Party Takes Title to Land purchased by another as security for purchase money advanced purchaser, he holds land under resulting trust for purchaser.

Approved in *Levy v. Ryland*, 32 Nev. 466, 109 Pac. 907, following rule; *Moultrie v. Wright*, 154 Cal. 523, 98 Pac. 259, party who paid half of purchase price and took title to whole held to hold undivided one-half for another who paid remainder of purchase money; *Prefumo v. Russell*, 148 Cal. 457, 83 Pac. 812, right of party taking title to secure purchase money advanced to purchaser held to be mortgage only.

77 Cal. 106-113, 11 Am. St. Rep. 244, 19 Pac. 227, 1 L. R. A. 185, PEEK v. PEEK.

Where Marriage is Brought About by promise to convey property, equity will decree conveyance.

Reaffirmed in *Offutt v. Offutt*, 106 Md. 244, 124 Am. St. Rep. 491, 67 Atl. 140, 12 L. R. A. (n. s.) 232.

Marriage is not Such Part Performance of parol contract to convey real property as will take case out of statute of frauds.

Approved in *Hunt v. Hunt*, 171 N. Y. 400, 64 N. E. 160, 59 L. R. A. 306, following rule; *Daily v. Minnick*, 117 Iowa, 570, 91 N. W. 915, 60 L. R. A. 840, privilege of naming child, when exercised, held to take contract for conveyance of land in consideration thereof from statute.

Taking Possession of Realty as Part Performance to satisfy statute of frauds. See note, 3 L. R. A. (n. s.) 814.

Specific Performance of Contract to provide for intended husband or wife. See note, 12 L. R. A. (n. s.) 234.

Moral Obligation as Consideration for promise. See note, 53 L. R. A. 359.

How Far Statutes will be Regarded as abrogating maxim that one cannot profit by his own wrong. See note, 25 L. R. A. 571.

77 Cal. 114-116, 19 Pac. 190, MORRILL v. EVERSON.

Specific Performance of Contract will not be Decreed unless there was adequate consideration.

Approved in *Cummings v. Roeth*, 10 Cal. App. 151, 101 Pac. 437, refusing specific performance of contract for purchase of land on ground of inadequate consideration; *White v. Sage*, 149 Cal. 615, 616, 87 Pac. 194, *Kaiser v. Barron*, 153 Cal. 790, 96 Pac. 807, *Herzog v. Atchison*, *Topeka etc. R. R.*, 153 Cal. 501, 95 Pac. 900, 17 L. R. A. (n. s.) 428, *Porter v. Anderson*, 14 Cal. App. 721, 113 Pac. 347, and *Martin v. Condrey*, 13 Cal. App. 620, 110 Pac. 458, all holding complaint for specific performance defective in not alleging contract to be fair and just.

Refusal of Specific Performance of Land contract because of inadequacy of consideration. See note, 14 L. R. A. (n. s.) 319.

77 Cal. 117-120, 19 Pac. 254, PEOPLE v. LEONG SING.

Where Bill of Exceptions Does not Affirmatively Show venue was not proven at trial it is presumed proven.

Approved in *People v. Connelly* (Cal.), 38 Pac. 43, following rule.

77 Cal. 120-121, 19 Pac. 231, PEOPLE v. GALE.

Allegation in Indictment for Embezzlement against administrator that he appropriated to his own use certain sums belonging to estate, held insufficient in absence of averment of other necessary inculpatory facts.

Approved in *People v. McManhill*, 4 Cal. App. 227, 87 Pac. 405, holding defective information for embezzlement of money by agent of association which did not state conditions of trust, nor that defendant appropriated money for purpose "not in due and lawful execution of trust."

77 Cal. 121-124, 19 Pac. 232, GREGORY v. BOVIER.

Miscellaneous.—Cited in *Gregory v. Allison* (Cal.), 19 Pac. 233, companion case.

77 Cal. 126-128, 19 Pac. 256, DE MALLAGH v. DE MALLAGH.

Agent cannot Acquire Principal's Property by using his own funds to make purchase which is in effect redemption of subject matter of agency.

Approved in *Sanguinetti v. Rossen*, 12 Cal. App. 629, 107 Pac. 562, property transferred to attorney by agreement of clients for their benefit is held in trust for them; *Curry v. King*, 6 Cal. App. 576, 92 Pac. 665, purchase by agent by circuitous means for himself, of property placed in his hands for sale, held to be in trust for principal; *Lehring v. Lehring*, 84 Kan. 770, 115 Pac. 558, deed by absent father to children to secure mortgage to settle claims against him held to create trust in children for father's benefit.

Purchase by Agent of Principal's Property. See note, 80 Am. St. Rep. 567.

77 Cal. 129-132, 19 Pac. 233, SLOSS v. DE TORO.

Action for Determination of Right or interest in realty must be tried in county where land lies.

Reaffirmed in *Bartley v. Fraser*, 16 Cal. App. 564, 117 Pac. 684.

Action to Set Aside Fraudulent Sale of land by administrator held to involve determination of right or interest in real property, and should be tried where land is situated.

Distinguished in *Cochrane v. McDonald*, 4 Cal. Prob. 535, 544, refusing change of venue of action based on fraud and collusion to county where land was situated.

77 Cal. 136-139, 19 Pac. 257, PEOPLE v. BOARD OF SUPERVISORS.

Value of Mortgage Given to Regents of state university should be deducted from full value of property mortgaged, and right to such deduction is not affected by fact that mortgage is not taxable.

Approved in *Henne v. Los Angeles County* (Cal.), 59 Pac. 781, following rule; *Brenner v. Los Angeles*, 160 Cal. 79, 116 Pac. 400, mortgagor whose mortgage runs to university regents may recover tax paid on amount of mortgage.

77 Cal. 139-147, 19 Pac. 260, HABENICHT v. LISSAK.

When Articles Sold Under Executory Contract are inspected and accepted by vendee upon arrival, title passes to vendee.

Approved in *Grange Co. v. Farmers' Union Co.*, 3 Cal. App. 524, 86 Pac. 617, title to grain held to pass by intention of parties at time of shipment.

77 Cal. 147-149, 19 Pac. 269, PEOPLE v. FINE.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 733.

77 Cal. 152-156, 19 Pac. 264, POPE v. KIRCHNER.

Misnomer of Insolvent Debtor held not to vitiate order of adjudication.

Approved in *Macomber v. Kinney*, 114 Minn. 159, 128 N. W. 1005, "Macomber" held equivalent of "McComber."

Idem Sonans. See note, 100 Am. St. Rep. 348.

Affidavit of Mailing Held Sufficient though signed by another person than one whose name appeared in body.

Approved in *Fairbanks etc. Co. v. Getchell*, 13 Cal. App. 461, 110 Pac. 332, affidavit for attachment need not be signed by party making it; *A. P. Hotaling & Co. v. Brogan*, 12 Cal. App. 502, 107 Pac. 712, upholding affidavit for attachment signed in corporate name by president.

Effect of Failure to Execute and record chattel mortgages. See note, 137 Am. St. Rep. 480.

77 Cal. 156-164, 11 Am. St. Rep. 251, 19 Pac. 275, EX PARTE STERNES.

Judgment of Court Finding Party Guilty of contempt imparts absolute verity and cannot be questioned on habeas corpus.

Approved in dissenting opinion in *Ex parte Duncan*, 42 Tex. Cr. 676, 62 S. W. 764, majority setting aside order adjudging party guilty of contempt.

Judgment of Court of Record is conclusive evidence of jurisdiction until set aside or reversed in direct proceeding, when jurisdiction depends upon existence of litigated fact which is adjudged to exist.

Reaffirmed in *In re Wallace*, 75 Kan. 436, 89 Pac. 688.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 174.

77 Cal. 164-171, 11 Am. St. Rep. 257, 19 Pac. 237, EX PARTE McNULTY.

It is not Within Police Power to enact law punishing physician, duly licensed, for what is styled "unprofessional conduct," in advertising himself as specialist in certain diseases.

Approved in *Hewitt v. Board of Medical Examiners*, 148 Cal. 595, 113 Am. St. Rep. 315, 84 Pac. 41, 3 L. R. A. (n.s.) 896, holding void statute providing that "all advertising of medical business in which grossly improbable statements are made" shall constitute unprofessional conduct; *Kennedy v. St. Board of Registration*, 145 Mich. 243, 108 N. W. 730, upholding act providing medical board could disbar physician for advertising in newspapers, in regard to venereal diseases; *Samuelson v. State*, 116 Tenn. 493, 115 Am. St.

Rep. 805, 95 S. W. 1017, "standard schedule rate" used in act to prohibit unauthorized dealing in passenger tickets held not such expression as to render act void.

Legislature cannot Delegate to Board of medical examiners power of declaring what shall constitute misdemeanor.

Approved in *People v. Roth*, 249 Ill. 536, 94 N. E. 954, upholding parole law as not being delegation of legislative power to board of pardons.

Act of April 3, 1876, Making It an Offense to practice medicine without first having procured certificate, does not forbid practice after such certificate is revoked.

Disapproved in *State v. Chaney*, 36 Wash. 357, 78 Pac. 917, under similar statute it is offense to continue practice of profession after revocation of certificate.

Right to Practice Medicine. See note, 113 Am. St. Rep. 320.

Power to Revoke Physician's License. See note, 1 L. R. A. (n. s.) 813.

Where Complaint, Though Inartificially Drawn, shows evident attempt to state essential facts which constitute crime sought to be charged, defect in statement does not warrant discharge of defendant.

Approved in *Application of Bunkers*, 1 Cal. App. 70, 81 Pac. 752, refusing habeas corpus asked on ground of alleged defect in indictment; *Ex parte Rickey*, 31 Nev. 89, 135 Am. St. Rep. 651, 100 Pac. 137, holding indictment charging president of bank with receiving deposits through teller, knowing bank to be insolvent, did not charge a crime; *Ex parte Shaw*, 4 Okl. Cr. 423, 113 Pac. 1066, information charging fraud in preventing elector from casting his vote held to charge no offense.

Before One can be Convicted of Crime there must be some rule of action prescribing with some certainty and expressing intelligently the sovereign will.

Approved in *State v. Squibb*, 170 Ind. 492, 84 N. E. 971, under act declaring no person either by his servant or agent, or as servant or agent of another, "shall sell adulterated milk," it is no offense for one to sell as principal; dissenting opinion in *Commonwealth v. International Harvester Co.*, 131 Ky. 584, 115 S. W. 714, majority upholding demurrer to indictment of International Harvester Company charging crime under anti-trust act.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 173, 185, 186.

Constitutional Limitations on Power to impose license or occupation taxes. See note, 129 Am. St. Rep. 293.

Constitutional Equality of Privileges, immunities and protection. See note, 14 L. R. A. 581.

77 Cal. 173-176, 19 Pac. 270, PEOPLE v. WASSERVOGLE.

Obtaining Money by Statement that one had credit with certain firm, when he knew he had no credit, is obtaining money by false pretenses.

Approved in *State v. Hammelsy*, 52 Or. 159, 132 Am. St. Rep. 686, 96 Pac. 866, 17 L. R. A. (n. s.) 244, giving check to obtain money on bank in which drawer had no funds, though he did not

specifically state he had funds there, held obtaining money on false pretenses.

Mere Drawing and Passing of Check without funds to meet it as false pretense. See note, 17 L. R. A. (n.s.) 244.

Necessary Averments to Charge of obtaining money on false pretenses stated.

Approved in *People v. Lapique*, 10 Cal. App. 675, 103 Pac. 167, holding fraud not shown to have been accomplished by means of false pretenses alleged to have been used for that purpose; *People v. White*, 7 Cal. App. 102, 93 Pac. 685, information for obtaining money under false pretenses held insufficient; *People v. Carpenter*, 6 Cal. App. 233, 91 Pac. 810, indictment for obtaining money on false pretenses held not to allege essential facts.

False Pretense must Relate to Existent or past fact.

Approved in *People v. Ward*, 5 Cal. App. 37, 89 Pac. 875, evidence of conduct and acts of parties admissible to determine truth or falsity of representation; *Biddle v. United States*, 156 Fed. 764, 84 C. C. A. 415, representations that building would be used as gambling place held not false pretense.

Admissibility of Evidence of other crimes. See notes, 105 Am. St. Rep. 997; 62 L. R. A. 241.

77 Cal. 176-179, 19 Pac. 268, **PEOPLE v. TRAVERS.**

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 75.

Correction of Verdict in Criminal Cases. See note, 23 L. R. A. 727.

77 Cal. 179-183, 19 Pac. 258, **PEOPLE v. JANUARY.**

Instructions Given at Criminal Trial are no part of record unless accompanied by indorsement of judge, or embodied in bill of exceptions.

Approved in *People v. Schultz*, 14 Cal. App. 110, 111 Pac. 273, *People v. Vital (Cal.)*, 34 Pac. 617, and *State v. Scholfield*, 13 N. D. 666, 102 N. W. 879, all reaffirming rule.

77 Cal. 183-184, 19 Pac. 267, **EX PARTE FENTON.**

Fact That Defendant had Been Previously Arrested on same charge, examined before magistrate, and discharged, is not bar to second arrest and examination.

Reaffirmed in *People v. Dillon*, 197 N. Y. 258, 90 N. E. 822.

77 Cal. 184-189, 19 Pac. 278, **WISE v. HOGAN.**

General Allegation of Indebtedness is sufficient in complaint in suit against estate upon account.

Approved in *Jensen v. Dorr*, 159 Cal. 747, 116 Pac. 555, items of account need not be set forth in complaint in suit to enforce mechanic's lien on ship.

Demurrer on Ground of Limitations is not good unless it affirmatively appears on face of complaint that claim is barred.

Approved in *Chemung Min. Co. v. Hanley*, 9 Idaho, 794, 77 Pac. 228, and *Corea v. Higuera*, 153 Cal. 456, 95 Pac. 885, 17 L. R. A. (n.s.) 1018, both following rule.

Where Presentation of Claim Against Estate which is sued on is alleged to have been made within ten months after first publication of notice to creditors, without alleging value of estate, defect cannot be reached by general demurrer.

Distinguished in *Burke v. Maguire*, 154 Cal. 463, 98 Pac. 24, complaint against estate sounding in contract which does not allege claim was presented to administrator is open to general demurrer.

77 Cal. 190-191, 19 Pac. 277, GOSS v. HELBING.

Managing Agent of Waterworks Held to have bound owners by purchase of pump so as to create lien therefor.

Approved in *Calhoun v. Buhre*, 75 N. J. L. 442, 67 Atl. 1069, one in charge of hotel held to have bound owner by contract for advertising; dissenting opinion in *Williamson v. Shank*, 41 Ind. App. 519, 83 N. E. 643, majority holding plaintiff entitled to lien on building by reason of furnishing materials for it to contractor constructing it for one who held as tenant at will.

77 Cal. 192-194, 19 Pac. 375, HEESER v. MILLER.

In Action to Quiet Title, Allegation that plaintiff is owner of property is of ultimate fact and is sufficient.

Approved in *Emerson v. Yosemite Gold Min. etc. Co.*, 149 Cal. 59, 85 Pac. 125, reaffirming rule; *Wutchumna Water Co. v. Pogue*, 151 Cal. 109, 90 Pac. 364, in action to determine respective water rights of plaintiff and defendants, deraignment of plaintiff's title need not be pleaded; *Lucas v. Whitacre*, 121 Iowa, 254, 96 N. W. 777, where petition of widow for confirmation of title to her in certain lands of which her husband had been seised alleged she "was owner thereof," such allegation sufficiently negatived loss of her rights by judicial sale.

When Complaint in Quiet Title Suit shows by necessary implication that defendant's claim is void, it need not aver it in terms.

Approved in *Woody v. Hinds*, 30 Mont. 192, 76 Pac. 2, holding burden on defendant in quiet title suit to discover nature of adverse claim.

77 Cal. 194-196, 19 Pac. 377, MURPHY v. HARRIS.

Farmer is not Entitled to Exemption as both farmer and teamster.

Reaffirmed in *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal. App. 751, 108 Pac. 718.

77 Cal. 196-198, 19 Pac. 376, CANNING v. FIBUSH.

Notice to Terminate Tenancy for fixed period is unnecessary.

Reaffirmed in *Craig v. Gray*, 1 Cal. App. 599, 82 Pac. 700.

In Suit to Recover Property on Ground it is exempt, burden is on plaintiff to show exemption.

Approved in *Cunningham v. Springer*, 13 N. M. 284, 82 Pac. 238, in action on contract, on plea of payment, and general denial, burden is on plaintiff to prove contract.

77 Cal. 198-203, 11 Am. St. Rep. 263, 19 Pac. 380, EX PARTE AH MEN.

Means by Which Prisoner is Brought within jurisdiction of court does not affect its right to try him so as to render judgment void on collateral attack.

Reaffirmed in *People v. Palermo Land & Water Co.*, 4 Cal. App. 722, 89 Pac. 725, and *Rigor v. State*, 101 Md. 473, 61 Atl. 634.

Judgment of Court in Contempt is conclusive if court had jurisdiction.

Approved in dissenting opinion in *Ex parte Duncan*, 42 Tex. Cr. 676, 62 S. W. 764, majority setting aside judgment in contempt on ground court lacked jurisdiction to render particular judgment.

Affidavit Charging Violation of Injunction need not set forth provisions of writ violated.

Reaffirmed in *State v. Sieber*, 49 Or. 5, 9, 88 Pac. 314.

Judicial Notice of Decree, in Proceeding to punish violation as contempt. See note, 24 L. R. A. (n. s.) 405.

Character of Contempt for Violation of injunction to protect private right. See note, 13 L. R. A. (n. s.) 594.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 180.

Miscellaneous.—Cited in *Ex parte Fong Yen You* (Cal.), 19 Pac. 500, companion case.

77 Cal. 208-213, 19 Pac. 382, McCUSICK v. WALKER.

Issuance of Writ of Attachment is ministerial act of clerk.

Approved in *Merchants' Nat. Union v. Buissieret*, 15 Cal. App. 447, 115 Pac. 59, clerk has no authority to issue attachment where affidavit does not show facts required for its issuance.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 471.

77 Cal. 213-217, 19 Pac. 490, PEOPLE v. CARTY.

Conviction for Manslaughter upon Indictment for murder, reversed on appeal of defendant, does not bar new trial for murder on same indictment.

Approved in *In re Sommers*, 31 Nev. 532, 135 Am. St. Rep. 700, 103 Pac. 1073, following rule; *People v. Grill*, 151 Cal. 598, 91 Pac. 517, where defendant was convicted of murder on first trial with penalty of imprisonment for life, such judgment was no bar to infliction of death penalty upon retrial granted on his motion.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 77.

Former Jeopardy in Retrial on Higher after setting aside verdict for lower charge. See note, 5 L. R. A. (n. s.) 573.

Court may Properly Refuse to permit counsel in opening statement to argue law to jury.

Approved in *People v. Denomme* (Cal.), 56 Pac. 99, holding case of instruction in argument to jury properly refused.

Stenographer's Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 367.

Admissibility in Criminal Trial of testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 884.

77 Cal. 217-218, 19 Pac. 422, MALONE v. DEL NORTE COUNTY.

When Facts Found Sustain Judgment, it is not necessary to find on other issues.

Approved in *Bowers v. Cottrell*, 15 Idaho, 240, 96 Pac. 943, findings held sufficient where they clearly were in effect against defendant's case made by answer.

77 Cal. 218-220, 19 Pac. 489, MORROW v. GRAVES.

Conveyance in Fraud of Creditors cannot be avoided as against subsequent purchaser from grantee for value without notice of fraud.

Approved in *Denike v. Santa Clara Valley Agr. Society*, 9 Cal. App. 232, 98 Pac. 689, refusing to set aside deed to property of district agricultural society given on execution of judgment alleged to have been procured by fraud.

77 Cal. 220-235, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, ESTATE OF COOK.

Judgment Becomes Rendered When Court pronounces decision, and need not be in writing signed by judge.

Approved in *Darlington v. Butler*, 3 Cal. App. 453, 86 Pac. 196, upholding judgment of dismissal entered by clerk on oral order of court.

Judgment of Divorce Becomes Operative upon rendition though not then entered by clerk.

Approved in *Mock v. Chaney*, 36 Colo. 65, 87 Pac. 540, and *Zahorka v. Geith*, 129 Wis. 506, 109 N. W. 555, both following rule; *Baum v. Roper*, 1 Cal. App. 437, 82 Pac. 391, upholding writ of possession against defendant although judgment was not entered when writ was issued.

Distinguished in *Brownell v. Superior Court*, 157 Cal. 707, 109 Pac. 93, order is "taken" under section 473, Code of Civil Procedure, when entered on official minutes of court.

Necessity of Entry of Judgment. See notes, 129 Am. St. Rep. 746; 28 L. R. A. 623.

77 Cal. 235-236, 19 Pac. 423, ZIRKER v. HUGHES.

Party Suing on Part of Entire Demand thereby abandons right to bring new suit for balance.

Reaffirmed in *Rawlins v. Jungquist*, 16 Wyo. 420, 94 Pac. 467.

Distinguished in *Haub v. Leggett*, 160 Cal. 496, 117 Pac. 558, allowance and approval in part of claim against estate of decedent is no bar to action for whole claim.

77 Cal. 236-239, 19 Pac. 487, BROWN v. ANDERSON.

"Year," as Used in Contract, does not necessarily mean calendar year, but meaning must be determined from connection in which used, and subject to matter of contract.

Approved in *Reusch v. City of Lincoln*, 78 Neb. 831, 112 N. W. 378, "year" as used in Slocumb law held to mean "municipal year."

77 Cal. 239-241, 19 Pac. 424, VULICEVICH v. SKINNER.

Contracts for Sale of Growing Periodical Crops need not be in writing.

Approved in *Cannon v. Matthews*, 75 Ark. 339, 112 Am. St. Rep. 64, 87 S. W. 429, 69 L. R. A. 827, growing strawberry plants held subject of replevin; *Johnson v. Johnson*, 31 Utah, 413, 88 Pac. 231, agreement

to give grantor of premises half crops raised during his life need not be in writing.

Whether Contract for Sale of Growing Crops or reservation thereof by a grantor must be in writing. See note, 23 L. R. A. (n. s.) 1220.

Growing Fruit as Real or Personal Property. See note, 16 L. R. A. 104.

Passing of Crops by Deed, Devise or descent of lands. See note, 181 Am. St. Rep. 618.

77 Cal. 246-247, 19 Pac. 425, 1 L. R. A. 572, **FISCHER v. TRAVELERS' INS. CO.**

Where Insurance Policy Excepts Liability for "death or injury" intentionally caused, intention of party inflicting injury is referred to, and when complaint on policy charges intentional killing, demurrer is properly sustained.

Approved in Continental Casualty Co. v. Morris, 46 Tex. Civ. App. 399, 102 S. W. 775, in such policy "injury" held to include fatal injuries.

What Constitutes an Accident, within meaning of accident policy. See note, 30 L. R. A. 208.

77 Cal. 257-263, 19 Pac. 429, **BURLING v. THOMPSON.**

Only One in Privity With United States can attack collaterally patent issued for lands listed to state as in lieu of school lands.

Approved in dissenting opinion in Williams v. San Pedro, 153 Cal. 52, 94 Pac. 237, majority holding certificate of purchase of tide lands in San Pedro subject to collateral attack on ground it was void, by parties not connected with title of state.

Patent Issued to Administrator Vests legal title in him, and entitles him to recover premises in his own name in action of ejectment.

Approved in Carr v. Carr, 15 Cal. App. 483, 115 Pac. 262, upholding complaint by administrator suing as such to recover property of estate.

Ejectment by Executor or Administrator. See note, 136 Am. St. Rep. 84.

77 Cal. 263-267, 18 Pac. 647, 19 Pac. 493, **GRANT v. HEVERIN.**

When Legal Title to Chose in Action is vested in assignee, debtor is completely protected against assignor, and assignee may maintain action in his own name.

Approved in Ingham v. Weed (Cal.), 48 Pac. 320, assignee of mortgage may maintain action to foreclose in his own name regardless of agreement to account for proceeds to another.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 606.

77 Cal. 267-279, 11 Am. St. Rep. 279, 19 Pac. 494, **HILL v. FINIGAN.**

Where Pledgee Purchases Pledged Property at sale, pledgor must exercise his right to treat sale as invalid within reasonable time.

Approved in Tennent v. Union Central Life Ins. Co., 133 Mo. App. 361, 112 S. W. 761, beneficiary in life policy pledged by insured to secure loan could on invalid sale by insurer to itself, made on default in payment of loan, sue on policy; Thomas v. Gilbert, 55 Or. 21, 101 Pac. 395, delay of five years held to validate sale of pledged bank stock to general partner of firm holding pledge.

Who may not Purchase at judicial execution and other compulsory sales. See note, 136 Am. St. Rep. 812.

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 762, 765.

Rights, Remedies and Liabilities of Pledgees of corporate stock. See note, 121 Am. St. Rep. 204.

77 Cal. 279-283, 19 Pac. 499, McDONALD v. HUFF.

Deed Delivered in Escrow cannot be Revoked by grantor.

Approved in *Kenney v. Parks* (Cal.), 54 Pac. 53, deeds executed by husband and wife mutually conveying separate property, and delivered to third person with directions to record that of spouse dying first, held not revocable; *Fitzgerald v. Allen*, 240 Ill. 94, 88 N. E. 245, delivery of deed in escrow to be held until grantor's death and then delivered to grantee, held sufficient delivery, where grantee knew contents and conditions of deed and accepted in writing.

Deed Delivered in Escrow Conveys Title upon performance of conditions for delivery.

Approved in *Daniels v. Daniels*, 3 Cal. App. 299, 85 Pac. 136, notes delivered in escrow to be delivered to payee on death of maker are not affected by limitations until death of maker; *De Bow v. Wollenberg*, 52 Or. 422, 96 Pac. 542, and *Whitmer v. Schenk*, 11 Idaho, 706, 83 Pac. 776, both holding upon fulfillment of condition of escrow it relates back to time of escrow agreement for purpose of cutting off intervening rights of third parties who had notice of terms of escrow.

Effect of Deed Delivered in Escrow as further security for debt. See note, 2 L. R. A. (n. s.) 629.

Escrows. See note, 130 Am. St. Rep. 941, 968, 969.

Where Deed is Delivered in Escrow in payment of grantor's debt, if not otherwise paid by certain date, acceptance of deed by vendee's attorney and execution by his agent of receipt in full shows delivery and acceptance of deed, though made after time limited.

Distinguished in *May v. Emerson*, 52 Or. 270, 96 Pac. 1065, where deed is deposited in escrow to be delivered to grantee on payment of price, but before payment, vendor's creditor obtained judgment and bought land at execution sale, payment to depositary not act of forfeiture of vendee's rights under contract of purchase.

Miscellaneous.—Cited in *Wagg v. Herbert*, 19 Okl. 560, 92 Pac. 264, as to right of mortgagee to purchase from mortgagor.

77 Cal. 286-290, 19 Pac. 426, CRESCENT CITY WHARF ETC. CO. v. SIMPSON.

Where Injunction is Sought to Restrain irreparable injury complaint need not allege insolvency of defendant.

Approved in *Dingley v. Buckner*, 11 Cal. App. 186, 104 Pac. 480, following rule; *Trade Dollar Consol. Min. Co. v. Fraser*, 148 Fed. 593, 79 C. C. A. 37, granting injunction to restrain diversion of water above dam, which would cause irreparable injury to owners of dam.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 742.

Affixing of Corporate Seal to Instrument by proper officer is prima facie evidence to show authority for its execution.

Approved in *Sibly v. England*, 90 Ark. 425, 119 S. W. 822, and *Greve v. Echo Oil Company*, 8 Cal. App. 284, 96 Pac. 907, both following rule.

77 Cal. 295-297, 19 Pac. 518, VON DRACHENFELS v. DOOLITTLE.

Action to Quiet Title cannot be Maintained by holder of equitable interest against holder of legal title.

Approved in *Mitchell v. Moses*, 16 Cal. App. 599, 117 Pac. 687, *Buchner v. Malloy*, 155 Cal. 255, 100 Pac. 688, and *Robinson v. Muir*, 151 Cal. 124, 90 Pac. 524, all reaffirming rule; *County of Los Angeles v. Hannon*, 159 Cal. 48, 112 Pac. 883, vendee under contract of sale could not quiet title against grantee of legal title.

Disapproved in *Coleman v. Jaggers*, 12 Idaho, 129, 130, 118 Am. St. Rep. 207, 85 Pac. 895, 896, holder of equitable interest may quiet title although he has neither possession nor legal title.

77 Cal. 300-305, 19 Pac. 518, DANIELS v. GUALALA MILL CO.

Improvement of Strip of Land Before Issuance of state patent by building of railroad thereon, though not inclosed, is sufficient possession to give title by adverse possession.

Approved in *Gray v. Walker*, 157 Cal. 385, 108 Pac. 279, when town lots were improved in usual manner, neither inclosure nor cultivation were essential to claim by adverse possession.

77 Cal. 305-308, 19 Pac. 481, FABRETTI v. SUPERIOR COURT.

Appeal Lies from Default Judgment of justice's court.

Reaffirmed in *Maxson v. Superior Court* (Cal.), 54 Pac. 520.

Order of Superior Court Dismissing Appeal from justice's court, taken on questions of law alone, is void.

Approved in *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 478, 114 Pac. 980, mandamus lies to compel superior court to proceed with appeal from justice's court properly taken but dismissed for lack of jurisdiction.

Where There has Been No Trial upon issues of fact in justice's court, superior court on appeal must decide upon questions of law alone.

Approved in *Maxson v. Superior Court* (Cal.), 54 Pac. 520, 521, and *Null v. Superior Court*, 4 Cal. App. 210, 87 Pac. 394, both following rule; *Smith v. Superior Court*, 2 Cal. App. 530, 84 Pac. 55, appeal from nonsuit in justice's court presents question of law alone, and superior court cannot try cause after reversal of nonsuit; *Armantage v. Superior Court*, 1 Cal. App. 135, 136, 81 Pac. 1035, where appeal is taken from justice's court on questions of law, or of law and fact, superior court can try case without statement if there was any trial of issues in justice's court, with or without jurisdiction.

Superior Court may, Within Reasonable Time, set aside judgment rendered inadvertently or through mistake.

Distinguished in *In re Sullivan*, 3 Cal. App. 195, 84 Pac. 782, where judgment imposes fine for assault with deadly weapon and contains void provision for imprisonment in penitentiary to enforce it, court cannot after issuance of commitment vacate judgment and impose same fine and designate county jail as place of imprisonment.

77 Cal. 308-309, 19 Pac. 521, PEOPLE v. LENON.

Appeal Purporting to be from Judgment of conviction dismissed when judgment did not appear of record.

Distinguished in *People v. Schmitz*, 7 Cal. App. 346, 94 Pac. 410, appeal not premature if taken after rendition of judgment and before entry.

77 Cal. 313-315, 19 Pac. 527, ESTATE OF GWIN.

Widow is not Estopped to Make Election to take under law by causing will of husband to be probated and becoming executrix.

Approved in *Benedict v. Wilmarth*, 46 Fla. 543, 35 So. 87, following rule; *In re Smith's Estate* (Cal.), 38 Pac. 951, where will showed testator meant to dispose of community property, conveyance by testator's widow of life estate devised by will operated as acceptance by her of provisions of will; *Hoggard v. Jordan*, 140 N. C. 617, 53 S. E. 223, 4 L. R. A. (n. s.) 1065, widow by acting under will as executrix for nine years held to have elected to accept its provisions.

77 Cal. 315-318, 19 Pac. 526, 1 L. R. A. 829, BURLINGAME v. ROWLAND.

Equity will Compel Specific Performance of parol promise of father to daughter to convey land to her if she will live on it, when agreement has been partly performed by her.

Distinguished in *Valentine v. Streeton*, 9 Cal. App. 644, 99 Pac. 1109, refusing to enforce specific performance of parol promise to convey when possession and improvements had been made by donee under lease.

Right of One to Testify as to his intent. See note, 23 L. R. A. (n. s.) 379.

77 Cal. 319-323, 19 Pac. 523, 1 L. R. A. 826, KATZ v. BEDFORD.

Plaintiff may State Cause of Action on contract, and upon quantum meruit.

Reaffirmed in *Remy v. Olds* (Cal.), 34 Pac. 217.

Contract to Build Sidewalk with quantity left blank held to be divisible.

Approved in *Schlosser v. Moores*, 16 N. D. 191, 112 N. W. 80, contract of sale of seed wheat and seed flax held to give separate liens on crops.

Contract Fixing Compensation at Certain Amount per unit of work as entire or severable. See note, 20 L. R. A. (n. s.) 1071.

Work Done on Sidewalk Under Contract held to have been accepted by owner by his conduct.

Approved in *Coplew v. Durand*, 153 Cal. 281, 95 Pac. 39, 16 L. R. A. (n. s.) 791, where contract work was completed to satisfaction of owner, and architect refused certificate, such certificate was not necessary to action for contract price.

77 Cal. 324-326, 19 Pac. 529, BRALY v. HENRY.

Witness cannot be Cross-examined on matters on which he gave no testimony on direct examination.

Reaffirmed in *Borden v. Lynch*, 34 Mont. 509, 87 Pac. 610.

77 Cal. 327-330, 19 Pac. 531, LABISH v. HARDY.

Bona Fide Occupancy was Essential to give equity to occupant of land, title to which was quieted by act of July 23, 1866.

Reaffirmed in *Town of Red Bluff v. Walbridge*, 15 Cal. App. 780, 781, 115 Pac. 80, 81.

Real Property Granted by Government to citizen as separate or community property. See note, 96 Am. St. Rep. 919, 920.

What is Community Property. See notes, 126 Am. St. Rep. 117; 4 Cof. Prob. 60.

Character of Property as Community or separate where title not completed until after death of spouse. See note, 17 L. R. A. (n. s.) 155.

Miscellaneous.—Cited in *Labish v. Hardy* (Cal.), 23 Pac. 124, companion case.

77 Cal. 330-340, 19 Pac. 513, BRODER v. CONKLIN.

Defendant Relying on Statute of Frauds must plead it.

Reaffirmed in *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 569, 112 Pac. 455.

Complaint on Agreement Required to be in writing need not so allege, and it will be presumed on demurrer to be in writing.

Reaffirmed in *Logan v. Brown*, 20 Okl. 342, 95 Pac. 444, 20 L. R. A. (n. s.) 298.

Purchase by Attorney for Parties in insolvent proceedings of insolvent property at assignee's sale with parol agreement to hold for later sale on better market creates constructive trust and is not within statute of frauds.

Approved in *Cooney v. Glynn*, 157 Cal. 587, 108 Pac. 508, conveyance by mother to son on his promise to convey to sister held to create constructive trust; *Chamberlain v. Chamberlain*, 7 Cal. App. 639, 95 Pac. 661, transfer of property to relative held to create constructive trust when induced by false representations as to suit against grantor, and promise to reconvey; *Reece v. Leitch*, 46 Ind. App. 346, 92 N. E. 555, payment of purchase price of real estate and transfer of title to another in good faith held to create resulting trust; *Newis v. Topper*, 121 Iowa, 442, 96 N. W. 908, deed to grantor's stepfather made to secure maintenance of grantor's children after his death held to be given in confidential relation and to raise constructive trust.

Creation of Trusts in Land by Parol. See notes, 115 Am. St. Rep. 795; 5 Cof. Prob. 265.

Limitations Do not Run Against Right to enforce trust until trustee repudiates it.

Approved in *Levy v. Ryland*, 32 Nev. 470, 109 Pac. 908, following rule; *Spencer v. Duncan* (Cal.), 40 Pac. 549, action against trustee held not barred when trust was not shown to have been denied.

Future Promise as Fraud. See note, 10 L. R. A. (n. s.) 647.

77 Cal. 353-357, 19 Pac. 577, SANSOME v. MYRES.

It is Duty of Party in Criminal Case desiring to have bill of exceptions settled to prepare full and fair draft of bill, but mistakes and omissions should be corrected by judge.

Approved in *State v. Craig*, 15 Wyo. 449, 89 Pac. 587, holding judge not bound to sign bill of exceptions not fully and fairly prepared; *Harden v. Card*, 14 Wyo. 493, 85 Pac. 249, holding court could permit correction of imperfect bill and sign same as though presented within proper time, when it was presented in imperfect condition on last day allowed.

77 Cal. 357-360, 19 Pac. 646, IN RE STEPHENS.

Necessity of Bad or Fraudulent Motive to justify disbarment. See note, 18 L. R. A. 401.

77 Cal. 360-383, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92, PEOPLE v. STANFORD.

Miscellaneous.—Cited in *State v. South Park City*, 34 Wash. 165, 107 Am. St. Rep. 998, 75 Pac. 637, to point that information against city, in its corporate name, to test its legal existence, does not lie because by suing city in that name its existence is admitted.

77 Cal. 383-390, 11 Am. St. Rep. 288, 19 Pac. 641, TAPIA v. DE-MARTINI.

Mortgage to Cover Future Advances is valid as to all such advances made before actual notice of attaching of junior lien.

Approved in *The Seattle*, 170 Fed. 288, 95 C. C. A. 480, and *Sousa v. Lucas*, 156 Cal. 464, 105 Pac. 415, both reaffirming rule; *Santa Monica v. Los Angeles County*, 15 Cal. App. 712, 115 Pac. 946, taxes for year beginning March 1st become lien on real property in hands of grantee, though property was transferred before tax was levied but after March 1st; *Valley Lumber Co. v. Wright*, 2 Cal. App. 290, 84 Pac. 59, prior recorded deed of trust given to secure loan to owner for construction of building is prior to mechanics' liens, though loan was paid after commencement of work; *Savings etc. Soc. v. Burnett (Cal.)*, 37 Pac. 183, deed of trust to secure future advances held not to secure advances made after payment of past advances and conveyance by grantor of property to another, with actual notice of such conveyance.

Mortgages to Secure Future Advances. See note, 116 Am. St. Rep. 690, 691, 692, 695, 696.

Parol Trust may Attach to Mortgage that mortgagee shall hold it in trust partly for self and partly for another.

Approved in *First State Bank of Le Sueur v. Sibley County Bank*, 96 Minn. 463, 105 N. W. 488, upholding mortgage of lands running to attorney made to secure creditors of mortgagor as being on good consideration.

Miscellaneous.—Cited in *Applegarth v. Burris (Cal.)*, 19 Pac. 693, companion case.

77 Cal. 390-392, 19 Pac. 644, BALDWIN v. SECOND ST. CABLE R. R. CO.

Married Woman Living Separate from husband may sue alone to recover damages for personal injuries.

Reaffirmed in *Duncan v. Duncan*, 6 Cal. App. 406, 92 Pac. 311.

Wife is Necessary Party to Action by husband to recover damages for injury to wife.

Reaffirmed in *Gomez v. Scanlon*, 155 Cal. 530, 102 Pac. 13.

77 Cal. 397-399, 19 Pac. 685, REEVES v. HYDE.

Passing of Crops by Deed, Devise or descent of lands. See note, 131 Am. St. Rep. 618.

77 Cal. 399-403, 19 Pac. 689, STANDART v. ROUND VALLEY WATER CO.

Action Lies to Quiet Title to Water-pipe used to conduct water to quartz-mill to which water right was appurtenant.

Approved in *Stanislaus Water Co. v. Bachman*, 152 Cal. 727, 93 Pac. 863, 15 L. R. A. (n. s.) 359, right of owner of land to have

water flow from canal through lateral ditch is appurtenant to land and is real property; *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 277, 90 Pac. 44, claim of city to right to flow water in water-course held an easement subject to suit to quiet title.

77 Cal. 408-410, 19 Pac. 692, **APPLEGARTH v. McQUIDDY.**

In Action Based on Fraud, facts constituting fraudulent breach of duty must be alleged.

Approved in *Perreau v. Perreau*, 12 Cal. App. 128, 106 Pac. 730, complaint held not to sufficiently allege fraudulent breach of duty.

77 Cal. 410-415, 19 Pac. 698, **KNIGHT v. RUSS.**

In Action of Assumpsit for Attorney's Services value of retainer is included, though not specified in complaint.

Reaffirmed in *Clements v. Watson*, 7 Cal. App. 75, 93 Pac. 386, and *Aydelotte v. Bloom*, 13 Cal. App. 58, 108 Pac. 877.

Right of Attorney, in Absence of express agreement, to compensation for debarring himself from representing antagonistic interests. See note, 19 L. R. A. (n. s.) 961.

77 Cal. 418-423, 19 Pac. 757, **SULLIVAN v. GRASS VALLEY ETC. MINING CO.**

Contract Fixing Compensation at Certain Amount per unit of work as entire or severable. See note, 20 L. R. A. (n. s.) 1071.

77 Cal. 423-427, 20 Pac. 544, **REDMOND v. WEISMANN.**

Verdict for Plaintiff not Finding amount recoverable is sufficient when only liability of defendant was in issue.

Distinguished in *Electric Imp. Co. v. San Jose & S. C. R. Co.* (Cal.), 31 Pac. 456, verdict held void for failure to find amount recovered.

77 Cal. 427-433, 19 Pac. 753, **NUNEZ v. MORGAN.**

Complaint on Contract Within Statute of Frauds need not allege contract was in writing.

Reaffirmed in *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 569, 112 Pac. 455.

77 Cal. 434-436, 19 Pac. 826, **VANN v. MCCREARY.**

Advice of Counsel as Defense to action for malicious prosecution. See note, 18 L. R. A. (n. s.) 63.

77 Cal. 440-444, 19 Pac. 824, **SMITH v. MILLARD.**

Assumption of Debts on Dissolution of partnership. See note, 9 L. R. A. (n. s.) 57.

77 Cal. 445-448, 19 Pac. 830, **PEOPLE v. HENRY.**

Indictment for Burglary Alleging Building entered was owned by certain company need not allege company was corporation.

Approved in *State v. Golden*, 86 Minn. 208, 90 N. W. 399, following rule; *People v. Mead*, 200 N. Y. 16, 140 Am. St. Rep. 616, 92 N. E. 1051, upholding indictment for embezzlement from "People's Mutual Life Insurance Association and League," not alleging it to be corporation.

Distinguished in *People v. Miles*, 9 Cal. App. 317, 101 Pac. 527, holding information for rape which did not aver female was not wife of defendant is insufficient.

Court may Refuse to Dismiss Criminal Case not brought to trial in sixty days when engaged during that time in trial of other cases.

Approved in *State v. Caruthers*, 1 Okl. Cr. 451, 98 Pac. 482, holding trial of causes not improperly delayed.

Delay of Prosecution as Ground for discharge. See note, 56 L. R. A. 528, 543.

77 Cal. 449-458, 19 Pac. 820, RENTON ETC. CO. v. MONNIER.

Showing That Witness is Out of State is sufficient to admit his deposition.

Approved in *People v. Leavens*, 12 Cal. App. 184, 106 Pac. 1106, admitting deposition of accomplice when shown to be out of state at time of trial; *Rollins v. Schawacker*, 153 Mo. App. 290, 133 S. W. 411, absence of deponent from place of trial in usual course of business held to admit deposition.

77 Cal. 458-461, 19 Pac. 879, GARDNER v. TATUM.

Entry or Record Necessary to complete judgment or order. See note, 28 L. R. A. 624.

77 Cal. 464-467, 19 Pac. 883, PEOPLE v. TODD.

Indictment for Forgery of Will need not allege testator has property which would be affected by will.

Approved in *People v. Di Ryana*, 8 Cal. App. 337, 339, 96 Pac. 921, indictment for forgery of proof of loss under insurance policy need not allege policy was issued to persons whose names were forged, nor that property was destroyed by fire; *People v. McPherson*, 6 Cal. App. 269, 91 Pac. 1099, indictment for forgery of deed need not allege person whose name was forged was owner of property described in deed at time of forgery.

Forgery of Worthless Instruments. See note, 24 L. R. A. 39.

77 Cal. 467-473, 19 Pac. 872, EVA v. McMAHON.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 62.

77 Cal. 473-475, 11 Am. St. Rep. 297, 19 Pac. 878, ROBINSON v. DUNN.

"Day," as Used in Statute Fixing Compensation for porters of Senate, means twenty-four hours.

Approved in *State v. Richardson*, 16 N. D. 8, 109 N. W. 1029, holding county commissioner could not charge for more than one day for services performed between one midnight and the next.

Appropriation of Public Money. See note, 89 Am. St. Rep. 815.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 37, 40.

77 Cal. 479-483, 19 Pac. 880, ESTATE OF BURRELL.

Contestants of Probate of Will must Allege all facts necessary to sustain claim that will was not properly signed and witnessed.

Approved in *Clements v. McGinn* (Cal.), 33 Pac. 924, where will had been probated, burden was on contestants to prove testator's incapacity.

77 Cal. 485-494, 11 Am. St. Rep. 299, 20 Pac. 66, WILSON v. ATKINSON.

Void Tax Deed Containing Sufficient description gives color of title.

Approved in *Owsley v. Matson*, 156 Cal. 403, 104 Pac. 984, deed and decree of distribution held to give color of title to one entering thereunder; *Nemo v. Farrington*, 7 Cal. App. 450, 94 Pac. 877, subsequent deed from grantor to plaintiff held admissible to show color of title in support of claim of adverse possession as against defendant, who held under earlier deed; *Knight v. Cohen*, 7 Cal. App. 48, 93 Pac. 399, deed from one supposed to be owner of easement, title to which was in trustee, held to give color of title; *Greenleaf v. Bartlett*, 146 N. C. 501, 60 S. E. 422, 14 L. R. A. (n.s.) 660, tax deed held color of title.

Invalid Tax Deed as Color of Title within general statutes of limitations. See note, 11 L. R. A. (n.s.) 785.

Color of Title. See note, 88 Am. St. Rep. 712, 727.

77 Cal. 494-507, 20 Pac. 56, PEOPLE v. IRWIN.

Declaration of Deceased to Third Persons before homicide as to his fears of murder are inadmissible.

Approved in *People v. Driggs*, 12 Cal. App. 246, 108 Pac. 64, declarations as to mental state toward accused of deceased owner of land, in whose name lease was forged, made outside presence of accused, held inadmissible in trial for forgery.

No Declarations Except Those Made During pendency of conspiracy and in furtherance of its objects can be used against co-conspirator.

Approved in *Del Campo v. Camarillo*, 154 Cal. 653, 98 Pac. 1053, following rule; *People v. Smith*, 151 Cal. 625, 91 Pac. 513, declaration of co-conspirator made while fleeing from scene of killing held inadmissible; *People v. Sidelinger*, 9 Cal. App. 300, 99 Pac. 391, declaration of co-conspirator made after killing held inadmissible.

Distinguished in *People v. Brady* (Cal.), 36 Pac. 950, where defendant, before witnesses, by arrangement with partner in crime, agreed witness should accompany partner, who should tell witness where stolen property was, and that witness should get it, and give it to partner, statements made to witness by such partner, in defendant's absence, as to location of property held admissible.

Limited in *People v. Ayhens*, 16 Cal. App. 622, 117 Pac. 790, in prosecution for burglary committed by accused and another, testimony of policeman as to what other said in presence of accused is inadmissible.

Evidence of Scrap of Conversation overheard between defendant and alleged conspirator not shown to refer to accusation is inadmissible.

Approved in *People v. Luis*, 158 Cal. 193, 110 Pac. 583, mere scrap of conversation in nature of confession or occasional words understood by one not understanding language of confession held inadmissible.

Court Should Instruct Jury that it cannot presume testimony of alleged conspirators, who refuse to testify, would, if given, be against defendant.

Reaffirmed in *People v. Glass*, 158 Cal. 689, 112 Pac. 291.

Reading of Newspaper Reports as to evidence respecting homicide, and forming opinion thereon, does not of itself disqualify juror.

Reaffirmed in *People v. Ruef*, 14 Cal. App. 594, 114 Pac. 61.

77 Cal. 507-511, 20 Pac. 61, McBLAIN v. McBLAIN.

Default Judgment in Divorce may be set aside where showing of service of summons outside state is doubtful.

Approved in *Hanson v. Hanson* (Cal.), 20 Pac. 737, setting aside default judgment in divorce on ground of lack of service of summons; *Pringle v. Pringle*, 55 Wash. 97, 104 Pac. 137, setting aside default judgment in divorce procured by fraud.

77 Cal. 511-518, 19 Pac. 875, SAN DIEGO v. GRANNISS.

All Parts of Statute Should be Considered together, keeping in view subject matter of legislation, to ascertain legislative intent.

Approved in *State v. Kelley*, 71 Kan. 814, 81 Pac. 451, 70 L. R. A. 450, and *Cooper v. Island Realty Co.*, 16 Haw. 99, both following rule; *People v. Nye*, 9 Cal. App. 164, 98 Pac. 246, applying rule to determine meaning of Constitution as to beginning of controller's term.

One Clause of Contract or Statute apparently conclusive as to particular thing may be enlarged or limited by other provisions of instrument on same subject.

Approved in *Dollar v. International Banking Corp.*, 10 Cal. App. 87, 101 Pac. 35, "not transferable" on deposit receipt held to import merely commercial non-negotiability, and not to render it non-assignable, under circumstances surrounding its execution; *Brookings County v. Murphy*, 23 S. D. 321, 121 N. W. 797, applying rule in construing act fixing salaries of county auditors.

77 Cal. 518-525, 19 Pac. 827, SAN BENITO COUNTY v. SOUTHERN PACIFIC R. R. CO.

Corporate Capacity is a Franchise.

Approved in *San Joaquin etc. Irr. Co. v. Merced Co.*, 2 Cal. App. 599, 84 Pac. 288, right to collect rates for water distributed is franchise independent of creative or corporate franchise.

Taxation of Corporate Franchises. See notes, 131 Am. St. Rep. 881; 57 L. R. A. 56.

Corporate Taxation and the Commerce Clause. See note, 60 L. R. A. 685.

Constitutional Equality in Relation to corporate taxation. See note, 60 L. R. A. 331.

Miscellaneous.—Cited in *People v. Southern Pac. R. Co.* (Cal.), 19 Pac. 830, companion case.

77 Cal. 529-533, 20 Pac. 73, PEOPLE v. MAHONEY.

Consent of Defendant in Murder Case to taking to jury-room of clothing worn by deceased identified but not in evidence waives objections thereto.

Approved in *Higgins v. Los Angeles Gas etc. Co.*, 159 Cal. 659, 115 Pac. 316, upholding conviction on verdict rendered although court failed to instruct jury as to use of experiment they might make with exhibit, when it appeared no injury could have resulted to defendant.

Objection to Question Calling for Opinion of medical expert, on ground no foundation was laid, will not support objection to opinion as given by witness on ground it was incompetent.

Approved in *People v. James*, 5 Cal. App. 430, 90 Pac. 562, objection to form of hypothetical question as involving conclusion, not urged

at trial, is waived, and general objection that question was hypothetical question not warranted by law raises no issue.

77 Cal. 534-541, 20 Pac. 62, TAYLOR v. WESTON.

Assignee of Holder of Certificate of purchase of public land, who acquires mere equity, is not protected by rule as to bona fide purchaser.

Approved in *Mills v. Rossiter Eureka etc. Mfg. Co.*, 156 Cal. 169, 103 Pac. 897, reaffirming rule; *Kleinsorge v. Burgbacher*, 6 Cal. App. 352, 92 Pac. 202, assignee of certificate of purchase which conferred no right on holder by reason of his false statements acquired no right, legal or equitable; *De Laittre v. Board of Commrs.*, 149 Fed. 809, assignee of state school land certificate who was innocent of fraud held to take certificate tainted with fraud of assignor.

In Action upon Reference from Land Office to determine right to purchase, certificate of purchase does not bar inquiry as to rights of purchaser.

Approved in *Boggs v. Ganeard*, 148 Cal. 717, 84 Pac. 198, fully paid certificate of purchase of swamp land held not to bar inquiry into rights of purchaser; *Miller v. Engle*, 3 Cal. App. 331, 332, 85 Pac. 161, fully paid certificate of purchase of state timber land held not to bar contest by subsequent applicant to purchase.

77 Cal. 541-543, 18 Pac. 113, 20 Pac. 73, COUNTY OF MONTEREY v. ABBOTT.

When License is Required for Conduct of business, failure to take out license does not make defendant liable for license fee in action of debt.

Reaffirmed in *Territory v. Kenney*, 11 Ariz. 358, 95 Pac. 94.

77 Cal. 548-555, 20 Pac. 77, COLEMAN v. COMMINS.

Illegality of Usury is Wholly a creature of legislation.

Approved in *Thomas v. Clarkson*, 125 Ga. 79, 54 S. E. 81, 6 L. R. A. (n. s.) 658, note held not to be usurious in absence of showing as to law of state where made.

Miscellaneous.—Cited in *Coleman v. Commins* (Cal.), 20 Pac. 80, on another appeal.

77 Cal. 555-560, 19 Pac. 817, KERNS v. DEAN.

Possession Taken Under Contract of purchase cannot be adverse as against vendor, unless its hostility has been manifested by unequivocal acts, brought expressly or by legal implication to vendor's knowledge.

Distinguished in *Fountain v. Lewiston Nat. Bk.*, 11 Idaho, 467, 83 Pac. 509, possession by bank of premises subject to overdue mortgage, under warranty deed from mortgagor, held to be adverse.

When Administrator Defendant is Removed pending appeal, his successor has right to prosecute appeal.

Approved in *Estate of McPhee*, 154 Cal. 392, 97 Pac. 881, administrator may appeal after his removal from order settling his account.

When Vendor may Recover Possession from vendee. See note, 107 Am. St. Rep. 731.

Admissibility in Evidence of Books of Account. See notes, 138 Am. St. Rep. 469; 52 L. R. A. 595.

What Provable by Books of Account. See note, 52 L. R. A. 720.

77 Cal. 570-571, 20 Pac. 92, PEOPLE v. MCGREW.

In Prosecution for False Imprisonment, prosecution must prove imprisonment, which done, law presumes it unlawful, and burden is on defendant to prove it lawful.

Reaffirmed in *Neves v. Costa*, 5 Cal. App. 121, 89 Pac. 864.

Burden of Proof as to Authority for arrest in action for false imprisonment. See note, 10 L. R. A. (n. s.) 304.

77 Cal. 572-574, 11 Am. St. Rep. 307, 20 Pac. 129, BEDELL v. HERRING.

Signing Note Voluntarily by One who cannot read or write English, under false representations as to contents, binds maker on note in hands of bona fide holder.

Approved in *First Nat. Bank v. Trogritz*, 14 Cal. App. 180, 111 Pac. 403, signing negotiable instrument in blank renders maker liable to holder in good faith for value; *First State Bank of Pleasant Dale v. Borchers*, 83 Neb. 534, 120 N. W. 143, and *First Nat. Bank v. Hall*, 129 Mo. App. 293, 108 S. W. 634, both holding maker of note, who signed carelessly and ignorantly, upon fraudulent inducement, liable to bona fide holder; *Lassas v. McCarty*, 47 Or. 483, 484, 84 Pac. 79, 80, innocent purchaser of note, invalid as between original parties, for less than face, could enforce it for full amount against maker.

Fraud in Obtaining Execution of Note as defense against bona fide holder. See note, 36 L. R. A. 438.

77 Cal. 579-588, 20 Pac. 136, SILVAREE v. HANSEN.

Title may be Established by Adverse possession though commenced under mistake.

Reaffirmed in *Steckter v. Ewing*, 6 Cal. App. 767, 93 Pac. 289.

Cross-examination of Witness is Largely in discretion of trial court.

Approved in *Estate of Higgins*, 156 Cal. 264, 104 Pac. 9, where witness in will contest had given opinion that testator was of sound mind, he could be asked whether he would have put management of large fund into hands of such man as testator.

Admission of Erroneous Evidence is harmless when there is abundance of other evidence, without substantial conflict to establish fact found.

Approved in *Love v. Anchor Raisin Vineyard Co. (Cal.)*, 45 Pac. 1046, *Spotswood v. Spotswood*, 4 Cal. App. 717, 89 Pac. 364, and *Bacon v. Kearney Vineyard Syndicate*, 1 Cal. App. 278, 82 Pac. 85, all following rule; *Union Transportation Co. v. Bassett (Cal.)*, 46 Pac. 911, refusing to reverse judgment because of admission of harmless hearsay.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 687.

Effect of Compromise Locating Division Line at place known not to be true boundary. See note, 10 L. R. A. (n. s.) 612.

77 Cal. 588-592, 20 Pac. 132, HUNT v. ELLIOTT.

Averaged Verdict When Freely Adopted after average was ascertained upheld.

Approved in *Pence v. Cal. Min. Co.*, 27 Utah, 385, 75 Pac. 936, and *State v. Cowell*, 125 Mo. App. 355, 102 S. W. 575, both following

rule; *Dixon v. Pluns* (Cal.), 31 Pac. 932, setting aside averaged verdict when it was agreed beforehand to reach verdict by averaging.

77 Cal. 596-601, 20 Pac. 134, **WILSON v. MORIARTY.**

In Action by Lessor to Rescind Lease obtained by fraud, complaint need not allege return of rents paid under lease, although lessee had made improvements under lease.

Approved in *Walling v. Thomas*, 133 Ala. 431, 31 So. 983, bill to avoid conveyance need not allege return of price paid when it was less than rental value for time premises were occupied by vendee; *Arnold v. Fraser*, 43 Mont. 547, 117 Pac. 1066, complaint by vendor to cancel contract of sale for vendee's default need not allege tender of price paid, when vendee occupied premises and rental value was greater than price paid.

77 Cal. 609-612, 20 Pac. 88, **WATSON v. SUTRO.**

Notice of Appeal from Order Denying new trial need only be served upon parties to motion in court below.

Approved in *O'Rourke v. Finch*, 8 Cal. App. 265, 96 Pac. 785, *Niles v. Gonzalez*, 155 Cal. 360, 100 Pac. 1080, and *Niles v. Gonzalez*, 152 Cal. 95, 92 Pac. 76, all following rule.

77 Cal. 612-618, 20 Pac. 142, **BANK OF NAPA v. GODFREY.**

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 745.

77 Cal. 618-635, 19 Pac. 865, 20 Pac. 129, **PEOPLE v. NORTHEY.**

Juror Accepting Bribe may Testify as to conversations with third persons to illustrate his conduct to show he was not accomplice of person giving bribe.

Approved in *People v. Emmons*, 7 Cal. App. 691, 95 Pac. 1035, declarations of co-conspirator made to feigned accomplices in absence of defendant held admissible on question whether witnesses were real or feigned accomplices and to trace money received as bribe; *People v. Bunkers*, 2 Cal. App. 207, 209, 84 Pac. 369, 370, conversations with accomplice connected with bribery of defendant admitted to trace money used as bribe from source to destination and to show witnesses were not accomplices.

Bribery and Solicitation of Bribe. See note, 116 Am. St. Rep. 39.

Notes of Shorthand Reporter of Testimony given orally upon trial and read to grand jury by reporter are not deposition, and reporter's name need not be indorsed on indictment as witness.

Approved in *People v. Gee Gong*, 15 Cal. App. 31, 114 Pac. 78, interpreter before grand jury not witness whose name must be indorsed on indictment.

Witnesses Sworn Before Grand Jury cannot invoke rule of secrecy, and grand juror may testify that a person was called, sworn and examined before grand jury.

Approved in *United States v. Kimball*, 117 Fed. 161, admissions of witness before federal grand jury, made after being informed of his rights, held competent evidence against him; *State v. Campbell*, 73 Kan. 713, 85 Pac. 793, 9 L. R. A. (n. s.) 533, holding grand juror could testify as to statements made by witness before jury when in furtherance of justice; *State v. McPherson*, 114 Iowa, 500, 87 N. W.

424, for purpose of impeachment, clerk of grand jury may be called on to testify as to testimony of witness before grand jury; *Wisdom v. State*, 42 Tex. Cr. 582, 61 S. W. 927, admissions of accused made before grand jury, after warning as to effect, held admissible at trial.

Stenographer's Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 366.

Competency of Evidence Before Grand Jury. See note, 28 L. R. A. 318.

Admissibility of Statements or Confessions made by accused before grand jury. See note, 9 L. R. A. (n. s.) 533.

When Evidence is Offered for special purpose, party who desires its effect so limited must ask for instruction to that effect.

Approved in *People v. Bruggy* (Cal.), 26 Pac. 757, where instruction as to degrees of murder was not misleading, defendant desiring further instructions thereon held bound to ask for them.

Points Waived upon Argument, Either Tacitly or expressly, will not be considered on rehearing.

Approved in *Kramm v. Stockton Electric R. R. Co.*, 3 Cal. App. 616, 86 Pac. 904, and *Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 271, 82 Pac. 87, both following rule.

77 Cal. 638-642, 11 Am. St. Rep. 327, 20 Pac. 294, **SHAKESPEAR v. SMITH**.

In Action by Taxpayer to Cancel Order for requisition and restrain school superintendent from drawing requisition on county auditor, parties interested in order and superintendent may be joined as defendants.

Approved in *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 605, 117 Pac. 770, incorporated association which was to pack, advertise and sell raisins of growers and which had entered into separate contracts with two thousand eight hundred growers, may join all growers as defendants in action for accounting.

77 Cal. 642-646, 20 Pac. 150, **ESTATE OF WALKERLY**.

Fact That Will Makes Ample Provision for widow does not prevent court from setting apart family allowance until dispositions of will become available for use.

Approved in *In re Estate of Leavitt*, 85 Neb. 526, 124 N. W. 116, reaffirming rule; *Estate of Bump*, 152 Cal. 278, 92 Pac. 644, provisions of will held not to deprive wife of right to family allowance; *Estate of Hessler*, 2 Cof. Prob. 357, 359, 360, setting aside homestead and making allowance to widow though she would receive three-fourths of estate upon distribution.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 78 CALIFORNIA.

78 Cal. 4-9, 20 Pac. 152, DAVIDSON v. CUCAMONGA FRUIT ETC. CO.

Applicant for Purchase of State Lands must not only state requisite facts in affidavit, but facts must be true.

Approved in *Waters v. Pool*, 149 Cal. 800, 87 Pac. 620, unintentional untruthfulness in affidavit held not to avoid sale.

78 Cal. 9-14, 20 Pac. 245, HOPE v. BARNETT.

User of Highway Without Objection of owner for five years constitutes dedication.

Disapproved in *Hartley v. Vermillion* (Cal.), 70 Pac. 273, user for fifteen years held not to show dedication.

78 Cal. 15-30, 20 Pac. 28, COMPTOIR D'ESTOMPTE v. DRESBACH.

Check Given for Debt does not Extinguish it unless so agreed.

Approved in *Herron v. Mawby*, 5 Cal. App. 42, 89 Pac. 873, following rule; *Conde v. Dreisam Gold Min. Co.*, 3 Cal. App. 588, 86 Pac. 828, draft held to be accepted in satisfaction of debt; *Menzel v. Primm*, 6 Cal. App. 211, 91 Pac. 757, note given for debt held given to secure extension of time only; *A. Leschen & Sons Rope Co. v. Mayflower etc. Co.*, 173 Fed. 858, 97 C. C. A. 465, note accepted in pursuance of agreement held not to be absolute payment; *Baumgardner v. Henry*, 131 Mich. 245, 91 N. W. 171, mailing of check for goods held not to be payment; dissenting opinion in *Stuart v. Hauser*, 9 Idaho, 79, 72 Pac. 728, majority deciding case on other grounds.

Receipt for Payment in Full is explainable by parol testimony.

Approved in *Jersey Island Dredging Co. v. Whitney*, 149 Cal. 275, 86 Pac. 510, and *San Pedro Lumber Co. v. Schroeter*, 156 Cal. 161, 103 Pac. 889, both admitting parol evidence to show receipt in full was not intended to include particular demand.

78 Cal. 31-34, 20 Pac. 154, HARNETT v. CENTRAL PACIFIC R. R. CO.

Specification of Particulars in which evidence was claimed insufficient to support verdict held sufficient.

Approved in *Gillies v. Clark Fork Coal Min. Co.*, 32 Mont. 327, 80 Pac. 373, specifications of error occurring at trial held sufficient.

Miscellaneous.—Miscited in *People v. Hemple*, 4 Cal. App. 125, 87 Pac. 229.

78 Cal. 41-49, 20 Pac. 359, **PEOPLE v. O'BRIEN.**

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 688, 707.

Cumulative Evidence as Ground for new trial. See note, 14 L. R. A. 609.

78 Cal. 49-58, 20 Pac. 41, **McDONALD v. SUPREME COUNCIL ETC. CHOSEN FRIENDS.**

Acceptance by Mutual Benefit Association of assessments after knowledge of forfeiture for nonpayment is waiver of forfeiture.

Approved in *Modern Woodmen v. Breckenridge*, 75 Kan. 379, 89 Pac. 663, and *United Order of the Golden Cross v. Hooser*, 160 Ala. 346, 49 So. 359, both following rule; *Modern Woodmen v. Lawson*, 110 Va. 87, 135 Am. St. Rep. 927, 65 S. E. 511, mutual benefit society held bound by knowledge of agents as to habits of insured when falsely stated with their connivance in application.

Waiver by Officers of Subordinate Lodge of forfeiture for nonpayment of assessments. See note, 4 L. R. A. (n. s.) 424.

78 Cal. 58-63, 20 Pac. 248, **MORGAN v. LONES.**

Property Acquired During Marriage is presumed to be community.

Approved in *Estate of Schade*, 4 Cal. Prob. 442, following rule; *Mitchell v. Moses*, 16 Cal. App. 598, 117 Pac. 687, husband suing to quiet title to community property, title to which had been taken in wife's name, need not plead facts on which his title rests; *Estate of Pepper*, 158 Cal. 622, 112 Pac. 64, evidence to show personal property acquired by either spouse after marriage is separate property must be clear and convincing; *Nilson v. Sarment*, 153 Cal. 527, 126 Am. St. Rep. 91, 96 Pac. 316, where deed was taken in wife's name prior to amendment of 1889 to section 164, Civil Code, property presumed to be community; *Bekins v. Dieterle*, 5 Cal. App. 692, 91 Pac. 174, presumption arising under amendment of 1889 to Civil Code, section 164, held not conclusive; *State v. Langan*, 32 Nev. 181, 105 Pac. 570, when husband was in possession of property at death it is presumed to be community.

What is Community Property. See notes, 126 Am. St. Rep. 116; 4 Cal. Prob. 58.

Real Property Granted by Government to citizen as separate or community property. See notes, 96 Am. St. Rep. 921; 26 L. R. A. (n. s.) 1118.

78 Cal. 63-80, 20 Pac. 372, 3 L. R. A. 83, **SAN DIEGO LAND ETC. CO. v. NEALE.**

Where Issues are Separable, Party may move for new trial as to part of them, leaving findings stand as to others.

Approved in *Robinson v. Muir*, 151 Cal. 125, 90 Pac. 524, ordering new trial, so far as necessary, to correct error in findings on certain issues.

Value of Land in Condemnation Suit is actual market value, and not value of use to owner.

Approved in *Central Pacific Ry. Co. v. Feldman*, 152 Cal. 309, 92 Pac. 852, *Sacramento etc. R. R. Co. v. Heilbron*, 156 Cal. 410, 411, 104 Pac. 980, 981, and *Hollister v. State*, 9 Idaho, 16, 71 Pac. 543, all following rule; *Guyandot Valley Ry. Co. v. Buskirk*, 57 W. Va. 426, 428, 110 Am. St. Rep. 785, 50 S. E. 525, market value in condemnation suit held to be price for which land could be sold in market by one desiring to sell to one desiring to buy, both freely exercising judgment and prudence.

Criticised in *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 538, 28 Pac. 684, in suit to condemn land for reservoir site, value of land for reservoir purposes is admissible.

Enhancement in Value of Adjacent Lands by reason of proposed improvement cannot be considered in fixing value in condemnation suits.

Approved in *Ranck v. Cedar Rapids*, 134 Iowa, 573, 111 N. W. 1031, following rule; *In re East Galer Street*, 47 Wash. 605, 92 Pac. 423, market value of narrow strip between street and adjacent lots held to be what prudent owner might expect to realize from strip from adjoining owners.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 298.

Evidence of Special Value of property taken for public use. See note, 124 Am. St. Rep. 537.

Right to Consider Value as Part of a natural water-power, in fixing compensation on condemnation. See note, 3 L. R. A. (n. s.) 913.

Special Value of Property for Purpose as element of compensation on condemnation. See note, 11 L. R. A. (n. s.) 996.

Miscellaneous.—Cited in *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 687, 87 Pac. 34.

78 Cal. 84-94, 20 Pac. 36, **PEOPLE v. ROZELLE.**

Accessory Before Fact must be Prosecuted, tried, and punished as principal.

Approved in *Rosencranz v. United States*, 155 Fed. 42, 83 C. C. A. 634, following rule; *People v. Lewis*, 9 Cal. App. 281, 98 Pac. 1079, accessory before act held properly charged as principal.

Under Section 1323, Penal Code, Defendant, who denied commission of offense, may be cross-examined as to whether letter which tends to contradict denial was in his handwriting.

Approved in *People v. Maughs*, 8 Cal. App. 117, 96 Pac. 412, when defendant testified only as to self-defense, cross-examination could cover all circumstances leading up to and connected with the homicide; *People v. Schmitz*, 7 Cal. App. 359, 94 Pac. 415, cross-examination of defendant as to receipt of money from codefendant, concerning which he had not testified in chief, held improper; *People v. Gallagher (Cal.)*, 33 Pac. 893, where defendant merely denied he had advised another to draw money from bank for purpose of embezzling it, and denied knowledge of other's intention to do so, he could not be cross-examined as to facts occurring after money was drawn.

Cross-examination of Defendant in criminal cases. See note, 15 L. R. A. 669.

Recital of Material Matter in Judgment of conviction in record imports absolute verity.

Approved in *State v. Pearce*, 19 S. D. 78, 102 N. W. 223, reaffirming rule; *Wood v. State*, 4 Okl. Cr. 454, 112 Pac. 19, record showing accused was present in court held to import verity.

78 Cal. 99-107, 12 Am. St. Rep. 22, 20 Pac. 241, **MOYLE v. LANDERS.**

Necessity of Serving Notice of Appeal upon respondent, who is adverse party, is not obviated by his death.

Approved in *Bell v. San Francisco Savings Union*, 153 Cal. 69, 70, 94 Pac. 227, representative of deceased adverse party must be served with notice of appeal.

Appeal will not be Dismissed for Failure to serve representative of deceased adverse party, when his death is concealed, and representatives retain same attorney, who accepts service.

Distinguished in *Deiter v. Kiser*, 158 Cal. 263, 110 Pac. 922, respondents not estopped to move to dismiss appeals taken in name of deceased by his unauthorized attorneys, merely because they took part in proceedings for new trial and accepted service of notices of appeal, their action not misleading opposing counsel.

It may Properly be Questioned whether exprese stipulation of parties, waiving steps necessary to perfect appeal, should not be binding on them and confer jurisdiction.

Approved in *Newman v. Maldonado (Cal.)*, 30 Pac. 835, refusing to dismiss appeal on ground written waiver of bond was not filed until sixth day after notice of appeal was served.

Effect on Contract of Death of Party. See note, 23 L. R. A. 711.

78 Cal. 109-113, 20 Pac. 367, **ESTATE OF OXARART.**

Question of Heirship may be Determined on hearing of petition for distribution of estate.

Distinguished in *In re Fleming's Estate*, 38 Mont. 60, 98 Pac. 649, question can only be determined under sections 7670-7672, Revised Codes.

78 Cal. 113-116, 20 Pac. 296, **DALE v. PURVIS.**

Appellant Should Point Out in what respect instruction is erroneous and not assail instruction as a whole.

Reaffirmed in *Elsom v. Moore*, 11 Cal. App. 382, 105 Pac. 273.

78 Cal. 116-117, 20 Pac. 131, **REESE v. THORBURN.**

In Contest of Right to Purchase state lands, each party must plead all facts on which he relies to show right to become purchaser.

Approved in *Moran v. Bonyng*, 157 Cal. 297, 299, 107 Pac. 314, complaint by intervener held insufficient in not averring his assignor was citizen of United States.

Miscellaneous.—Cited in *Derevan v. MacClean (Cal.)*, 20 Pac. 131, and *O'Brien v. Newman (Cal.)*, 20 Pac. 132, both companion cases.

78 Cal. 118-126, 20 Pac. 297, **SILCOX v. LANG.**

Demurrer to Answer will be Deemed Waived when trial is had without ruling thereon and plaintiff calls for no ruling.

Approved in *Diamond Coal Co. v. Cook (Cal.)*, 61 Pac. 578, demurrer to complaint held waived when answer was filed without calling for ruling thereon.

78 Cal. 126-135, 12 Am. St. Rep. 29, 20 Pac. 382, LAWRENCE v. GAYETTY.

Executed Conveyance cannot be Set Aside for mere failure of consideration owing to vendee's nonperformance of agreement made at time of its execution as consideration of the conveyance in absence of fraud.

Approved in *Shaw v. Caldwell*, 16 Cal. App. 6, 115 Pac. 943, where conveyance of interest in mine granted and sold undivided half interest for one dollar and required grantee to do assessment work, subsequent provision that grantor could work mine at own expense, sharing proceeds with grantor, was not condition subsequent.

Conveyance of Land Executed in Reliance upon future promise to pay consideration cannot be rescinded where vendor waives actual performance as condition to vesting title.

Approved in *Schultz v. McLean* (Cal.), 25 Pac. 429, following rule; *Albert v. Albert*, 12 Cal. App. 273, 107 Pac. 159, rescission held not to apply to fully executed assignment of certificate of purchase; *Downing v. Rademacher* (Cal.), 62 Pac. 1057, 1058, conveyance of interest in mining claim in consideration of agreement to work mine and give share to grantor could not be canceled for grantee's failure to perform; *Culbertson v. Young*, 86 Mo. App. 282, failure on part of promisor as to representation of future intention held not to afford ground to promisee for avoiding contract.

Cancellation of Instrument Fraudulently Procured. See note, 137 Am. St. Rep. 280.

Future Promise as Fraud. See note, 10 L. R. A. (n. s.) 642, 646.

Expression of Opinion as Fraud. See note, 35 L. R. A. 434.

78 Cal. 144-148, 20 Pac. 302, PEARSON v. CREED.

Intervention. See note, 123 Am. St. Rep. 292.

78 Cal. 154-158, 20 Pac. 369, PEOPLE v. HUSON.

Sureties on Official Bond of Wharfinger which recites appointment by state harbor commissioners are estopped to deny such appointment.

Approved in *Hoffman v. Fleming*, 66 Ohio St. 163, 64 N. E. 67, sureties on executor's bond reciting his appointment by court estopped to deny such appointment.

Failure of Proper Officers to Approve official bond will not invalidate it.

Reaffirmed in *Deer Lodge Co. v. United States Fidelity & G. Co.*, 42 Mont. 328, 112 Pac. 1064.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 190.

78 Cal. 166-168, 20 Pac. 399, 400, 2 L. R. A. 841, MERRILL LODGE v. ELLISWORTH.

Order of Association, to Which Officers and members of corporation belong, declaring corporation suspended, and directing delivery of its property, has no effect upon existence or rights of corporation.

Approved in *Grand Lodge etc. of Connecticut v. Grand Lodge etc. of Mass.*, 81 Conn. 209, 70 Atl. 625, holding grand lodge in dividing territory over which subordinate jurisdiction had been committed could not deprive separated members of property theirs in equity.

78 Cal. 169-175, 20 Pac. 396, PEOPLE v. FONG OHING.

Instruction Which was in Effect upon Weight of evidence held erroneous.

Approved in *People v. Olsen*, 1 Cal. App. 19, 81 Pac. 676, remark of judge to juror upon his voir dire as to circumstantial evidence held harmless; *State v. Marren*, 17 Idaho, 788, 107 Pac. 1000, instruction in regard to circumstantial evidence held argumentative and on weight of evidence.

Evidence of Details of Crime Committed by third person cannot be introduced on trial of defendant accused of bribing witness to testify for such third person.

Approved in *People v. Davenport*, 13 Cal. App. 640, 110 Pac. 321, details of collateral and distinct offense not admissible to prejudice of defendant.

Defendant Testifying in Chief About Birth, parentage, education, and business, may be asked, on cross-examination, whether he had ever been arrested before.

Approved in *People v. Gallagher* (Cal.), 33 Pac. 893, defendant who merely denied he had advised another to draw funds from bank to embezzle them, and denied knowledge of his intention to do so, could not be cross-examined as to facts occurring after such withdrawal; *People v. McSweeney* (Cal.), 38 Pac. 743, witness who had not testified as to defendant's reputation on direct examination, and testified on cross his knowledge was insufficient to testify on, could not be further examined on that matter on redirect examination.

Cross-examination of Defendant in criminal cases. See note, 15 L. R. A. 669.

Evidence of Good Character to Create doubt of guilt. See notes, 103 Am. St. Rep. 896, 897; 20 L. R. A. 615.

Immaterial Testimony as Basis for charge of subornation of perjury. See note, 25 L. R. A. (n. s.) 121.

78 Cal. 175-180, 12 Am. St. Rep. 37, 20 Pac. 406, SIMPSON v. McCARTY.

Affidavit for Attachment Made by Business Agent of plaintiff, if facts are stated positively, is sufficient.

Approved in *Mayer Co. v. Ferguson*, 17 N. D. 104, 114 N. W. 1092, 14 L. R. A. (n. s.) 1126, upholding attachment based on affidavit made by plaintiff's attorney which stated essential facts, but did not state they were true of affiant's personal knowledge.

Necessity that Affidavit for Attachment, made by agent or attorney, show personal knowledge. See note, 14 L. R. A. (n. s.) 1127.

78 Cal. 181-192, 20 Pac. 408, COWAN v. PHENIX INS. CO.

In Complaint on Insurance Policy, it is not necessary to aver performance or truth of affirmative warranties in praesenti contained in application.

Approved in *Himmelein v. Supreme Council* (Cal.), 33 Pac. 1130, following rule; *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 235, 107 Pac. 301, plaintiff not obliged to aver waiver of condition as to existence of chattel mortgage on property insured.

Complaint on Fire Policy Which Provides for payment sixty days after proof of loss must aver such period has elapsed.

Disapproved in *Vail v. Pennsylvania Fire Ins. Co.*, 67 N. J. L. 69, 50 Atl. 673, general averment of performance of conditions precedent held sufficient.

Arbitration as Condition Precedent to action on insurance policy. See note, 15 L. R. A. (n. s.) 1060.

78 Cal. 193-201, 20 Pac. 419, GIANT POWDER CO. v. SAN DIEGO FLUME CO.

Acceptance and Occupation of Building by owner is conclusive evidence of completion under mechanic's lien law.

Distinguished in *Farnham v. California etc. Trust Co.*, 8 Cal. App. 269, 96 Pac. 790, occupation of part of building by owners before completion of work held not to start time for filing liens.

Personal Action Against Contractor may be joined with action to foreclose lien against owner.

Approved in *Merced Lumber Co. v. Bruschi*, 152 Cal. 375, 92 Pac. 846, holding erroneous, in suit on mechanic's lien, personal judgment against owner; *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 521, 97 Pac. 417, holding contractors should be joined when lien was declared invalid; *Gnekow v. Confer (Cal.)*, 48 Pac. 332, owner not personally liable to materialman under section 1183, Code of Civil Procedure.

Powder Used in Performance of Building Contract is material furnished giving right to lien.

Approved in *City Trust etc. Co. v. United States*, 147 Fed. 158, 77 C. C. A. 397, coal used by contractor for pumping engines in performing government contract held to be material furnished giving right to lien; *Sampson Co. v. Commonwealth*, 202 Mass. 335, 88 N. E. 914, gunpowder used by contractor for aqueduct for water supply in blasting trench held to be material furnished under lien law; *Barker v. Stewart Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 22, 130 N. W. 869, materials used in construction of coffer-dam held so used for permanent dam as to give lien thereon.

Lien for Explosives as Materials used in improving real property. See note, 2 L. R. A. (n. s.) 288.

78 Cal. 202-216, 20 Pac. 386, MARRINER v. DENNISON.

Incomplete Description in Contract of sale of land may be aided by parol evidence to identify tract, provided new description is not thereby introduced.

Approved in *Lange v. Waters*, 156 Cal. 145, 103 Pac. 891, reaffirming rule; *Carr v. Howell*, 154 Cal. 375, 97 Pac. 886, 887, admitting extrinsic facts to render certain description in contract to sell land; *Sanchez v. Yorba*, 8 Cal. App. 495, 97 Pac. 207, description of land in memorandum of sale as "Yorba Ranch" held sufficient; *Willmon v. Peck*, 5 Cal. App. 667, 91 Pac. 165, where description in contract was clear, parol evidence held inadmissible to show contract intended to describe lands of wholly different description; *Mendenhall v. Rose (Cal.)*, 33 Pac. 885, holding inadmissible, evidence which did not tend to remove ambiguity in letter concerning real estate as to land mentioned; *Wills v. Porter (Cal.)*, 61 Pac. 1111, where corporation paid debt due principal stockholder before maturity, in consideration

of his becoming guarantee for its note, repayment will not be enforced in absence of showing of injury to corporation or stockholders; *Sponberg v. First Nat. Bank*, 15 Idaho, 676, 99 Pac. 713, admitting oral evidence to identify property in indefinite lease.

Fraud Without Damage cannot be Made basis of an action.

Approved in *Sonnesyn v. Akin*, 14 N. D. 256, 104 N. W. 1029, and *United Real Estate etc. Co. v. Barnes*, 159 Cal. 246, 113 Pac. 169, both following rule.

78 Cal. 217-221, 12 Am. St. Rep. 41, 20 Pac. 415, 3 L. R. A. 168, **BEST v. JOHNSON.**

Acts for Which Sureties on Official Bonds are Liable. See note, 91 Am. St. Rep. 533, 545.

78 Cal. 221-225, 20 Pac. 404, **WENZEL v. SHULZ.**

Where Party is Induced to Sign Instrument by misleading him as to contents, so as to prevent examination, it is no answer to say higher degree of care on his part would have enabled him to escape effect.

Approved in *Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 638, 100 Pac. 121, suspicious circumstances, and means of knowledge by purchaser of area of land sold, held not to excuse fraud in its sale.

Distinguished in *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 413, 92 N. W. 249, applicant for insurance who received policy differing from that called for in application held bound thereby when he failed to inspect it within reasonable time.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 600.

78 Cal. 225-231, 20 Pac. 547, **SEARS v. STARBIRD.**

Where Motion to Quash Summons was denied, defendant answering to merits waives objection to defects therein.

Approved in *Smith v. Alford*, 31 Utah, 354, 88 Pac. 18, party objecting to items in cost bill could not thereafter object it was prematurely filed.

Disapproved in *Fisher v. Crowley*, 57 W. Va. 319, 50 S. E. 424, defect in summons not waived by answering to merits after denial of motion to quash, to which exception was taken.

Contest on Merits After Special Appearance, as waiver of objections to jurisdiction over person. See note 16 L. R. A. (n. s.) 180.

Power of Partner After Dissolution to interrupt statute of limitations as to firm debt. See note, 15 L. R. A. 658.

78 Cal. 235-242, 12 Am. St. Rep. 44, 20 Pac. 550, **GALE v. BEST.**

Where Power of Land Department to issue patent depends on finding that land is of certain character, issuance of patent is adjudication that land is of that character.

Approved in *Jameson v. James*, 155 Cal. 278, 100 Pac. 701, following rule; *North Dakota State Fair Assn. v. Holmes*, 17 N. D. 38, 117 N. W. 146, failure of one state fair association to act in accordance with law could not be taken advantage of by another association as ground for payment to it of appropriations.

Distinguished in *Van Ness v. Rooney*, 160 Cal. 142, 116 Pac. 396, where patent for railroad lands excludes mineral lands, it does not

pass title to railroad to land within description of patent on which, prior to its issuance, was valid quartz location.

When Tract Named in Patent has been reserved from disposal, patent is worthless and assailable from any quarter.

Approved in *Williams v. San Pedro*, 153 Cal. 47, 48, 94 Pac. 235, 236, admitting evidence aliunde, in action to quiet title, to show tract had been reserved from sale and certificate of purchase was void.

Patent to Public Lands. See note, 86 Am. St. Rep. 283.

78 Cal. 247-254, 18 Pac. 133, 20 Pac. 545, DAVIS v. BUTTON.

It is Sufficient if All Instructions, taken together, not being inconsistent or confusing, give jury fair notion of law on issue.

Approved in *Nash v. Kreling* (Cal.), 56 Pac. 262, and *De Witt v. Floriston etc. Paper Co.*, 7 Cal. App. 781, 96 Pac. 400, both holding instructions construed together fairly stated law of case.

Plaintiff cannot Recover Damages for injury if his negligence contributes proximately to injury.

Approved in *Wardlaw v. California Ry. Co.* (Cal.), 42 Pac. 1076, question of contributory negligence held to be for court unless facts were undisputed; *Johnson v. Thomas* (Cal.), 43 Pac. 580, question of contributory negligence held properly left to jury.

78 Cal. 254-257, 20 Pac. 556, WEINREICH v. JOHNSTON.

In Action by Partner on Note alleged to have been executed to firm, one or plaintiffs cannot recover personal judgment on proof that note was executed to him individually.

Distinguished in *Morgan v. Righetti* (Cal.), 45 Pac. 260, under Code of Civil Procedure, section 578, where two are sued on alleged firm debt and it is found they are not partners but that debt is individual debt of one of them, judgment may be rendered against him.

78 Cal. 268-269, 20 Pac. 676, OLANTON v. RUFFNER.

Application for Change of Place of Trial on ground of convenience of witnesses is addressed to sound discretion of court.

Approved in *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 673, 86 Pac. 509, mere preponderance of number of witnesses does not determine right.

78 Cal. 273-278, 20 Pac. 566, McLENNAN v. McDONNELL.

Deed Conveying All Right, Title, and interest of grantor is not limited by further definition of what right grantor possesses.

Approved in *Dickson v. Wildman*, 183 Fed. 403, granting clause held to prevail over habendum clause as to interest conveyed; *Costello v. Graham*, 9 Ariz. 263, 80 Pac. 337, where deed purported to convey all grantor's interest, further statement that such interest was undivided half held not to limit effect of deed; *Murphy v. Murphy*, 132 N. C. 364, 43 S. W. 923, deed conveying all grantor's interest described as one-sixth held to convey also a fifth inherited by him.

Distinguished in *Smith v. Williams* (Cal.), 55 Pac. 602, grant to all grantor's water rights in stream held to convey only part above certain point referred to in deed when parties had so construed deed.

Duty of One Debtor to Exonerate the other, as ground for marshaling assets. See note, 12 L. R. A. (n. s.) 965.

78 Cal. 283-286, 20 Pac. 570, HAUSMAN v. HAUSLING.

Plaintiff's Declarations to Third Persons are inadmissible in his own favor.

Approved in *Batcheller v. Whittier*, 12 Cal. App. 267, 107 Pac. 143, declaration not part of *res gestae* made in favor of plaintiff relying upon it and not in presence of defendant held inadmissible; *Clay v. State*, 15 Wyo. 67, 86 Pac. 22, *arguendo*.

Distinguished in *Edson & Foulke Co. v. Winsell*, 160 Cal. 787, 118 Pac. 245, where defendant claimed prior right by adverse possession to water of stream, evidence that where plaintiff's servant diverted waters, defendant turned back water and told servant master must make arrangements for water, is admissible.

78 Cal. 287-289, 12 Am. St. Rep. 50, 20 Pac. 678, WOOD v. PENDOLA.

Findings of Probative Facts cannot Invalidate finding of ultimate fact unless ultimate facts are entirely based thereon.

Approved in *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 575, 87 Pac. 27, affirming judgment based on ultimate fact, when findings of probate facts were not necessarily inconsistent therewith.

78 Cal. 289-293, 12 Am. St. Rep. 53, 20 Pac. 677, SMITH v. LOS ANGELES IMMIGRATION ETC. ASSN.

Directors of Corporation Who are Directly Interested in passage of resolution are not competent to vote thereon.

Approved in *Bassett v. Fairchild* (Cal.), 61 Pac. 795, and *Ritchie v. Telephone Co.*, 22 S. D. 606, 119 N. W. 993, both following rule.

If Majority of Quorum of Corporation Directors votes for measure, it will prevail.

Approved in *Steele v. Gold Fissure etc. Min. Co.*, 42 Colo. 532, 126 Am. St. Rep. 117, 95 Pac. 351, where two of three directors of corporation were officers whose salaries were fixed by single resolution, they were both disqualified, and could not be counted to make quorum; *Smith v. State*, 64 Kan. 733, 68 Pac. 642, holding measure voted for by three members of council, three others being present and not voting, validly passed.

Validity of Contract Between Director and his corporation. See note, 139 Am. St. Rep. 614, 617.

Where Evidence on Any Point is Conflicting and lower court made no finding thereon, appellate court cannot supply one to uphold judgment.

Approved in *Rogers v. Kimball* (Cal.), 49 Pac. 722, following rule; *Loomis v. Connecticut Fire Ins. Co.*, 16 Cal. App. 546, 117 Pac. 647, *arguendo*.

78 Cal. 296-299, 20 Pac. 680, WHITTAKER v. PENDOLA.

Homestead Claimant of Public Land may recover whole premises against trespasser who has held part thereof under inclosure.

Approved in dissenting opinion in *Balsz v. Liebenow*, 4 Ariz. 234, 235, 236, 36 Pac. 211, 212, majority holding duplicate receiver's receipt issued to one making homestead filing does not entitle holder to maintain ejectment, though filing was after land office contest in which he was given right to enter; dissenting opinion in *Tonopah & Goldfield R. R. Co. v. Fellanbaum*, 32 Nev. 302, 107 Pac. 890, majority holding void patent issued for forest reserve scrip covering land occupied by settler.

Distinguished in *Gragg v. Cooper*, 150 Cal. 586, 89 Pac. 346, when whole of tract claimed by homesteader was inclosed by previous settler, it was not subject to homestead entry.

78 Cal. 300-301, 20 Pac. 863, **ESTATE OF SACKETT.**

Where Order Appointing Special Administrator is not before appellate court, it cannot consider disallowance by superior court of claim paid by him.

Distinguished in *McNeil v. Morgan*, 157 Cal. 380, 108 Pac. 71, appointment of special administrator complete when order was signed.

78 Cal. 301-303, 20 Pac. 682, **BANK OF SANTA CRUZ v. BARTLETT.**

County Warrant Does not have Qualities of negotiable paper, and assignee stands in shoes of original holder.

Approved in *First Nat. Bank of Arkansas v. Gates*, 66 Kan. 507, 97 Am. St. Rep. 383, 72 Pac. 208, purchase in good faith of county warrant from one without authority to sell held to convey no title.

Liabilities of Counties for Torts and negligence. See note, 39 L. R. A. 35.

78 Cal. 304-307, 20 Pac. 683, **EX PARTE ARRAS.**

Judgment Imposing Imprisonment in state prison for purpose of collecting fine is void.

Approved in *In re Sullivan*, 3 Cal. App. 194, 84 Pac. 781, judgment of imprisonment in state prison as alternative of fine imposed on conviction for misdemeanor held void.

Court has No Jurisdiction to Impose hard labor as part of punishment for misdemeanor.

Distinguished in *People v. McNulty* (Cal.), 28 Pac. 820, upholding amendment of 1891 to Penal Code sections relating to place of execution of death sentence.

Cruel and Unusual Punishments. See note, 35 L. R. A. 567, 568.

Right to Compel Prisoners to Labor. See note, 27 L. R. A. 599.

78 Cal. 307-310, 12 Am. St. Rep. 50, 20 Pac. 674, **IN RE TYLOR.**

Disbarment or Suspension of Attorney for withholding client's money or property. See note, 19 L. R. A. (n. s.) 414.

78 Cal. 310-317, 12 Am. St. Rep. 58, 20 Pac. 715, 3 L. R. A. 781, **BURKETT v. BURKETT.**

Effect of Declaration of Homestead is to create joint title in property to extent of homestead.

Reaffirmed in *Rosenberg Bros. & Co. v. Ross*, 6 Cal. App. 759, 93 Pac. 285, and *Cordano v. Wright*, 159 Cal. 619, 115 Pac. 231.

Husband can Convey to Wife separate real estate, upon which he has declared homestead, by deed executed by himself alone.

Approved in *Luhre v. Hancock*, 6 Ariz. 344, 57 Pac. 606, and *Beedy v. Finney*, 118 Iowa, 280, 91 N. W. 1070, both following rule; *Loomis v. Loomis*, 148 Cal. 152, 82 Pac. 680, 1 L. R. A. (n. s.) 312, wife's right of survivorship in homestead not affected by its conveyance to her by husband on condition it should go to his brother when she was through with it; *Pryal v. Pryal* (Cal.), 71 Pac. 803, deed to

wife by husband alone of homestead selected from community conveys title subject to homestead, which was not destroyed by wife's deed to third party; *Wright v. Wright* (Cal.), 41 Pac. 696, conveyance by husband to wife of property purchased with community funds held to operate as gift to her.

Conveyance of Homestead by Husband to Wife. See note, 129 Am. St. Rep. 938.

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 379.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 924.

Effect of Divorce on Homestead Rights. See note, 23 L. R. A. 240.

What is Community Property. See notes, 126 Am. St. Rep. 107; 4 Cof. Prob. 49.

78 Cal. 317-340, 20 Pac. 719, PEOPLE v. LEE CHUCK.

Urging Admission of Incompetent Testimony and commenting thereon with evident intent to prejudice jury is error when defendant objects.

Approved in *State v. Irwin*, 9 Idaho, 44, 71 Pac. 611, 60 L. R. A. 716, reversing judgment of conviction on ground of misconduct of prosecuting attorney in asking improper prejudicial questions on cross-examination; *Leo v. State*, 63 Neb. 732, 89 N. W. 306, granting new trial because of prejudicial comments of district attorney and asking questions in regard to previous conviction of which no evidence had been offered; *State v. Williams*, 28 Nev. 414, 82 Pac. 356, conduct of prosecuting attorney in commenting upon alleged confession not introduced in evidence held not to amount to reversible error.

Distinguished in *People v. McRoberts*, 1 Cal. App. 29, 81 Pac. 736, holding it unwarranted license for district attorney to avow belief in mob law and say defendant should have been lynched, though not prejudicial when homicide was admitted, and jury were not misled.

Upon Cross-examination of Witness as to statements made by him on former trial, he has statutory right to have such statements presented to him and read, if in writing.

Approved in *People v. Dillwood* (Cal.), 39 Pac. 439, following rule; *Keane v. Pittsburg Lead Min. etc. Co.*, 17 Idaho, 189, 105 Pac. 64, witness asked if he did not make certain statements in letter held entitled to be shown letter.

Drinking of Intoxicants by Jury during deliberation on verdict is such misconduct as to warrant new trial.

Approved in *People v. Wong Loung*, 159 Cal. 528, 114 Pac. 832, granting new trial for misconduct of juror in reading newspaper article during trial prejudicial to defendant.

Misconduct of Jurors, Other Than Their Separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1039.

Instructions must be Taken Together as a whole to determine correctness.

Approved in *De Witt v. Floriston Pulp & Paper Co.*, 7 Cal. App. 781, 96 Pac. 400, instructions as whole held to fairly state law of case.

Court may Refuse to Allow Defendant in criminal case to cross-examine parties who file counter-affidavits in support of verdict, when assailed by defendant for misconduct of jury.

Approved in *Goodwin v. Blanchard*, 73 N. H. 551, 64 Atl. 23, party has no legal right to examine persons who have given affidavits in opposition to his motion to set aside verdict.

Counsel's Right to Refer in Argument to witness' refusal to testify as evidence of defendant's guilt. See note, 121 Am. St. Rep. 807.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 657, 662.

78 Cal. 345-350, 20 Pac. 731, **PEOPLE v. PRATT.**

Means by Which Prisoner is Brought within jurisdiction of court does not affect its right to try him.

Approved in *People v. Palermo Land & Water Co.*, 4 Cal. App. 722, 89 Pac. 725, right of justice to try corporation for failure to furnish water under county ordinance not affected by procedure prescribed against corporations in sections 1392 and 1397, Penal Code; *Pettibone v. Nichols*, 203 U. S. 215, 27 Sup. Ct. 111, 51 L. ed. 148, 7 Ann. Cas. 1047, federal court cannot discharge prisoner on habeas corpus although brought before state court from another state by connivance of authorities of both states without hearing; *In re Moyer*, 12 Idaho, 258, 118 Am. St. Rep. 214, 85 Pac. 900, 12 L. R. A. (n. s.) 227, conduct of governor in state in which prisoner was taken in issuing warrant in extradition cannot be inquired into by courts of demanding state.

78 Cal. 351-358, 12 Am. St. Rep. 63, 20 Pac. 874, 5 L. R. A. 713, **HABE-NICHT v. LISSAK.**

Proceedings Supplementary to Execution are intended to take place of creditor's bill.

Approved in *Phillips v. Price*, 153 Cal. 148, 94 Pac. 618, creditor's bill does not lie unless supplementary proceedings are inadequate.

Seat or Funds Derived from Transactions on exchange, as assets in bankruptcy. See note, 27 L. R. A. (n. s.) 614.

78 Cal. 360-366, 20 Pac. 740, **WRIGHT v. CALIFORNIA CENT. RY. CO.**

Place Where One Refusing to Pay Fare may be ejected. See note, 26 L. R. A. 132.

78 Cal. 374-379, 20 Pac. 743, **ONETO v. RESTANO.**

Use of Water Right Without Disputing owner's rights is not adverse.

Approved in *Dietz v. Mission Transfer Co. (Cal.)*, 25 Pac. 426, occupancy of land in conjunction with owner for purpose of exercising occupant's rights held not to be adverse.

In Suit to Determine Adverse Claim to water right, burden of showing that taxes have been assessed is on party opposing claim of possession.

Approved in *Silva v. Hawn*, 10 Cal. App. 552, 102 Pac. 955, following rule; *Spotswood v. Spotswood*, 4 Cal. App. 716, 89 Pac. 364,

admitting evidence by defendant in action to quiet title to show assessment, so court could determine whether plaintiff had paid all taxes.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 722.

78 Cal. 384-388, 20 Pac. 706, PICO v. COHN.

When Trial Court Rules Against Respondent on motion for new trial, he must cause facts in regard to notice to be included in statement on bill of exceptions, so that appellate court can determine whether proper notice was given.

Approved in *Great Western Gold Co. v. Chambers*, 153 Cal. 310, 95 Pac. 152, and *Steve v. Bonners Ferry etc. Co.*, 13 Idaho, 389, 92 Pac. 364, both following rule; *Sprigg v. Barber* (Cal.), 54 Pac. 900, notice of motion for new trial constitutes no part of statement on appeal without being referred to in statement as such.

78 Cal. 388-389, 20 Pac. 705, PEOPLE v. O'NEIL.

Failure of Verdict, "Guilty as Charged," under information for murder, to specify degree, vitiates verdict.

Approved in *People v. Bannister* (Cal.), 34 Pac. 710, failure to find degree of burglary held to render verdict insufficient and entitle accused to new trial; *McLane v. Territory*, 8 Ariz. 155, 71 Pac. 939, verdict of "guilty as charged in indictment" for grand larceny, which did not charge any degree, held insufficient; *State v. Noah*, 20 N. D. 289, 124 N. W. 1125, plea to charge of murder of "guilty as charged in indictment" held insufficient as not stating degree.

Correction of Verdict in Criminal Cases. See note, 23 L. R. A. 727.

78 Cal. 389-399, 20 Pac. 868, BAILEY v. FOX.

Party Seeking to Rescind Contract for Fraud must do so promptly upon discovery of fraud.

Approved in *Wills v. Porter* (Cal.), 61 Pac. 1111, two years' delay held to bar action.

Party Seeking to Rescind Contract for fraud must show damage.

Reaffirmed in *Sonnesyn v. Akin*, 14 N. D. 256, 104 N. W. 1029.

Party Seeking to Rescind Contract must place other party in statu quo.

Approved in *Wills v. Porter* (Cal.), 61 Pac. 1111, and *Buskirk Bros. v. Peck*, 57 W. Va. 372, 50 S. E. 437, both following rule.

78 Cal. 407-410, 21 Pac. 6, GLOSTER v. WADE.

Section 2619, Political Code, as It Stood prior to passage of amendments of 1874, providing for acquisition of highway by user, was not changed by those amendments so far as concerned counties excepted therein.

Overruled in *Sutton v. Nicolaisen* (Cal.), 44 Pac. 806, holding section 2619 repealed as to all counties by act of March 30, 1874.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 454.

78 Cal. 410-417, 20 Pac. 864, HOULT v. BALDWIN.

Evidence Improperly Admitted is entitled to no weight in arriving at conclusion as to sufficiency of evidence.

Approved in *Willmon v. Peck*, 5 Cal. App. 667, 91 Pac. 165, disregarding parol evidence admitted to supply new description for land.

78 Cal. 427-429, 21 Pac. 7, IN RE LOWENTHAL.

Charge of Misconduct Against Attorney as ground of disbarment is not subject to defense of limitation.

Approved in *In re Smith*, 73 Kan. 750, 85 Pac. 586, *In re Mosher*, 24 Okl. 64, 102 Pac. 766, and *State v. Hays*, 64 W. Va. 50, 61 S. E. 357, all following rule; *State Medical Examining Bd. v. Stewart*, 46 Wash. 84, 123 Am. St. Rep. 915, 89 Pac. 477, 11 L. R. A. (n. s.) 557, limitations held not to be defense to action to revoke physician's license on ground of dishonorable conduct.

Disbarment for Criminal Acts prior to conviction therefor. See note, 114 Am. St. Rep. 843.

Statute of Limitations. See note, 123 Am. St. Rep. 921.

78 Cal. 430-438, 12 Am. St. Rep. 69, 21 Pac. 114, MAGEE v. NORTH PACIFIC COAST R. R. CO.

In Action for Injury Caused by defendant's negligence, it is not necessary to allege injury was done without fault of plaintiff.

Approved in *Matthews v. Bull* (Cal.), 47 Pac. 774, following rule; *Wistrom v. Redick Bros.*, 6 Cal. App. 675, 92 Pac. 1049, holding it sufficient for plaintiff to show, in first instance, that injury resulted from negligence of defendant, and need not show want of contributory negligence in himself; *Williams v. Sleepy Hollow Min. Co.*, 37 Colo. 74, 86 Pac. 341, 7 L. R. A. (n. s.) 1170, employer held to have burden of proving employee knew of danger.

Right of Servant to Recover on Account of master's negligence is not affected by notice of any defects other than servant in exercise of ordinary prudence ought to know.

Approved in *Southern Railway Co. v. Howell*, 135 Ala. 649, 34 So. 10, brakeman injured by derailment of car held not bound to have observed obstruction near track, causing derailment, with reference to which he had assumed dangerous position on car; *Umsted v. Colgate Elevator Co.*, 18 N. D. 317, 122 N. W. 393, holding servant had right to rely on master for information as to risks of employment.

Whether Plaintiff had Such Knowledge of defects of machinery as would charge him with contributory negligence is question of fact for jury.

Approved in *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 683, 84 Pac. 260, applying rule to plaintiff's knowledge of defect in roof of mine.

Right of Recovery by Employees accepting extrahazardous duties. See note, 97 Am. St. Rep. 892.

Obligation of Railroad to Employees as to fencing track. See note, 25 L. R. A. 321.

78 Cal. 439-443, 21 Pac. 1, GATES v. CARQUINEZ PACKING CO.

Essentials to Valid Sale of Goods. See note, 17 L. R. A. 180.

Passing of Title to Property by Delivery to carrier for transportation to consignee or vendee. See note, 22 L. R. A. 417.

78 Cal. 443-448, 21 Pac. 2, COBURN v. BROOKS.

Demand is Unnecessary to Maintain Action against sureties on bond given for possession in condemnation proceedings.

Approved in *People's Bank v. Stewart*, 152 Mo. App. 328, 133 S. W. 74, demand held unnecessary when guaranty on overdrafts was direct promise to pay.

Necessity of Notice of Default to bind guarantor. See note, 20 L. R. A. 258.

Miscellaneous.—Cited in *Coburn v. Josselyn* (Cal.), 21 Pac. 4, companion case.

78 Cal. 449-450, 21 Pac. 15, McINTYRE v. TRAUTNER.

Attorneys' Fees in Action to Foreclose mechanic's lien are not part of costs, but are incident to foreclosure of lien.

Approved in *Peckham v. Fox*, 1 Cal. App. 308, 82 Pac. 92, upholding section 1195. Code of Civil Procedure, allowing attorney's fees on foreclosure of mechanic's lien, and making them lien on property; *Thompson v. Wise Boy etc. Co.*, 9 Idaho, 370, 74 Pac. 961, and *Genest v. Las Vegas etc. Assn.*, 11 N. M. 271, 67 Pac. 748, both upholding act providing for attorney's fee in mechanic's lien suit; *Shaw v. Johnston*, 17 Idaho, 685, 107 Pac. 402, attorneys' fees allowed in lien proceeding are lien on property; *Pittsburgh etc. Ry. Co. v. Taber*, 168 Ind. 422, 77 N. E. 742, upholding act providing that where property owner refuses to pay street assessment, attorney's fee may be recovered; *Pyramid Land etc. Co. v. Pierce*, 30 Nev. 246, 95 Pac. 213, upholding act providing for recovery of attorney's fee by party recovering damages against one unlawfully grazing stock on his land.

Constitutionality of Statutes Allowing attorneys' fees. See note, 79 Am. St. Rep. 181.

78 Cal. 454-468, 18 Pac. 872, 21 Pac. 11, LEARNED v. CASTLE.

Right to Injunction to Prevent Nuisance does not depend upon extent of damage, even though it be merely nominal.

Approved in *The Salton Sea Cases* (California Development Co. v. New Liverpool Salt Co.), 172 Fed. 817, 97 C. C. A. 214, impossibility of further injury by reason of destruction of plaintiff's salt works by flooding held not ground for refusing injunction to restrain maintenance of works causing flooding.

To Cause Water to Flow Wrongfully upon another's land which would not flow there naturally is to create nuisance per se.

Approved in *Drew v. Hicks* (Cal.), 35 Pac. 565, reaffirming rule; *Galbreath v. Hopkins*, 159 Cal. 302, 113 Pac. 176, injunction lies to prevent such wrongful overflow; *The Salton Sea Cases* (California Development Co. v. New Liverpool Salt Co.), 172 Fed. 801, 97 C. C. A. 214, enjoining maintenance of works which caused flooding of plaintiffs' property, although present value was entirely destroyed pending suit, by flooding; *United States v. Rickey Land etc. Co.*, 164 Fed. 497, owner of land entitled to injunction to prevent construction of reservoir which would include his land in its basin and flood it; *Wood v. Craig*, 133 Mo. App. 552, 113 S. W. 677, land owner could not so divert stream as to cause overflow on land of lower owner although diversion and return to stream were entirely on his own land; *Sanders v. Miller*, 52 Tex. Civ. App. 378, 113 S. W. 999, excavation for collection of surface water near plaintiff's land held to be abatable nuisance as soon as injury was caused thereby.

Where Plaintiff was Heavily Damaged by waters, commingled from several sources, but largely caused to flow by neglect of defendant, finding of nominal damage only was against evidence.

Approved in *Jenkins v. Pennsylvania R. R. Co.*, 67 N. J. L. 335, 51 Atl. 706, 57 L. R. A. 309, when impossible to distinguish between

damages arising from actionable and nonactionable injuries, reasonable judgment of jury, as to part caused by actionable injury, based on evidence, is proper.

Right to Embank Against Water turned out of stream. See note, 6 L. R. A. (n. s.) 137.

Liability for Damming Back Stream. See note, 59 L. R. A. 905.

Effect of Concurring Negligence of third person upon defendant's liability. See note, 17 L. R. A. 36.

Inadequacy of Damages as Ground for setting aside verdict. See note, 47 L. R. A. 39, 49.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 339.

78 Cal. 470-477, 21 Pac. 116, TYRRELL v. BALDWIN.

Homestead Selected from Community Property vests absolutely in survivor on death of either spouse, and is not subject to forced sale for subsequent debts of survivor.

Reaffirmed in *Estate of Clavo*, 6 Cal. App. 777, 93 Pac. 295.

Law in Force at Time of Death controls subject of homesteads and rights of survivors.

Reaffirmed in *Estate of Clavo*, 6 Cal. App. 779, 93 Pac. 296.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 48, 63.

Miscellaneous.—Cited in *Hannon v. Southern Pac. R. R. Co.*, 12 Cal. App. 359, 107 Pac. 339, to point that rights of homestead require legislation to make them effectual.

78 Cal. 477-482, 21 Pac. 8, IN RE SOHER.

Holographic Will is Entitled to Probate though witnessed by another.

Approved in *Estate of Zeile*, 5 Cof. Prob. 292, following rule; *Baker v. Brown*, 83 Mich. 797, 36 So. 540, testamentary instrument in handwriting of testatrix, except words "My will," as caption, held valid as holographic will.

Necessity of Witnesses to Holographic Will. See note, 14 L. R. A. (n. s.) 968.

Holographic Wills. See notes, 104 Am. St. Rep. 22, 32; 1 Cof. Prob. 442, 443.

Document Referred to in Will is part of will.

Approved in *Estate of Plumel*, 151 Cal. 80, 121 Am. St. Rep. 100, 90 Pac. 193, codicil written on back of holographic will held incorporated in will.

Incorporation of Extrinsic Document into will. See note, 68 L. R. A. 360, 369.

78 Cal. 483-485, 21 Pac. 182, ESTATE OF SHARP.

In Absence of Evidence to Contrary, finding that premises are suitable and proper for homestead will be presumed on appeal to have been supported by evidence.

Approved in *Estate of Gray*, 159 Cal. 161, 112 Pac. 891, testator is presumed to have known his power of disposition was subordinate to power of court to grant family homestead from estate.

78 Cal. 486-489, 12 Am. St. Rep. 80, 21 Pac. 185, 3 L. R. A. 653, **SESLEER v. MONTGOMERY**.

In Absence of Legal Establishment of exception thereto, common-law rule obtains that existence of wife is merged in that of husband.

Approved in *People v. Vasquez*, 9 Cal. App. 548, 99 Pac. 983, in absence of statutory provision as to who shall summon venire when sheriff is disqualified, common-law rule prevails.

78 Cal. 490-492, 21 Pac. 362, **RISER v. WALTON**.

Statement of Damages in Prayer Only is sufficient as against general demurrer.

Reaffirmed in *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 636, 112 Pac. 893,

78 Cal. 493-497, 21 Pac. 118, **POTTER v. FOWZER**.

Section 25, Subdivision 20, County Government Act, does not authorize transfer to fund established by law and expressly limited in amount of receipts.

Approved in *Brown v. Klemmer*, 150 Cal. 456, 89 Pac. 326, supervisors could not transfer money from general fund to fund of road district.

Poll Taxes. See note, 29 L. R. A. 413.

78 Cal. 504-509, 21 Pac. 121, **SOUTHWICK v. DAVIS**.

Homestead Statute Should be Liberally Construed.

Approved in *Hohn v. Pauly*, 11 Cal. App. 730, 106 Pac. 268, use of homestead as hotel held to be mere incident to use as home and not to render declaration void.

78 Cal. 509-511, 21 Pac. 11, **MILLER v. THOMAS**.

Where Record is in Such Condition it would be useless to attempt examination of case upon merits, appeal will be dismissed.

Approved in *Fisher v. Western Fuse etc. Co.*, 12 Cal. App. 307, 107 Pac. 335, dismissing appeal from order dismissing motion for new trial when no bill of exceptions had ever been settled and long delays appeared.

78 Cal. 511-517, 21 Pac. 123, **PEABODY v. PRINCE**.

Right to Set Aside Patent to state lands rests in state alone.

Approved in *Ewbank v. Mikel*, 6 Cal. App. 143, 91 Pac. 674, following rule; *Payne v. Providence Gas Co.*, 31 R. I. 333, 77 Atl. 160, lease of fishing grounds in public waters valid on face held not subject to collateral attack.

78 Cal. 517-525, 21 Pac. 124, **TAYLOR v. BALDWIN**.

Proximate Cause of Injury must be one without which injury would not have occurred.

Approved in *Evansville Hoop etc. Co. v. Bailey*, 43 Ind. App. 157, 84 N. E. 550, failure to properly guard saw in factory held proximate cause of injury; *Home Oil & Gas Co. v. Dabney*, 79 Kan. 830, 102 Pac. 492, when undisputed facts showed injury was remote result of cause, question of probable cause was for court.

Liability for Negligence in Escape and explosion of gas. See note, 29 L. R. A. 339, 350.

78 Cal. 529-539, 21 Pac. 179, BRECKINRIDGE v. CROOKER.

To Sustain Action for Damages for breach of contract of sale of real estate, contract must be complete and certain, and agreed to by parties in same sense, and burden is on plaintiff to show these facts.

Approved in Jules Levy & Bro. v. Mautz, 16 Cal. App. 669, 117 Pac. 937, applying rule to contract for sale of goods and merchandise; House v. McMullen, 9 Cal. App. 670, 100 Pac. 347, contract for sale of realty held sufficiently definite to sustain action for specific enforcement.

Memorandum Required Under Statute of Frauds must contain all material elements of contract.

Approved in Seymour v. Oelrichs, 156 Cal. 787, 134 Am. St. Rep. 154, 106 Pac. 91, memorandum of employment for ten years held insufficient; Baume v. Morse, 13 Cal. App. 457, 110 Pac. 350, memorandum for sale of land held insufficient to support specific performance; Mendenhall v. Rose (Cal.), 33 Pac. 885, holding inadmissible parol evidence to explain what land was referred to in letter giving authority to sell land; Mertz v. Hubbard, 75 Kan. 3, 121 Am. St. Rep. 352, 88 Pac. 530, refusing specific performance of contract to convey land at suit of principal where his connection with transaction could only be proved by parol.

Contracts by Telegraph. See note, 110 Am. St. Rep. 747, 748, 763.

Telegrams as Writings to Make a Contract within statute of frauds. See note, 50 L. R. A. 242.

78 Cal. 540-543, 21 Pac. 184, JAPSEN v. BECK.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 319.

78 Cal. 543-546, 21 Pac. 183, SOUTER v. MAGUIRE.

Allegation in Quiet Title Suit that plaintiff is "the owner" of land is of ultimate fact, and is sufficient.

Approved in Bryan v. Tormey (Cal.), 21 Pac. 726, following rule; McArthur v. Clark, 86 Minn. 168, 91 Am. St. Rep. 333, 90 N. W. 370, allegation that plaintiff is owner of undivided portion held sufficient in action for partition.

Location upon Land on Which there already exists valid mining location is invalid.

Reaffirmed in Swanson v. Kettler, 17 Idaho, 338, 105 Pac. 1065.

Citizenship Need not be Alleged in ordinary action to quiet title to mining claim.

Distinguished in Allyn v. Schultz, 5 Ariz. 159, 48 Pac. 962, in action under section 2326, United States Revised Statutes, to contest right to patent, citizenship must be alleged and proven.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 780, 860, 864.

78 Cal. 546-552, 21 Pac. 302, DUFFEE v. GARVEY.

Duty of Servient Owner to Maintain and protect easement. See note, 15 L. R. A. (n. s.) 992.

78 Cal. 552-556, 21 Pac. 304, UPPER SAN JOAQUIN IRR. CANAL CO. v. ROACH.

Covenant not to Sue cannot Operate as release or otherwise without consideration.

Reaffirmed in Grunwald v. Freese (Cal.), 34 Pac. 75.

78 Cal. 556-570, 21 Pac. 307, 541, GREEN v. SUPERIOR COURT.

Superior Court has Jurisdiction of misdemeanors not otherwise provided for.

Approved in *Roberts v. Police Court*, 148 Cal. 133, 134, 82 Pac. 839, provision of San Francisco charter giving police court such concurrent jurisdiction over misdemeanors in certain cases is void; *People v. Palermo Land & Water Co.*, 4 Cal. App. 720, 89 Pac. 725, justice's court held to have jurisdiction of offense of refusing to deliver water in violation of county ordinance.

Distinguished in *Rosencranz v. United States*, 155 Fed. 40, 83 C. C. A. 634, chapter 1778, 33 Statutes, 529, conferring power on municipalities in Alaska to punish certain offenses as misdemeanors and repealing prior acts, held not to affect jurisdiction of district court.

Police Court of San Francisco has Jurisdiction of charge of conspiracy against trade.

Approved in *Union Ice Co. v. Rose*, 11 Cal. App. 362, 104 Pac. 1008, Los Angeles police court held to have jurisdiction of charge of conspiracy under Cartwright law.

Legislature has Power to Establish Justices' Courts and confer on them such powers as it may deem proper.

Approved in *Ex parte Wilbarger*, 41 Tex. Cr. 520, 55 S. W. 971, upholding act creating corporation court in each municipality with same jurisdiction as justice's court.

Prohibition Lies to Prevent Superior Court from proceeding in criminal action of which it has no jurisdiction.

Reaffirmed in *Moore v. Orr*, 30 Nev. 460, 464, 98 Pac. 398, 399.

78 Cal. 571-572, 21 Pac. 304, STINSON v. CARPENTER.

Failure to File Bond Before Issuance of summons in action for slander does not affect jurisdiction of court.

Approved in *Becker v. Schmidlin*, 153 Cal. 671, 96 Pac. 280, following rule; *Fowler v. Fowler*, 15 Okl. 534, 82 Pac. 925, bond for costs in civil action in district court may be filed in discretion of court after motion to quash summons.

78 Cal. 573-578, 21 Pac. 305, WASHBURN v. HUNTINGTON.

In Action to Recover Possession of personal property, court should find plaintiff entitled to recover property sued for, and finding that he is entitled to judgment for particular amount does not comply with statute.

Approved in *Hynes v. Barnes*, 30 Mont. 27, 75 Pac. 523, judgment in replevin must be in alternative; *Ulrich v. McConaughy*, 63 Neb. 16, 88 N. W. 153, reversing judgment in replevin where verdict did not comply with statute; *Salisbury v. Burr* (Cal.), 44 Pac. 462, arguendo.

Participation in Fraudulent Intent of Debtor which will invalidate transfer to pay or secure debt as to other creditors. See note, 31 L. R. A. 650.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 466.

78 Cal. 578-581, 21 Pac. 428, HIGGINS v. DEENEY.

Violation of City Ordinance by Driving at unlawful rate of speed is negligence per se.

Approved in *Stein v. United Railroads*, 159 Cal. 371, 113 Pac. 664, following rule; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 538,

71 N. E. 1084, violation of city ordinance held prima facie evidence of negligence.

Violation of Police Ordinance as ground for private action. See note, 5 L. R. A. (n. s.) 254.

Sufficiency of General Allegations of negligence. See note, 59 L. R. A. 273.

78 Cal. 581-586, 21 Pac. 426, ESTATE OF ALLEN.

Surviving Wife of Deceased Person upon remarriage becomes incapable of administering upon her former husband's estate and cannot nominate third person to act as administrator.

Cited in Estate of Bedell, 3 Cal. Prob. 82, nominee of father of deceased held entitled to letters under section 1379, Code of Civil Procedure.

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1163.

78 Cal. 586-588, 12 Am. St. Rep. 80, 21 Pac. 435, ESTATE OF INGRAM.

When Person Dies Intestate, leaving surviving husband, but no issue, parents, brother or sister, whole estate goes to surviving husband.

Approved in Estate of Nigro, 149 Cal. 703, 87 Pac. 384, and Sweetland v. Transberg, 176 Fed. 642, following rule.

Succession to Estates is Purely a Matter of statutory regulation, and cannot be changed by courts.

Approved in Estate of De Cigaran, 150 Cal. 688, 89 Pac. 835, question as to whether surviving spouse, if illegitimate, should inherit held to be for legislature to determine.

78 Cal. 588-593, 12 Am. St. Rep. 113, 21 Pac. 364, 4 L. R. A. 325, CHOPE v. EUREKA.

Municipal Corporation is not Liable for personal injuries caused by neglect of its officers to properly perform duties.

Approved in Schindler v. Young, 13 Cal. App. 21, 108 Pac. 734, city not liable for damages caused by defective street; Healdsburg etc. P. Co. v. Healdsburg, 5 Cal. App. 561, 90 Pac. 956, city not responsible for torts ultra vires the corporation; Collier v. Ft. Smith, 73 Ark. 450, 84 S. W. 481, 68 L. R. A. 237, city not liable for failure of its servants to display danger signals where street was obstructed during repairs.

Distinguished in Davoust v. Alameda, 149 Cal. 70, 75, 84 Pac. 761, 763, 5 L. R. A. (n. s.) 536, city liable for negligence in respect to exercise of mere proprietary and private rights; McPherson v. San Joaquin County (Cal.), 56 Pac. 804, county liable for damages resulting from neglect of its officers to furnish suitable casings for well being bored for it; Carson v. City of Genesee, 9 Idaho, 251, 254, 108 Am. St. Rep. 127, 74 Pac. 864, 865, city held liable for injury to pedestrian caused by defective sidewalk, when city had exclusive control over streets.

Municipal Liability to Persons injured by defects in or want of repair of streets. See notes, 103 Am. St. Rep. 261, 262; 20 L. R. A. (n. s.) 516.

What Municipal Corporations are Answerable for injuries due to defects in streets and other corporations. See note, 108 Am. St. Rep. 151, 152.

78 Cal. 593-596, 12 Am. St. Rep. 115, 21 Pac. 363, WHITE v. LEE.

Requirement That Mining Claim be distinctly marked upon ground is not satisfied by reference to public surveys.

Approved in *Worthen v. Sidway*, 72 Ark. 225, 79 S. W. 780, notice posted on tree claiming exclusive right to prospect certain quarter section held of no effect; *Saxton v. Perry*, 47 Colo. 273, 274, 275, 107 Pac. 284, 285, locator of placer claim bound to sink posts at angles, though claim was on surveyed land.

Necessity of Marking on the Ground boundaries of placer claims on surveyed land of United States. See note, 3 L. R. A. (n. s.) 993.

Boundary of Mining Claim. See note, 85 Am. St. Rep. 966.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 857, 862.

78 Cal. 597-600, 21 Pac. 372, KERTOHEM v. GEORGE.

Petition for Sale of Land of Estate must disclose condition of estate to render sale valid.

Approved in *Plains Land & Imp. Co. v. Lynch*, 38 Mont. 280, 129 Am. St. Rep. 645, 99 Pac. 849, petition held to contain insufficient statement of condition of estate.

Relief of Purchaser upon Annuling judicial or execution sale. See note, 69 L. R. A. 36.

78 Cal. 600-606, 12 Am. St. Rep. 118, 21 Pac. 365, SWAIN v. STOCKTON SAVINGS ETC. SOCIETY.

Purchaser of Land at Execution Sale, before time of redemption has passed and before sheriff's deed has issued, has lien upon land, and is entitled to be subrogated to superior lien under prior deed of trust.

Approved in *Hardin v. Kelley*, 144 Fed. 354, 75 C. C. A. 355, interest of purchaser at execution sale is an inchoate ownership that may automatically ripen into title; *Northern Investment Co. v. Frey Real Estate etc. Co.*, 33 Colo. 483, 108 Am. St. Rep. 104, 81 Pac. 301, where purchaser at foreclosure sale redeemed from tax sales made before foreclosure, he was entitled to be subrogated to rights of state against judgment creditor of mortgagor who redeemed from foreclosure; *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 491, 138 Am. St. Rep. 717, 117 N. W. 463, holding real estate subject to mortgage by holder of legal title between act of sale on foreclosure of prior mortgage and expiration of period of redemption.

Right of Subrogation. See note, 99 Am. St. Rep. 528.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 48.

78 Cal. 606-611, 21 Pac. 369, GREENLEAF v. STOCKTON COMBINED HARVESTER ETC. WORKS.

Actual Damages Held Recoverable for breach of warranty of threshers as to fitness for particular work.

Approved in *Hodgkins v. Dunham*, 10 Cal. App. 711, 103 Pac. 360, allowing proof of actual damage for breach of warranty in contract of sale as to potency of stallion.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 63.

78 Cal. 611-618, 12 Am. St. Rep. 121, 21 Pac. 366, GRANDONA v. LOVDAL.

Where Branches of Trees Extend Over Boundary upon land of adjoining owner, they belong to him, and he may cut them off at pleasure.

Reaffirmed in *Silva v. Souza*, 14 Haw. 49.

Property Rights in Trees on boundary line. See note, 21 L. R. A. 731.

Liability of Owner or Occupant of land for spread of weeds or noxious vegetation. See note, 52 L. R. A. 295.

Duty and Liability of Land Owners to adjoining proprietors. See note, 123 Am. St. Rep. 574.

78 Cal. 619-624, 21 Pac. 370, CURTIN v. PHENIX INS. CO.

Provision in Insurance Policy that it shall be void upon default in payment of insurance note is valid.

Reaffirmed in *Palmer v. Continental Ins. Co. (Cal.)*, 61 Pac. 784, and *McCullough v. Home Ins. Co.*, 118 Tenn. 270, 100 S. W. 106.

Effect of Nonwaiver Agreement on Conditions existing at inception of policy. See note, 13 L. R. A. (n. s.) 856.

78 Cal. 629-634, 21 Pac. 373, ALTA SILVER MINING CO. v. ALTA PLACER MIN. CO.

No Officer of Corporation can Execute Mortgage of its property in absence of resolution of directors conferring authority.

Approved in *Black v. Harrison Home Co.*, 155 Cal. 127, 99 Pac. 497, mortgage could not be executed by president alone when president and secretary were jointly authorized to execute it; *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 108, 89 Pac. 982, an authorized executory contract of president to sell corporate property held void.

Powers of President and Vice-president of corporation. See note, 14 L. R. A. 359.

78 Cal. 634-636, 21 Pac. 536, FILLMORE v. JENNINGS.

Land Formed by Natural Accretion on bank of stream belongs to owner of bank on which formed.

Approved in *Bouchard v. Abrahamsen*, 160 Cal. 797, 118 Pac. 236, where patent bounded defendant's land by meander line of navigable stream, island formed in channel did not belong to defendant.

Distinguished in *Western Pacific Ry. Co. v. Southern Pac. Co.*, 151 Fed. 398, 80 C. C. A. 606, rule does not apply to accretions in tide lands in San Francisco Bay.

Accretion to Shore Lands. See note, 58 L. R. A. 206.

78 Cal. 637-640, 21 Pac. 537, DORLAND v. BERGSON.

Fixing of Definite Height of Street at two points cannot, in view of topography of San Francisco, determine grade at intermediate points.

Distinguished in *Ogden etc. Co. v. Chicago*, 224 Ill. 209, 79 N. E. 701, rule held not to apply in Chicago.

78 Cal. 640-645, 21 Pac. 377, DUNN v. DALY.

Entire Contract may be Separable as to payments and payments may be separately enforced.

Approved in *Los Angeles Gas etc. Co. v. Amal. Oil Co.*, 156 Cal. 781, 782, 106 Pac. 58, entirety of contract of sale not affected by fact that payments for installments actually delivered could be enforced as they fell due.

Breach of Entire Contract by One Party excuses other party from further performance.

Approved in *Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 255, 90 Pac. 52, refusal of one party to make payments as called for by contract held to excuse other party from further performance.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 64.

Remedy of Wrongfully Discharged Servant by action for breach of contract. See note, 6 L. R. A. (n. s.) 96.

78 Cal. 645-647, 21 Pac. 540, PEOPLE v. BURNS.

Satisfaction of Judgment Bars Appeal thereon by party in whose favor rendered.

Approved in *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 194, 81 Pac. 1031, and *Signor v. Clark*, 13 N. D. 46, 99 N. W. 72, both following rule; *Turner v. Markham*, 152 Cal. 247, 92 Pac. 486, judgment debtor whose homestead was subjected to execution, who accepted five thousand dollars from sheriff as homestead exemption, held to have elected to abide by judgment and to be estopped to further prosecute appeal.

Right to Appeal from Unfavorable while accepting favorable part of decree, judgment or order. See note, 29 L. R. A. (n. s.) 16.

Right to New Trial After Satisfaction of judgment. See note, 68 L. R. A. 128.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 79 CALIFORNIA.

79 Cal. 7-13, 21 Pac. 375, BOLLINGER v. MANNING.

Certificate of Acknowledgment of Married Woman must show that certifying officer, upon examination without hearing of husband, made her acquainted with contents of instrument.

Reaffirmed in *Cordano v. Wright*, 159 Cal. 615, 115 Pac. 229.

When Defects in Certificates of Acknowledgment are fatal. See note, 108 Am. St. Rep. 569.

On Death of Husband, Title to homestead declared on community property vests absolutely in surviving wife, and her title cannot be affected by subsequent order of court.

Reaffirmed in *Fisher v. Bartholomew*, 4 Cal. App. 583, 88 Pac. 609.

79 Cal. 14-16, 21 Pac. 380, STAPLES v. CONNOR.

Section 1573, Code of Civil Procedure, does not bar minor heir, if administrator has not qualified.

Approved in *Brandon v. Jensen*, 74 Neb. 571, 104 N. W. 1055, applying rule under Ann. Stats. 4982.

79 Cal. 17-22, 12 Am. St. Rep. 126, 21 Pac. 534, CHAMPION v. WOODS.

Where Means of Knowledge were Equally open to both parties, injured party, in order to avail himself of other's misrepresentations, must show due diligence.

Reaffirmed in *De Laval Dairy Co. v. Steadman*, 6 Cal. App. 655, 92 Pac. 878.

Where Wife Induced by Misrepresentations of husband to allege in divorce complaint that there is no community property, wife cannot reach community property three and one-half years later and after husband's death.

Distinguished in *Holt v. Holt*, 23 Okl. 660, 662, 102 Pac. 196, 197, where wife is induced by means of husband's fraud to accept unfair property settlement upon divorce, her acceptance of benefit of decree will not estop her to bring suit for further alimony.

Right of Party Obtaining or Consenting to divorce to contest its validity. See note, 60 L. R. A. 295.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 605.

Negligence as Cause for, and as Bar to, injunctions against judgments. See note, 31 L. R. A. 39.

Injunctions Against Judgments obtained by fraud, accident, mistake, surprise, and duress. See note, 30 L. R. A. 797.

79 Cal. 23-29, 21 Pac. 359, COWARD v. CLANTON.

Partnership Agreement to Deal in real estate is not within statute of frauds.

Approved in *Koyer v. Williams*, 150 Cal. 787, 90 Pac. 136, *Jones v. Patrick*, 140 Fed. 406, and *Rice v. Parrott*, 76 Neb. 504, 107 N. W. 841, all reaffirming rule.

Validity of Parol Partnership for dealing in lands. See note, 16 L. R. A. 747, 749.

Pleadings in Prior Suit Between Same Parties are admissible in evidence.

Approved in *Chicago R. I. & P. Ry. Co. v. Mashore*, 21 Okl. 278, 96 Pac. 631, holding such pleadings to be evidence, but not operative as estoppel.

79 Cal. 30-34, 21 Pac. 381, AH FONG v. STERNES.

In Action for False Imprisonment, it is not necessary to aver malice or want of probable cause.

Reaffirmed in *Neves v. Costa*, 5 Cal. App. 121, 89 Pac. 864.

Where Defendant is Entitled to Trial in county of residence, he cannot be deprived of right by addition of another count.

Reaffirmed in *Bond v. Hurd*, 31 Mont. 318, 78 Pac. 581.

79 Cal. 34-44, 21 Pac. 357, BAKER v. FIREMAN'S FUND INS. CO.

Court may Reject Most Positive Testimony because of inherent improbability, although witness be not impeached or contradicted.

Reaffirmed in *Davis v. Judson*, 159 Cal. 130, 113 Pac. 151.

79 Cal. 55-62, 21 Pac. 429, SNODGRASS v. PARKS.

Homestead may be Declared on Land held under contract to convey.

Approved in *Helgebye v. Dammen*, 13 N. D. 171, 100 N. W. 246, applying rule to oral contract which is partially performed.

After Abandonment of Contract for Purchase of land, vendee cannot claim homestead.

Reaffirmed in *Helgebye v. Dammen*, 13 N. D. 174, 100 N. W. 247.

Receipt may be Varied by Parol.

Approved in *San Pedro Lumber Co. v. Schroeter*, 156 Cal. 161, 103 Pac. 889, reaffirming rule; *California P. Co. v. Merritt F. Co.*, 6 Cal. App. 512, 92 Pac. 511, admission of execution of receipt pleaded, by failure to deny under oath, does not preclude defendant from varying it by parol; *Newson v. Woollacott*, 5 Cal. App. 726, 91 Pac. 348, applying rule to check.

Homestead Claim Does not Give new title nor strengthen existing title.

Approved in *Smith v. Baugham*, 156 Cal. 366, 104 Pac. 692, and *Alexander v. Jackson* (Cal.), 25 Pac. 417, both reaffirming rule.

Where Husband Acts as Agent of Wife, he may abandon contract of purchase.

Approved in *Alexander v. Jackson* (Cal.), 25 Pac. 417, applying rule where part payment was made with community property.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 789.

79 Cal. 62-65, 21 Pac. 543, **MILLER v. BUTTERFIELD.**

Equity will not Decree Specific Performance of grubstake agreement where it would work hardship.

Approved in *Elliott v. Elliott*, 3 Alaska, 364, and *Marks v. Gates*, 2 Alaska, 527, 531, both reaffirming rule.

Under Grubstake Agreement, Parties are tenants in common of mines.

Reaffirmed in *Morrow v. Matthew*, 10 Idaho, 434, 79 Pac. 201.

Cotenants in Mines. See note, 91 Am. St. Rep. 855.

Written Agreement cannot be Varied by parol.

Reaffirmed in *Agnew v. Montgomery*, 72 Neb. 15, 99 N. W. 822.

79 Cal. 65-68, 21 Pac. 545, **ESTATE OF DOLAN.**

Instance Where Will Created Express Trust to collect and apply rents.

Cited in *Estate of Clancy*, 3 Cal. Prob. 351, construing devise as contingent.

79 Cal. 69-73, 21 Pac. 551, 748, **FIRST NATIONAL BANK v. WOLFF.**

Note is not Avoided by Immaterial alterations innocently made.

Distinguished in *Reese v. Bell* (Cal.), 71 Pac. 90, where note not duly indorsed to plaintiff before apparent maturity, maker may set up equitable defenses.

Unauthorized Alteration of Written Instruments. See note, 86 Am. St. Rep. 85, 88, 115.

Under Section 664, Code of Civil Procedure, providing that judgment must be entered within twenty-four hours after verdict, judgment subsequently entered is valid.

Reaffirmed in *Kaleialii v. Grinbaum & Co.*, 9 Haw. 215.

Competency of Acquaintance to Testify to reputation of accused for peace or violence. See note, 2 L. R. A. (n. s.) 554.

Right to Testify to Character from personal knowledge. See note, 22 L. R. A. (n. s.) 667.

79 Cal. 74-77, 21 Pac. 546, **DONNELLY v. HUFSCHEMIDT.**

In Action for Damages for Personal Injuries, plaintiff cannot prove that he has incurred physician's bill, under allegation that he has paid it.

Distinguished in *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 275, 104 Pac. 313, holding that question, "What expenses were you put to?" asked of witness, only calls for statement of actual expenditures.

Right of Servant to Recover Damages from third persons for injuries in performance of duties. See note, 46 L. R. A. 86.

Liability of Contractor to Tenant for injury by defects in building. See note, 21 L. R. A. (n. s.) 479.

79 Cal. 77-82, 12 Am. St. Rep. 131, 21 Pac. 555, **READ v. BUFFUM.**

In Action by Assignee of Claim, fact of assignment may be denied by defendant on information and belief.

Reaffirmed in *Jensen v. Dorr*, 159 Cal. 747, 748, 116 Pac. 555.

79 Cal. 84-90, 12 Am. St. Rep. 134, 21 Pac. 554, PEOPLE v. VAN NESS.

Money Collected by State Officer under color of office must be accounted for to state.

Approved in *Perry v. Otay Irr. Dist.* (Cal.), 60 Pac. 42, *State v. Porter*, 69 Neb. 207, 95 N. W. 771, and *Finley v. Territory*, 12 Okl. 632, 73 Pac. 276, all following rule.

Denial by State Officer of Right of state to moneys collected by him is conversion.

Distinguished in *Goldschmidt v. Maier* (Cal.), 73 Pac. 985, sale of trust property by trustee cannot be regarded as conversion as to cotrustee.

Acts for Which Sureties on Official Bond are liable. See note, 92 Am. St. Rep. 449.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 189.

Right of Public to Fees Unlawfully Collected by Officer. See note, 20 L. R. A. (n. s.) 1016.

79 Cal. 95-97, 21 Pac. 553, EX PARTE LEWIS.

Recitals in Governor's Warrant of arrest of fugitive are conclusive on habeas corpus.

Reaffirmed in *Bergman v. State*, 60 Tex. Cr. 14, 130 S. W. 177.

Rendition Warrant Need not Set Out copy of indictment.

Approved in *In re Renshaw*, 18 S. D. 37, 112 Am. St. Rep. 778, 99 N. W. 84, sufficiency of indictment is question for courts of state in which crime was committed.

79 Cal. 97-103, 21 Pac. 437, 3 L. R. A. 824, FAGUNDES v. CENTRAL PACIFIC R. R. CO.

Employer is not Liable to Employee for negligence of fellow-servant.

Approved in *Sartin v. Oregon Short Line R. R.*, 27 Utah, 454, 76 Pac. 221, holding laborer to be fellow-servant of foreman.

Liability of Master for Injuries to servant by incompetency of fellow-servant. See note, 25 L. R. A. 712.

Where Evidence is Such That if Verdict had been found for plaintiff it would have been duty of court to set aside verdict, nonsuit may be granted.

Approved in *Bohn v. Pacific Electric Ry. Co.*, 5 Cal. App. 624, 91 Pac. 116, holding such action not violative of right of trial by jury.

Where Facts are Undisputed, question of negligence is one of law.

Reaffirmed in *Brounton v. Southern Pac. Co.*, 2 Cal. App. 177, 83 Pac. 267.

When Conductor Deemed a Coservant of other railway employees. See note, 46 L. R. A. 360.

What Servants Deemed to be in Common Employment, apart from statutes, where no questions as to vice-principalship arise. See note, 50 L. R. A. 433, 435.

Miscellaneous.—Cited in *Hardesty v. Largy Lumber Co.*, 34 Mont. 164, 86 Pac. 33.

79 Cal. 103-105, 21 Pac. 609, PACIFIC COAST RY. CO. v. SUPERIOR COURT.

Notice of Appeal is Analogous to summons.

Reaffirmed in *Ensley v. State*, 4 Okl. Cr. 55, 109 Pac. 253.

79 Cal. 105-115, 21 Pac. 423, PEOPLE v. PERRY.

Action Brought by Attorney General under sections 802 to 810, Code of Civil Procedure, to determine rights of relator and defendant to office, is within appellate jurisdiction of supreme court.

Approved in *People v. Bingham*, 82 Cal. 242, 22 Pac. 1040, holding such action within original jurisdiction of superior court.

Provisions for Forfeiture of Vested Rights are construed strictly against forfeiture.

Approved in *In re Chadbourne*, 15 Cal. App. 373, 114 Pac. 1016, applying rule to forfeiture of office of executor under section 1511, Code of Civil Procedure.

Provision of Statute Fixing Term of members of board of health at five years is unconstitutional, but other provisions being valid, members hold at pleasure of governor.

Approved in *People v. Clinton* (Cal.), 21 Pac. 426, *People v. McCarthy* (Cal.), 21 Pac. 426, and *People v. Rosenstirn* (Cal.), 21 Pac. 426, all following rule; *White v. Mears*, 44 Or. 219, 74 Pac. 931, and *Commonwealth v. Sheatz*, 228 Pa. 306, 77 Atl. 549, both applying rule to similar enactments; *State v. Dillon*, 42 Fla. 110, 28 So. 785, applying rule to ordinance of Jacksonville in conflict with general law, and holding that officers may hold office during legal term.

79 Cal. 115-130, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, RANDALL v. DUFF.

If Agent to Sell Real Property conveys without consideration, no title passes.

Approved in *Hunter v. Eastham*, 95 Tex. 653, 69 S. W. 67, applying rule where agent with power of attorney to sell conveys upon consideration inuring to himself.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 36.

79 Cal. 130-136, 21 Pac. 607, CARR v. QUIGLEY.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 347.

79 Cal. 140-159, 21 Pac. 527, 855, GAGE v. DOWNEY.

Where Plaintiff in Ejectment has Agreed to convey part of land to attorneys for services, it is no defense to action that such contract is void.

Reaffirmed in *Seaton Co. v. Idaho Springs Co.*, 49 Colo. 131, 111 Pac. 837, 33 L. R. A. (n. s.) 1078.

79 Cal. 159-165, 21 Pac. 547, MORAN v. ROSS.

Section 22, Article XII, of Constitution, providing for supervision of railroad commission over railroad corporations and transportation companies, should be construed to extend supervision over all cor-

porations, joint stock companies, partnerships or individuals engaged in transportation business.

Approved in *Moran v. Farley* (Cal.), 21 Pac. 549, following rule; *Efland v. Southern Railroad*, 146 N. C. 144, 59 S. E. 358, Revisal, sections 2642, 2643, 2644, imposing penalty on transportation "companies" for failure to return overcharge apply to all corporations, companies, or individuals engaged as common carriers of freight; *Lowther v. Bridgeman*, 57 W. Va. 309, 50 S. E. 412, word "companies" in chapter 96 of acts of legislature of 1891, authorizing county court to consent to construction of telephone line, includes individuals.

Right of Eminent Domain may be Delegated by state to any corporation or individual.

Distinguished in *Boca etc. R. R. v. Sierra Valleys R. R.*, 2 Cal. App. 557, 84 Pac. 303, right of corporation to condemn land is limited by its charter.

Right of Eminent Domain is Inherent in state, and not conferred by Constitution.

Reaffirmed in *Hollister v. State*, 9 Idaho, 15, 71 Pac. 543.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 9, 14, 20, 35, 99.

79 Cal. 166-171, 21 Pac. 538, **PEOPLE v. DAVIDSON.**

Under Section 2619 of Political Code, upon expiration of toll-road franchise, road becomes free public highway, and toll-road owner is entitled to no compensation.

Approved in *State v. Scott etc. Road Co.*, 207 Mo. 84, 105 S. W. 760, applying rule to toll-road company organized under Laws of Missouri of 1853, page 337.

Right to Take Tolls Without Franchise. See note, 37 L. R. A. 717.

79 Cal. 171-172, 21 Pac. 539, **PEOPLE ex rel. EL DORADO CO. v. O'KEEFE.**

Right to Take Tolls Without Franchise. See note, 37 L. R. A. 717.

79 Cal. 173-177, 21 Pac. 652, 4 L. R. A. 429, **BROOKS v. FISCHER.**

City Charter must be Consistent with Constitution and general laws of state.

Distinguished in *Milner v. Reibenstein*, 85 Cal. 594, 24 Pac. 935, holding questions not involved.

Miscellaneous.—Cited in *In re Straud* (Cal.), 21 Pac. 654.

79 Cal. 178-181, 21 Pac. 724, **PEOPLE v. OREILEUS.**

Slight Mistake in Name of Person injured, variance is not fatal.

Approved in *People v. Spencer*, 16 Cal. App. 758, 117 Pac. 1040, in prosecution for drawing check without funds to meet same, variance in name of bank on which check drawn held immaterial.

79 Cal. 181-183, 21 Pac. 729, **ANGELL v. HOPKINS.**

In Determining Value of Property at time of conversion, evidence of cost is admissible.

Approved in *Bunting v. Salz* (Cal.), 22 Pac. 1133, and *Osmer v. Furey*, 32 Mont. 591, 81 Pac. 348, both reaffirming rule; *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 637, 112 Pac. 894, in action

for breach of building contract, actual cost of completing work is evidence of value, in absence of evidence to contrary.

Judgment Should not be Reversed for error from which no injury resulted.

Reaffirmed in *Bollinger v. Bollinger*, 154 Cal. 699, 99 Pac. 198.

Distinguished in *Bollinger v. Bollinger*, 154 Cal. 707, 99 Pac. 201, holding rule inapplicable where judgment is reversed for other error.

Right of One Leaving Chattels in another's possession as against latter's vendees or creditors. See note, 25 L. R. A. (n. s.) 773.

79 Cal. 192-199, 21 Pac. 732, **SALINAS CITY BANK v. GRAVES.**

Miscellaneous.—Cited in *Salinas City Bank v. Graves* (Cal.), 21 Pac. 734.

79 Cal. 200-203, 21 Pac. 651, **LORING v. STUART.**

What is Community Property. See notes, 126 Am. St. Rep. 113; 4 Cal. Prob. 57, 58.

79 Cal. 203-206, 21 Pac. 737, **FARLEY v. HOPKINS.**

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 100.

79 Cal. 211-213, 21 Pac. 742, **DASHAWAY ASSN. v. ROGERS.**

Where Vendor Assumes to Convey Land, representing himself as owner, but having in fact no title, and receives deposit of purchase money, really for benefit of himself and another secretly interested, he acts as agent for latter, and both are jointly liable to vendee.

Approved in *In re Salmon*, 145 Fed. 653, where two banks secretly agree to suppress bids for county funds, such funds to be apportioned between them by successful bidder, latter was acting as agent of other, from which county may recover funds on bankruptcy of successful bidder as against general creditors.

79 Cal. 213-215, 21 Pac. 735, **NORTH PACIFIC COAST R. R. CO. v. GARDNER.**

Mandamus will Lie to Compel Sheriff to execute writ of execution on justice's court judgment.

Approved in *State v. Stokes*, 99 Mo. App. 238, 73 S. W. 255, constable may be forced by mandamus to serve writ of restitution.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 872.

79 Cal. 215-218, 21 Pac. 742, **SPENCER v. LAWLER.**

Contempt Proceedings to Compel Payment of alimony. See note, 24 L. R. A. 439.

79 Cal. 218-223, 12 Am. St. Rep. 139, 21 Pac. 743, **BARTLETT v. ODD FELLOWS' SAVINGS BANK.**

Where Complaint Alleges That Defendant promised to pay specified amount for which judgment is prayed, it is unnecessary to allege that plaintiff has been damaged in such sum.

Approved in *Quick v. Swing*, 53 Or. 153, 99 Pac. 420, reaffirming rule; *Dickinson v. Zubiato Mining Co.*, 11 Cal. App. 663, 106 Pac. 125, upholding complaint alleging conditional purchase of stock

with agreement that on happening of condition vendor would refund price, and which alleges happening of condition and tender of stock on demand of payment, and prays judgment for money paid.

For Breach of Contract of Employment attorney may recover sum to which he would have been entitled had he completed entire service, with interest.

Approved in *Sessions v. Warwick*, 45 Wash. 168, 89 Pac. 483, reaffirming rule; *Watson v. Columbia Min. Co.*, 118 Ga. 606, 45 S. E. 462, applying rule where attorney was retained generally, client agreeing to employ him in all cases which might "come up."

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 161, 166, 180.

Cause of Action for Services of Attorney under agreement that he shall be paid when judgment is recovered or compromise effected does not accrue until receipt of money from defendant.

Approved in *Felt v. Mitchell*, 44 Ind. App. 98, 88 N. E. 723, contract of employment of firm of attorneys not terminated by dissolution of firm so as to start limitation against claim for services; *Estate of Leahy*, 3 Cal. Prob. 371, 372.

79 Cal. 224-230, 21 Pac. 745, COUSINS v. PARTRIDGE.

It is in Discretion of Court to allow plaintiff to introduce evidence after defendant has closed his evidence.

Approved in *People v. McPherson*, 6 Cal. App. 270, 91 Pac. 1099, applying rule to reopening of case of prosecution for further evidence after close thereof.

Sections 3131, 3135, Civil Code, do not change rule that demand must be made on principal debtor in order to charge indorser of negotiable instrument.

Reaffirmed in *Wills v. Booth*, 6 Cal. App. 202, 91 Pac. 761.

Payee of Demand Note may Sue Maker without any demand other than that made by suit itself.

Approved in *Ex parte Howitz*, 2 Cal. App. 754, 84 Pac. 230, holding rule applicable to ordinary contract for payment of money when action is brought against principal debtor.

Where Instructions, Taken Together, correctly state law, judgment will not be reversed for error in one part.

Reaffirmed in *Nash v. Kreling* (Cal.), 56 Pac. 262.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 186.

Effect of Bar of Statute of Limitations. See note, 95 Am. St. Rep. 676.

79 Cal. 232-233, 21 Pac. 739, PEREIRA v. SMITH.

It is not Error to Refuse to adopt requested findings, provided court finds on all issues, as it is bound to do, without request.

Reaffirmed in *Ricks v. Lindsay* (Cal.), 31 Pac. 262.

79 Cal. 234-239, 21 Pac. 751, HANSCOM v. DRULLARD.

Instruction in Action for Fraudulent Misrepresentation accompanying sale that plaintiff cannot recover if he does not avail himself of opportunity to inspect subject of sale, unless induced by trick of defendant not to do so, is correct.

Approved in *Neher v. Hansen*, 12 Cal. App. 372, 107 Pac. 565, instruction that purchaser must avail himself of opportunity for

inspection properly refused in absence or want of evidence tending to make it applicable, and property was located at great distance; *Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 638, 100 Pac. 121, holding that mere existence of opportunity for examination cannot remove fraud in law arising from false representations, where only question is purchaser's right to rely thereon, and no question of laches is involved.

In Action for Fraudulent Misrepresentation accompanying sale, defendant is liable for false representations, although he gave source of information on which he professed to rely, if he had reason to believe they were untrue.

Approved in *Hanson v. Kline*, 136 Iowa, 109, 113 N. W. 508, reaffirming rule; *Howe v. Martin*, 23 Okl. 568, 138 Am. St. Rep. 840, 102 Pac. 130, definite assertion as fact of that which is untrue, concerning which party had no knowledge, is equivalent to assertion of what party knows to be untrue.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 614.

79 Cal. 239-246, 21 Pac. 740, COUNTY OF YUBA v. CLOKE.

Appellate Court will not Interfere with order dissolving or continuing in force preliminary injunction unless there is abuse of discretion.

Approved in dissenting opinion in *Humphrey v. Buena Vista Water Co.*, 2 Cal. App. 544, 84 Pac. 297, majority holding preliminary injunction granted on notice and hearing cannot be dissolved without good cause, merely because words "until further order of court" are inserted therein.

Pollution of Stream by Mining. See note, 24 L. R. A. 65.

79 Cal. 246-250, 21 Pac. 746, IN RE CASTLE DOME MIN. ETC. CO.

Notice of Appeal must be Served on party whose rights would be affected by reversal of judgment.

Approved in *Estate of Young*, 149 Cal. 175, 85 Pac. 145, bill of exceptions to order dismissing petition for partial distribution by children not provided for in will of decedent must be served on children named in will who appeared and opposed petition; *Ford v. Cannon*, 5 Cal. App. 188, 89 Pac. 1072, in action to enforce agreement in relation to trust of which plaintiff and defendant were beneficiaries, upon appeal by defendant from order appointing receiver, codefendant, who was party to order and whose interest will be affected by reversal or modification, must be served with notice of appeal; *Porter v. Lassen County Land & Cattle Co. (Cal.)*, 55 Pac. 395, defendant, who holds second mortgage and who answered foreclosure and was decreed to hold second mortgage, must be served with notice of appeal from such decree, though it merely directed payment of surplus into court to await further order; *De Arnaz v. Jaynes (Cal.)*, 34 Pac. 224, where owner of one-third of mortgaged property consents to judgment for plaintiff in foreclosure, latter having waived deficiency judgment upon appeal by other owners from judgment against them, one-third owner must be served with notice of appeal; *Clayton v. Sievertsen*, 115 Iowa, 689, 87 N. W. 413, where judgment on purchase money mortgage is rendered against defendant A, and relief for alleged shortage in acreage is denied

defendant B, to whom A had sold land and assigned claim for shortage, A must be served with notice of appeal by B.

79 Cal. 250-257, 21 Pac. 755, BOYD v. DESMOND.

Where Affidavits to Foreclose laborers' liens are in fact filed in office of clerk, failure of clerk to mark them filed does not warrant dismissal of executions issued on them.

Distinguished in *Cooper v. Nisbet*, 119 Ga. 755, 47 S. E. 174, it is essential to legal filing that intention to file be communicated to clerk.

Burden of Proof in Suit for failure to execute process. See note, 3 L. R. A. (n. s.) 427.

79 Cal. 258-260, 21 Pac. 757, MAHAN v. WOOD.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 337.

79 Cal. 262-264, 21 Pac. 747, SHAIN v. BELVIN.

If Defendant Wishes Affirmative Relief, his pleading should show distinctly that it was intended as cross-complaint.

Approved in *Miller & Lux v. Rickey*, 146 Fed. 579, in equity defendant cannot, by calling his pleading cross-bill and praying affirmative relief, require complainant to answer same, when matter set up is purely defensive.

Distinguished in *Garbe v. Wilks* (Cal.), 38 Pac. 500, holding rule inapplicable where pleading, though entitled "Cross-complaint and Counterclaim," is counterclaim only, and plaintiff files answer to it.

Defendant in Action on Promissory Note is not entitled to decree of cancellation where defense is purely legal.

Approved in *Miller v. Kettenbach*, 18 Idaho, 258, 138 Am. St. Rep. 192, 109 Pac. 507, equity will not decree release of guarantor upon contract of guaranty unless circumstances exist which could not be shown as defense at law; *The Sailors v. Woelfle*, 118 Tenn. 758, 102 S. W. 1109, 12 L. R. A. (n. s.) 881, equity will not enjoin action on benefit certificate, nor cancel it because obtained by fraud.

79 Cal. 265-266, 21 Pac. 754, FAULKNER v. HENDY.

Compensation of Expert Witnesses. See note, 27 L. R. A. 670, 673.

79 Cal. 266-268, 21 Pac. 743, BATCHELDER v. BAKER.

Presumption is in Favor of Lower Court, and appellant must show error affirmatively.

Reaffirmed in *Boyer v. Pac. Mutual Life Ins. Co.*, 1 Cal. App. 55, 81 Pac. 672.

Miscellaneous.—Cited in *Whelen v. Brickell* (Cal.), 33 Pac. 397.

79 Cal. 268-273, 21 Pac. 827, AFFIERBACH v. McGOVERN.

Complaint in Action of Claim and Delivery which only avers ownership and right of possession at time more than four years prior to commencement of suit is bad.

Approved in *Affierbach v. McGovern* (Cal.), 36 Pac. 839, reaffirming rule; *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 29, 77 Pac. 303, complaint in claim and delivery action must show ownership and right to immediate possession at time of wrongful taking; *Melvin v. Melvin*, 8 Cal. App. 688, 97 Pac. 698, in action to enforce trust,

complaint which does not aver title in plaintiff at time of commencement of action is bad; *Manti City Sav. Bk. v. Peterson*, 30 Utah, 477, 116 Am. St. Rep. 862, 86 Pac. 414, averment of ownership and right to possession on day preceding filing of complaint is bad.

79 Cal. 285-287, 21 Pac. 753, TAYLOR v. NORTH STAR GOLD MIN. CO.

Corporation Which Borrows Money cannot refuse to repay it on ground that it was borrowed for payment of expenses incidental to act ultra vires.

Approved in *Mechanics' Ins. Co. v. Hoover Distilling Co.*, 182 Fed. 594, contract of insurance of whisky stored in Iowa is not void because it tends to assist insured to violate anti-liquor laws of Iowa; *Jenson v. Toltec Ranch Co.*, 174 Fed. 92, 98 C. C. A. 60, lender's knowledge of use to which money was to be put is no defense where lender did not combine to induce, and did not share in benefits of, such use.

79 Cal. 288-297, 21 Pac. 830, ROMAN CATHOLIC ARCHBISHOP v. SHIPMAN.

Roman Catholic Archbishop of San Francisco is corporation sole, and as such cannot acquire title by adverse possession to land title to which was vested in him in individual capacity.

Reaffirmed in *Roman Catholic Archbishop of San Francisco v. Shipman* (Cal.), 21 Pac. 833.

Distinguished in *Bishop of Zeugma v. Paahao*, 16 Haw. 349, Roman Catholic bishop in Hawaii is not corporation sole, and must show privity of title or estate between himself and predecessor, whether he claims by paper title or adverse possession.

79 Cal. 297-300, 12 Am. St. Rep. 143, 21 Pac. 824, WITHERS v. JACKS.

Action to Quiet Title may be Maintained against claimant of invalid mortgage lien.

Approved in *Dorris v. McManus*, 3 Cal. App. 582, 86 Pac. 911, action to quiet title lies against asserted right based on fraudulent transfer.

Reversal of Judgment on Question of priority of mortgage liens will not affect title to land when title has passed by sheriff's deed under foreclosure sale.

Approved in *Purser v. Cady* (Cal.), 49 Pac. 181, where judgment is reversed as to counsel fees, but in other respects affirmed, title to land under execution sale and sheriff's deed is not affected, there having been no order for restitution of property sold; *St. John v. Andrews Institute*, 192 N. Y. 386, 85 N. E. 144, nonappealing defendant not made party to appeal cannot take advantage of modification of judgment in action for construction of will.

Reversal of Judgments. See notes, 96 Am. St. Rep. 127; 91 Am. St. Rep. 705.

Purchaser at Execution or Judicial Sale as bona fide purchaser. See note, 21 L. R. A. 53.

79 Cal. 301-303, 21 Pac. 833, MITCHELL v. HAWLEY.

Allowance of Counsel Fees as Damages in injunction suits is exceptional and should not be carried beyond point of former decisions.

Approved in *Spooner v. Cady* (Cal.), 44 Pac. 1019, under section 3294, Civil Code, payment of gross sum for counsel fee in proposed suit not allowable as damages incurred in pursuit of property wrongfully taken; *Hooper v. Patterson* (Cal.), 32 Pac. 514, in action by administrator on injunction bond, attorneys' fees paid by intestate in procuring dissolution of injunction cannot be recovered, when such fees have not been paid nor claim for them filed at time of filing of complaint; *Darling v. McBride*, 86 Neb. 485, 125 N. W. 1090, right to damages for attorneys' fees is limited to expense of dissolving injunction, and does not include expenses of trial of principal issues.

Recovery on Injunction Bond of attorneys' fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n.s.) 66, 67.

Conflict of Laws as to Measure of Damages. See notes, 91 Am. St. Rep. 725; 56 L. R. A. 303.

79 Cal. 304-312, 21 Pac. 759, ESTATE OF BAUER.

Where Attorney Acts for Two Parties, either can compel him to testify concerning negotiations.

Reaffirmed in *Gerety v. O'Sheehan*, 9 Cal. App. 451, 99 Pac. 546.

Recital in Joint Declaration of Homestead that property to extent of certain amount was husband's separate property is admission by wife.

Approved in *Estate of Foster*, 4 Cal. Prob. 40, holding on application of widow for probate homestead that property of decedent was his separate estate and homestead could be awarded her for life only.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 925.

79 Cal. 313-317, 21 Pac. 758, ESTATE OF KOHLER.

Miscellaneous.—Cited in *Estate of Dolbeer*, 3 Cal. Prob. 245, as to when person is of sound and disposing mind; *Estate of Dolbeer*, 3 Cal. Prob. 247, to point that jury must not go outside evidence; *Estate of Dolbeer*, 3 Cal. Prob. 243, 244, 248, to point that if testator is of sound mind, jury cannot consider justness of disposition.

79 Cal. 323-332, 12 Am. St. Rep. 145, 21 Pac. 842, 5 L. R. A. 233, JENNINGS v. BANK OF CALIFORNIA.

Officers Who Transact Ordinary Business of corporation are presumed to have authority to do all acts usual and incidental thereto.

Approved in *Preston v. Central Cal. etc. Irr. Co.*, 11 Cal. App. 201, 104 Pac. 466, applying rule to assignment of account for transporting freight by manager of railroad corporation.

Assignee of Certificate of Stock stands in no better position than assignor.

Approved in *Miller v. Engle*, 3 Cal. App. 334, 85 Pac. 162, applying rule to assignment of certificate which is partly paid for.

79 Cal. 336-340, 21 Pac. 838, PEYRE v. PEYRE.

Under Section 132, Civil Code, Court may compel husband in divorce action to pay reasonable attorney's fee, amount of which it may determine from its own experience, without hearing of testimony.

Approved in *Sweat v. Sweat*, 123 Ga. 802, 51 S. E. 716, applying rule under section 2457, Civil Code.

79 Cal. 347-350, 21 Pac. 763, CARDWELL v. SACRAMENTO COUNTY.

What Waters are Navigable. See note, 42 L. R. A. 320, 327.

Right to Obstruct or Destroy Rights of navigation. See note, 59 L. R. A. 92.

79 Cal. 351-365, 21 Pac. 825, CENTRAL IRRIGATION DISTRICT v. DE LAPPE.

Irrigation Districts are Public Corporations.

Approved in *People v. San Joaquin etc. Agricultural Assn.*, 151 Cal. 805, 91 Pac. 744, district agricultural association is public corporation; *Whipple v. Tuxworth*, 81 Ark. 402, 99 S. W. 90, improvement districts organized by city and town councils are corporations.

Distinguished in *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 405, 105 Pac. 280, reclamation districts do not belong to any class of corporations defined by section 284 of Civil Code, nor do they come within inhibition of section 1, article XII of Constitution against creation of corporations by special act; nor are they municipal corporations within section 6, article XI, of Constitution.

Description Which Would be Sufficient in ordinary deed is sufficient in petition for formation of irrigation district.

Approved in *Cullen v. Glendora Water Co.*, 113 Cal. 517, 39 Pac. 772, holding description sufficient if landmarks called for are definite, if there is no evidence that they cannot be found.

Proceedings for Formation of Irrigation districts are to be liberally construed.

Approved in *Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 484, 489, 83 Pac. 503, 505, applying rule under Idaho irrigation district law of 1903.

Denied in *Ahern v. Board of Directors*, 39 Colo. 417, 89 Pac. 965, holding that Colorado irrigation district act of 1901, as it imposed special taxes and burdens, should be strictly construed.

Wright Law (Laws 1887, p. 29), Providing for organization of irrigation districts, does not violate "due process of law" principle.

Approved in *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 533, 85 Pac. 316, applying rule to irrigation district law of 1901.

Wright Law (Laws 1887, p. 29) is Constitutional.

Approved in *Little W. W. Irr. Dist. v. Preston*, 46 Or. 6, 78 Pac. 982, applying rule to Oregon irrigation district of 1895.

79 Cal. 365-375, 21 Pac. 764, BAKER v. DUCKER.

Not Even Majority of Religious Society may divert property to different church organization.

Approved in *Union Benevolent Soc. v. Martin*, 113 Ky. 30, 67 S. W. 39, minority faction of benevolent organization which adheres to its laws is entitled to property, provided it includes number of persons necessary to continue existence of organization.

Litigation Growing Out of Schism in religious society. See note, 24 L. R. A. (n. s.) 708.

Power of Local Church Society to withdraw from general church body. See note, 32 L. R. A. 96.

79 Cal. 375-381, 12 Am. St. Rep. 152, 21 Pac. 833, COUNTY OF YOLO v. BARNEY.

Title to Land Dedicated to Public Use cannot be acquired by adverse possession, even where county has power to dispose of such land.

Approved in *Proctor v. San Francisco*, 100 Fed. 351, 40 C. C. A. 398, reaffirming rule; *People v. Kerber*, 152 Cal. 734, 735, 125 Am. St. Rep. 93, 93 Pac. 879, 880, applying rule to tide lands; *Kern Island etc. Co. v. Bakersfield*, 151 Cal. 407, 90 Pac. 1053, unlawful construction and user of ditch along highway for eleven years does not create prescriptive right.

Right to Acquire Title by Adverse Possession to lands devoted to public use. See note, 87 Am. St. Rep. 779.

79 Cal. 382-388, 21 Pac. 835, ESTATE OF CARPENTER.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 730, 733.

Miscellaneous.—Cited in *McGorray v. O'Connor*, 79 Fed. 862, for history of litigation.

79 Cal. 388-402, 21 Pac. 849, KAHN v. SAN FRANCISCO.

Under Statutes of 1871-72, Page 911, in petition for improvements of street, signatures of officers of corporation will be rejected in absence of proof of authority from directors.

Approved in *Kahn v. San Francisco (Cal.)*, 25 Pac. 404, following rule; *McCroskey v. Ladd (Cal.)*, 28 Pac. 217, holding that deed signed by president and secretary of corporation does not convey good title in absence of showing of authority from directors.

Under Statutes of 1871-72, Page 911, decision of county court as to jurisdiction is not conclusive of fact as to whether or not petition for improvement of street was signed by necessary number of property owners.

Approved in *Wilcox v. Engebretsen*, 160 Cal. 292, 294, 296, 116 Pac. 751, 752, 753, under change of grade act of 1893, if petition for change of grade is not signed by requisite number of property owners, order of council directing improvement was subject to collateral attack; *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 54, 93 N. W. 232, and *Morse v. Omaha*, 67 Neb. 433, 93 N. W. 737, both holding that under section 110, chapter 12a, Compiled Statutes of 1897, providing for pavement of street upon petition of property owners, petition signed by statutory number is jurisdictional of right of city council to levy assessment.

79 Cal. 404-409, 21 Pac. 846, SHARP v. HOFFMAN.

Charge of Court is Decision Made by court during trial that law thus declared must be applied by jury to facts.

Approved in *Partelow v. Newton & Boston St. Ry.*, 196 Mass. 34, 81 N. E. 896, R. L., c. 173, sec. 80, providing that judge shall not charge as to matters of fact, word "charge" refers only to final summing up of case by judge to jury.

79 Cal. 411-414, 21 Pac. 842, SHARP v. BLANKENSHIP.

Declarations of Former Owners of Land as evidence against their successors in title. See note, 134 Am. St. Rep. 619.

79 Cal. 415-419, 21 Pac. 752, PEOPLE v. BOWERS.

It is Prejudicial Error for Judge to question witnesses in interest of prosecution in such manner as to give jury impression he thinks defendant guilty.

Distinguished in *People v. Saunders*, 13 Cal. App. 748, 110 Pac. 827, holding questions not error when pertinent and showing no leaning against defendant.

Power of Court to Call and examine witnesses. See note, 57 L. R. A. 882, 883.

It is Prejudicial Error for Prosecuting Attorney to refer to matters outside of evidence calculated to influence jury against accused, although court instructs jury to disregard such statements.

Approved in *State v. Irwin*, 9 Idaho, 40, 71 Pac. 609, 60 L. R. A. 716, holding it error to repeatedly ask witness questions imputing to defendant other like crimes; *State v. Rodriguez*, 31 Nev. 346, 102 Pac. 864, holding it reversible error to call defendant "macque" in argument to jury.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 649.

79 Cal. 420-428, 12 Am. St. Rep. 157, 21 Pac. 858, 5 L. R. A. 189, CURDY v. BERTON.

Where Testator Bequeaths Property in trust without specifying purpose, but verbally tells legatee purpose, which legatee expressly or impliedly promises to perform, equity will enforce constructive trust.

Approved in *Gemmel v. Fletcher*, 76 Kan. 592, 93 Pac. 718, where husband, in order to prevent wife from devising property to which he holds legal title, promises to convey to wife's nominee, after wife's death constructive trust may be enforced against husband.

Heir, Devisee or Legatee as Trustee ex maleficio. See note, 106 Am. St. Rep. 97.

Constructive Trust from Fraud in frustrating decedent's intention to give property to third person. See note, 8 L. R. A. (n. s.) 699, 703.

Trust Implied to Effectuate Purpose when terms of contract cannot be given effect. See note, 58 L. R. A. 115.

79 Cal. 428-433, 21 Pac. 856, 4 L. R. A. 845, PEOPLE v. STEPHENS.

Defendant cannot be Convicted of two crimes growing out of same act.

Approved in *People v. Bunkers*, 2 Cal. App. 204, 84 Pac. 368, holding that one may not be guilty of giving bribe under Penal Code, section 85, and at same time accomplice in accepting bribe, guilty as principal, under section 86; *Cook v. State*, 43 Tex. Cr. 188, 96 Am. St. Rep. 854, 63 S. W. 874, where defendant kills two persons by one act, one intent, one volition, acquittal of murder of one is bar to prosecution for murder of other.

79 Cal. 433-438, 21 Pac. 860, WALLACE v. MAPLES.

In Equity Verdict of Jury is Advisory and may be disregarded by court.

Reaffirmed in *McClelland v. Bullis*, 34 Colo. 81, 81 Pac. 774.

79 Cal. 442-443, 21 Pac. 861, McDONALD v. HANLON.

While Real Property is Occupied by tenant from month to month, where owner makes lease in praesenti to third person, latter may without entering and without attornment change terms of tenancy and maintain action of unlawful detainer for nonpayment of increased rent.

Approved in *Teich v. Arms*, 5 Cal. App. 481, 90 Pac. 965, where land leased is sold to state for taxes, and right of lessor to redeem is foreclosed by state's conveyance to another, such other has right to receive rents.

Unlawful Detainer. See note, 120 Am. St. Rep. 37.

79 Cal. 443-449, 21 Pac. 946, CASTRO v. BARRY.

Mistake in Course is Harmless Error in description when reference is also made to visible boundary.

Reaffirmed in *Meeker v. Simmons*, 10 Cal. App. 256, 101 Pac. 685.

Action to Quiet Title cannot be Maintained against holder of legal title by one who has equitable right.

Reaffirmed in *Spotswood v. Spotswood*, 4 Cal. App. 713, 89 Pac. 362.

Denied in *Coleman v. Jaggars*, 12 Idaho, 129, 118 Am. St. Rep. 207, 85 Pac. 895, under section 4538, Revised Statutes of 1887, action may be maintained, although plaintiff have neither possession nor legal title.

Action to Quiet Title may be Maintained by owner of property to determine any adverse claim whatever.

Approved in *Dorris v. McManus*, 3 Cal. App. 581, 86 Pac. 911, action lies to quiet title against asserted right based on fraudulent transfer; *McGuinness v. Hargiss*, 56 Wash. 164, 105 Pac. 234, recorded notice of contract of sale is such cloud as may be removed by quiet title action.

In Action to Quiet Title, Plaintiff is not required to set forth with particularity nature of defendant's claim.

Approved in *Woody v. Hinds*, 30 Mont. 192, 76 Pac. 2, applying rule to action brought to quiet title to mineral lands under section 2326, United States Revised Statutes; *Merk v. Bowery Min. Co.*, 31 Mont. 309, 78 Pac. 523, applying rule to action brought under section 1310, Code of Civil Procedure; *Savage v. Savage*, 51 Or. 170, 94 Pac. 184, applying rule to action brought under section 516, B. & C. Comp.

Location of Boundaries. See note, 129 Am. St. Rep. 1001.

79 Cal. 449-459, 22 Pac. 47, SPAULDING v. BRADLEY.

Quitclaim Deed Conveys Absolute fee simple title if party executing it had such title.

Approved in *Myers v. Oceanside*, 7 Cal. App. 93, 93 Pac. 688, holding such deed will support action to quiet title.

Quitclaim Deeds. See note, 105 Am. St. Rep. 856.

If Evidence Sustains Finding upon material issue which is decisive of case, and this finding and others not objected to support judgment, it is immaterial whether other findings objected to are sustained by evidence or not.

Approved in *Hatton v. Gregg*, 4 Cal. App. 546, 88 Pac. 595, where findings are sufficient to support judgment, failure to find upon plea of statute of limitations is immaterial.

79 Cal. 468-472, 21 Pac. 869, TAYLOR v. OPPERMAN.

Quitclaim Deeds are as **Effectual** to pass whatever title grantor has as any other deeds.

Approved in *Myers v. Oceanside*, 7 Cal. App. 93, 93 Pac. 688, holding such deed sufficient to support quiet title action.

When Husband Conveys Community Property to wife to her separate use, presumption is that property becomes separate property of wife.

Approved in *Main v. Main*, 7 Ariz. 155, 60 Pac. 890, reaffirming rule; *Wright v. Wright* (Cal.), 41 Pac. 696, where property purchased with community funds is conveyed to wife by direction of husband, with intent that it shall become separate property, conveyance operates as gift from him to her.

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 378.

What is Community Property. See notes, 126 Am. St. Rep. 107; 4 Cof. Prob. 49.

79 Cal. 490-495, 21 Pac. 847, BURTON v. BURTON.

It is not Ground for Reversal that finding of fact as to statute of limitations is placed under heading of conclusion of law.

Approved in *Towle v. Sweeney*, 2 Cal. App. 32, 83 Pac. 75, where case is submitted on agreed facts it is immaterial that conclusion of law as to statute of limitations is inserted as finding of fact; *Gainsley v. Gainsley* (Cal.), 44 Pac. 456, under section 633, Code of Civil Procedure, it is not necessary for findings of fact and conclusions of law to be written on different pieces of paper, if they are distinctly separate; *Curtis v. Boquillas Land Co.*, 9 Ariz. 65, 76 Pac. 613, applying rule to finding of fact of ownership of land.

Exception to Rule that Equity retains for all purposes jurisdiction once assumed. See note, 116 Am. St. Rep. 881.

79 Cal. 504-511, 21 Pac. 961, KING v. GILDERSLEEVE.

Contract to Convey Land in compensation for personal services will be specifically enforced where such services are fully performed.

Approved in *Turley v. Thomas*, 31 Nev. 203, 205, 135 Am. St. Rep. 667, 101 Pac. 577, 578, applying rule to contract to deliver stock.

Contract to Convey Land in Compensation for personal services will not be specifically enforced where such services are not fully performed.

Approved in *Guardianship of Hayden*, 1 Cal. App. 77, 81 Pac. 669, applying rule to promise to bequeath land.

Specific Performance of Contracts Calling for services of a personal nature. See note, 140 Am. St. Rep. 86.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 166, 180.

79 Cal. 511-517, 21 Pac. 1095, ROBINSON v. ROBINSON.

Under Section 139, Civil Code, Superior court may make allowance of alimony to wife in divorce suit in gross sum.

Approved in *Nobrega v. Nobrega*, 13 Haw. 659, applying rule under section 1943, Civil Laws; *De Roche v. De Roche*, 12 N. D. 25, 94 N. W. 770, applying rule under section 2761, Revised Codes of 1899.

Money Decree for Alimony or Separate Maintenance as lien on realty. See note, 25 L. R. A. (n. s.) 132.

79 Cal. 525-537, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826, **FEENEY v. HOWARD.**

Deed cannot be Avoided by parol agreement to hold in trust unless case falls within exceptions to operation of statute of frauds.

Approved in *Kinley v. Thelen*, 158 Cal. 183, 110 Pac. 516, action does not lie for violation of obligation of alleged express trustee of land to pay purchase price and taxes, where terms of alleged trust agreement are not in writing.

If by Means of Parol Promise to reconvey party obtains absolute deed without consideration from one to whom he stands in fiduciary relation, violation of promise is constructive fraud, although at time of promise there was no intention not to perform, whereupon trust arises.

Approved in *Cooney v. Glynn*, 157 Cal. 584, 108 Pac. 508, performance of promise for time does not prevent trust arising when it is broken.

Fraudulent Intent, Being One of facts constituting actual fraud, must be alleged.

Reaffirmed in *Hodgkins v. Dunham*, 10 Cal. App. 698, 103 Pac. 355.

In Absence of Fiduciary Relation or fraud, trust cannot be imposed upon grantee under absolute deed unless declared by writing.

Reaffirmed in *Gray v. Walker*, 157 Cal. 384, 108 Pac. 279.

Distinguished in *Chamberlain v. Chamberlain*, 7 Cal. App. 636, 95 Pac. 660, trust arises where grantee secured conveyance by means of fraudulent misrepresentation and without consideration.

Creation of Trusts in Land by Parol. See notes, 115 Am. St. Rep. 778; 5 Cof. Prob. 249.

Recital of Consideration in Deed cannot be contradicted for purpose of defeating operation of deed.

Reaffirmed in *Ah Hoy v. Raymond*, 19 Haw. 573.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 108.

If Plaintiff Relies upon Contract within statute of frauds, denial of contract is sufficient to raise question of validity under statute.

Reaffirmed in *Hamilton v. Thirston*, 93 Md. 220, 48 Atl. 711.

In Action for Constructive Fraud arising out of violation of fiduciary relation, plaintiff must allege existence of such relation.

Distinguished in *Bleyer v. Bleyer*, 219 Mo. 121, 117 S. W. 715, holding rule inapplicable where actual fraud is alleged, and proof tends to show actual fraud and fiduciary relation.

Future Promise as Fraud. See note, 10 L. R. A. (n. s.) 641.

79 Cal. 537-539, 12 Am. St. Rep. 172, 21 Pac. 960, **OULLAHAN v. SWEENEY.**

Section 3785, Political Code, Requiring purchaser at tax sale to give owner thirty days' notice of application for deed, and extending time for redemption until such notice is given, is valid and applies to all applications for deeds made after act took effect.

Approved in *Boggs v. Ganeard*, 148 Cal. 721, 84 Pac. 199, amendment of 1903 to section 3443, Political Code, which provides new

method to determine validity of certificate of purchase of state lands, does not impair obligation of contract for purchase or any existing legal right of defendant; *Weller v. Wheelock*, 155 Mich. 702, 118 N. W. 611, Act No. 236, Public Acts of 1903, which provides for new form of notice of purchase to owners, is valid as applied to tax deeds issued before amendment; *State ex rel. v. Krahmer*, 105 Minn. 430, 117 N. W. 784, 21 L. R. A. (n. s.) 157, chapter 271, Laws of 1905, which shortened time within which notice of expiration of time for redemption must be given by holder of tax certificate, does not impair obligation of contract.

Distinguished in *Johnson v. Taylor*, 150 Cal. 207, 119 Am. St. Rep. 181, 88 Pac. 906, 10 L. R. A. (n. s.) 818, it is not within power of legislature to prejudicially affect right of redemption by law passed subsequent to tax sale; dissenting opinion in *Weller v. Wheelock*, 155 Mich. 710, 118 N. W. 613, majority holding Act No. 236, Public Acts of 1903, applies to tax deeds issued before amendment.

Applicability to Past Tax Sales of statute eliminating or requiring notice of expiration of redemption period. See note, 10 L. R. A. (n. s.) 819.

79 Cal. 540-548, 21 Pac. 952, **PAYNE v. ENGLISH**; S. C., 101 Cal. 11, 35 Pac. 348.

Monument Movable and Uncertain in character cannot control other descriptive parts of deed.

Distinguished in *Andrews v. Wheeler*, 10 Cal. App. 618, 103 Pac. 148, court may inquire location of stakes and monuments commonly used in lieu of lost or destroyed original ones.

State Harbor Commissioners may be Enjoined from erecting wharf upon water lot which is property of private persons.

Approved in *State v. District Court of Cass County*, 17 N. D. 294, 115 N. W. 678, 15 L. R. A. (n. s.) 331, pure food commissioner may be enjoined from committing acts in excess of authority which would cause irreparable injury.

When Monuments of Senior Survey are destroyed, evidence of monuments of junior survey made by same surveyor at about same time may be received.

Reaffirmed in *Washington Rock Co. v. Young*, 29 Utah, 121, 110 Am. St. Rep. 666, 80 Pac. 386, reaffirming rule.

Right of Owner of Upland to Access to navigable water. See note, 40 L. R. A. 596.

Municipal Ownership of Tide Lands. See note, 64 L. R. A. 334.

Title to Land Between High and Low water mark. See note, 45 L. R. A. 240.

Establishment of Dock Lines. See note, 14 L. R. A. 499.

79 Cal. 549-552, 21 Pac. 958, **MORAN v. ROSS.**

Right to Set Off Benefits Against Damages on condemnation. See note, 9 L. R. A. (n. s.) 828.

Miscellaneous.—Cited in *Moran v. Farley* (Cal.), 21 Pac. 1135.

79 Cal. 554-556, 21 Pac. 952, **PEOPLE v. SMITH.**

Instance of Evidence, Including Possession of stolen property, held sufficient to support conviction of burglary.

Cited in *People v. O'Donnell*, 16 Cal. App. 717, 117 Pac. 934, upholding sufficiency of evidence to convict of burglary where defendant seen coming from and going to burglarized house and left part of loot in saloon and he denied he had stolen property.

79 Cal. 556-561, 21 Pac. 971, HAMMOND v. STARR.

Misnomer of Defendant is Waived by appearance and answer in true name without objection.

Reaffirmed in *Commissioners v. Aiken Canning Co.*, 123 Ga. 649, 51 S. E. 586.

Objection that Amendment Stated different cause of action from original complaint cannot be urged for first time in collateral suit on bond given for release of attachment.

Approved in *Ross v. Gold Ridge Min. Co.*, 14 Idaho, 691, 95 Pac. 823, if it appears from complaint that cause of action can be stated by amendment, then on hearing of motion to dissolve attachment, amendment will be considered as made.

79 Cal. 561-563, 21 Pac. 964, GREEN v. McMANN.

If Printed Transcript Contains Large number of interlineations, is not properly certified, nor in form required by rules of court, appeal will be dismissed.

Distinguished in *White v. White* (Cal.), 24 Pac. 276, refusing to dismiss appeal merely because of interlineations in transcript.

79 Cal. 565-568, 21 Pac. 959, TURNER v. TURNER.

Possession of Promissory Note by payee raises presumption of non-payment.

Reaffirmed in *Light v. Stevens*, 159 Cal. 292, 113 Pac. 661.

79 Cal. 572-574, 21 Pac. 967, PEREGOY v. McKISSICK.

Where Appropriator is not Using Water for beneficial purpose, he cannot enjoin riparian owner who diverts water for irrigation.

Approved in *Anderson v. Bassman*, 140 Fed. 27, both riparian owner in California and appropriator in Nevada are subject to limitation that they divert only reasonable amount of water for beneficial purpose; *Stenger v. Tharp*, 17 S. D. 21, 94 N. W. 403, riparian owner is limited to amount of water actually used for irrigation.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 677.

79 Cal. 575-584, 12 Am. St. Rep. 174, 21 Pac. 955, FARNUM v. HEFNER.

Agreement Between Landlord and Tenant that crops raised shall belong to landlord will not protect title of landlord against attaching creditor of tenant, unless consideration is shown for agreement.

Approved in *Stockton Savings etc. Society v. Purvis* (Cal.), 42 Pac. 441, oral agreement that crop should be property of landlord, that he should sell it and deliver balance of purchase price to tenant after deducting rent, will not support action for conversion against sheriff for seizing crop under attachment.

Sale Under Execution Against Tenant is not breach of covenant against assignment of lease.

Approved in *Powell v. Nichols*, 26 Okl. 736, 110 Pac. 763, reaffirming rule; *Gazlay v. Williams*, 147 Fed. 682, 77 C. C. A. 662, transfer

of lease from lessee to trustee in bankruptcy is neither voluntary assignment nor transfer under legal process; *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 717, 61 Atl. 158, covenant not to assign is not broken by assignment by receiver appointed for lessee after execution of lease.

Subletting of Leased Premises. See note, 117 Am. St. Rep. 95.

What Amounts to Violation of Covenant in lease against assignment or sale. See note, 14 L. R. A. (n. s.) 1203.

Landlord may Provide in Lease that involuntary transfer of leasehold shall work forfeiture.

Approved in *Julian v. Eagle Oil & Gas Co.*, 83 Kan. 134, 109 Pac. 998, upholding condition in assignment of oil and gas lease that if interest of assignees should be assailed for debt, it should work forfeiture.

Lessee cannot Acknowledge Forfeiture of lease, after levy of execution upon his interest, so as to affect rights of judgment creditor.

Approved in *Hughes v. Farmers' Nat. Bank*, 83 Vt. 394, 76 Atl. 36, applying rule to voluntary surrender of old lease by accepting new one.

79 Cal. 587-594, 21 Pac. 1099, COONRADT v. HILL.

When Water of Stream has Been Diverted by dam and ditch and used adversely to lower riparian proprietor for five years, prescriptive title is acquired.

Reaffirmed in *Hubbs etc. Ditch Co. v. Pioneer Water Co.*, 148 Cal. 417, 83 Pac. 257.

79 Cal. 594-600, 21 Pac. 950, PEHRSON v. HEWITT.

Fraud must be Pleaded by Setting up facts constituting it.

Reaffirmed in *Sukeforth v. Lord* (Cal.), 23 Pac. 298.

Distinguished in *Eaton v. Metz* (Cal.), 40 Pac. 948, where court erroneously admitted evidence of fraud under mere general allegations, but found in favor of plaintiff upon issue of fraud, plaintiff cannot complain.

79 Cal. 600-603, 21 Pac. 954, VAN CLEAVE v. BUCHER.

If Execution Directs Levy of specified sum, without showing amount due upon judgment, it is not void, but amendable.

Approved in *Kipp v. Burton*, 29 Mont. 104, 101 Am. St. Rep. 544, 74 Pac. 88, 63 L. R. A. 325, failure of clerk to affix seal of court to execution renders it voidable only.

Execution may be Issued for Alimony allowed under order incident to divorce decree without giving defendant opportunity to show cause.

Distinguished in *Kapp v. District Court*, 32 Nev. 268, 107 Pac. 96, denying right to order for execution for alimony pendente lite.

79 Cal. 603-604, 21 Pac. 963, CROSSMAN v. DAVIS.

Dismissal by Agreement is Bar to subsequent suit involving same issues.

Denied in *Lindsay v. Allen*, 112 Tenn. 653, 82 S. W. 174, holding contra.

79 Cal. 606-608, 21 Pac. 965, WILLIAMS v. HALL.

General Finding That All Allegations are true or untrue is sufficient.

Approved in *Heinrich v. Heinrich*, 2 Cal. App. 482, 84 Pac. 328, and *Paden v. Goldbaum* (Cal.), 37 Pac. 760, both reaffirming rule.

Written Contract Imports Consideration, and if set forth in full it is not necessary to allege consideration.

Reaffirmed in *Noyes v. Young*, 32 Mont. 236, 79 Pac. 1065.

79 Cal. 608-611, 12 Am. St. Rep. 180, 21 Pac. 973, BROWN v. STARR.

One Who Holds Life Estate in homestead premises cannot have appraisement limited to value of such estate.

Approved in *Calmer v. Calmer*, 15 N. D. 129, 106 N. W. 687, in determining value for purpose of ascertaining exemption, amount of liens cannot be deducted.

79 Cal. 612-613, 21 Pac. 1135, MARTIN v. HUDSON.

Where Transcript Does not Conform to rules, appellate court may dismiss appeal or order new transcript to be filed.

Approved in dissenting opinion in *Dees v. Cassels*, 54 Fla. 487, 44 So. 1013, and *Porter v. Ewing*, 51 Fla. 268, 39 So. 994, majority in both holding that appeal should be dismissed forthwith.

79 Cal. 613-625, 22 Pac. 50, GOLDTREE v. THOMPSON.

Civil Code, Section 715, Applies to trusts in personalty.

Reaffirmed in *Estate of Spreckels*, 5 Cal. Prob. 369.

Will Construed as not Suspending power of alienation.

Distinguished in *Estate of Clancy*, 3 Cal. Prob. 351, *arguendo*.

79 Cal. 633-703, 22 Pac. 26, 131, SHARON v. SHARON.

Question Decided by Appellate Court becomes law of case and is binding on appellate court on second appeal if facts are same.

Approved in *Tally v. Ganahl*, 151 Cal. 421, 90 Pac. 1050, holding law of case binding even though on second appeal appellate court considered first decision clearly erroneous; *People's Lumber Co. v. Gillard*, 5 Cal. App. 438, 90 Pac. 557, holding doctrine of law of case not confined to portion of opinion of appellate court strictly essential to decision.

Where There are Two Appeals, doctrines laid down in first are not law of case of second, where facts are different.

Reaffirmed in *Millsap v. Balfour*, 158 Cal. 714, 112 Pac. 451, and *Adams v. Thornton*, 5 Cal. App. 458, 90 Pac. 714.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 337.

For Purpose of Impeachment, Witness may not be questioned as to particular wrongful acts.

Approved in *Estate of Gird*, 157 Cal. 547, 137 Am. St. Rep. 131, 108 Pac. 505, reaffirming rule; *Clements v. McGinn* (Cal.), 33 Pac. 922, holding witness cannot be asked question as to having been in jail.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 700.

When Party has Once Excepted to admission of line of testimony, he is not required to repeatedly object to further questions of same character.

Approved in *People v. Driggs*, 12 Cal. App. 243, 108 Pac. 63, and *Gabriel v. McMullin*, 127 Iowa, 430, 103 N. W. 356, both reaffirming rule.

There is No Prejudicial Error where objectionable question is asked but no answer given.

Reaffirmed in *Duncan v. State*, 171 Ind. 451, 86 N. E. 644.

Supreme Court will Take Judicial Notice of decree of federal court.

Reaffirmed in *Ohm v. San Francisco (Cal.)*, 25 Pac. 157.

Mutual Consent and Mutual Assumption of marital rights, duties, and obligations constitute marriage.

Approved in *Estate of Blythe*, 4 Cal. Prob. 165, 299, reaffirming rule; *Estate of Jessup*, 2 Cal. Prob. 498, discussing question of acknowledgment of paternity of illegitimate child; dissenting opinion in *Lee v. State*, 44 Tex. Cr. 366, 72 S. W. 1011, 61 L. R. A. 904, majority holding that facts did not constitute marriage, where parties did not live together and man did not recognize woman as wife.

Common-law Marriages. See notes, 124 Am. St. Rep. 111, 113, 118; 3 Cal. Prob. 203, 205, 210.

Communication to Attorney, to be Privileged, must have been received professionally and intended to be confidential.

Approved in *In re Niday*, 15 Idaho, 564, 566, 568, 98 Pac. 847, 848, reaffirming rule; *Mackel v. Bartlett*, 33 Mont. 131, 82 Pac. 797, where defendant took brother to attorney to employ him in matter of brother's assignment for creditors, statements made by defendant to attorney were not privileged.

In Action for Divorce, Judgment decreeing divorce and providing for distribution of property is final judgment, although it contains provision providing for report by referee as to what property is community.

Approved in *Costello v. Scott*, 30 Nev. 90, 94 Pac. 223, decree ordering dissolution of partnership and disposing of property is final judgment, although court reserves right to make supplemental decree.

Pendency of Actions in Both State and federal courts sitting in same state. See note, 42 L. R. A. 458.

Admissibility of Communications to Persons serving in judicial capacity. See note, 67 L. R. A. 924.

Miscellaneous.—Cited in *Higgins v. Eaton*, 188 Fed. 958.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 80 CALIFORNIA.

80 Cal. 1-8, 22 Pac. 22, RAISCH v. SAN FRANCISCO.

No Recovery can be had for street work not completed within time specified in contract.

Approved in Connolly v. San Francisco (Cal.), 33 Pac. 1111, upholding rule where contractor for street improvements who was to be paid by assessments of benefits abandoned contract before completion of work because such assessments were illegal.

No Void Act of Municipal Officer can be cured by the aid of the doctrine of estoppel.

Approved in Lukens v. Wye, 156 Cal. 506, 105 Pac. 596, beneficiaries under act of legislature appropriating money to pay claim against the state are not estopped from claiming whole amount by an agreement between the governor and themselves that a smaller amount should be received in satisfaction thereof, such agreement being against public policy.

Extensions of Time for Completion of contracts for street work must be obtained before expiration of period fixed therein for completion.

Reaffirmed in Palmer v. Burnham (Cal.), 47 Pac. 600.

80 Cal. 8-16, 21 Pac. 1127, JENNINGS v. LE BRETON.

Superintendent of Streets may Approve Work upon certificates showing work was completed according to contract, without personal inspection.

Approved in Reid v. Clay, 134 Cal. 215, 66 Pac. 263, where certificate of engineer is simply for the purpose of assisting the superintendent of streets to determine whether contract has been performed, if satisfactory to the superintendent, its contents are immaterial to the validity of the lien.

It is Presumed That All Conditions necessary to authorize court to appoint person as administrator existed.

Approved in Estate of King, 4 Cal. Prob. 18, request of next of kin named as executors for appointment of another as administrator, who is appointed and dies pending administration, does not deprive them of right to letters after such death.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 908.

Assessments for Improvements by front-foot rule. See note, 28 L. R. A. (n. s.) 1177, 1179.

80 Cal. 19-33, 21 Pac. 1123, WEST v. CRAWFORD.

Terms of Subscription to Stock Create a valid promise to pay which is not dependent upon creation of corporation.

Approved in *Horseshoe Pier etc. Co. v. Sibley*, 157 Cal. 446, 108 Pac. 309, the fact that a subscriber who had paid part of her subscription toward stock of a proposed corporation was not included as a stockholder in such corporation did not estop the corporation from maintaining action to enforce the residue.

Subscriber of Stock may Agree to Pay his subscription in a certain manner and relieve corporation from duty of making calls.

Approved in *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 197, 81 Pac. 1032, by signing by-laws of bank containing provision for the enforcement of unpaid calls by action, stockholders waived right to insist that the corporation levy assessments therefor.

Liability to Corporation of Subscribers to stock. See note, 93 Am. St. Rep. 371, 383.

Withdrawal of Stock Subscription. See note, 33 L. R. A. 596.

Supreme Court will not Search the Record for errors not specifically pointed out.

Approved in *Bell v. Staacke*, 151 Cal. 548, 91 Pac. 324, refusing to consider specifications of error where transcript was voluminous and no reference was made in transcript or brief to page or folio where ruling complained of might be found; *Wheelock v. Godfrey*, 100 Cal. 589, 35 Pac. 320, appellate court is justified in concluding errors are not important where no direction is given as to where they are to be found in voluminous record.

Miscellaneous.—Cited in *West v. Belding* (Cal.), 21 Pac. 1136, and *West v. Hitchcock* (Cal.), 21 Pac. 1136, companion cases.

80 Cal. 34-38, 21 Pac. 1130, PEOPLE v. DUNNE.

Error in Ruling on Irrelevant Question is immaterial if no prejudicial error is committed.

Approved in *Wabash Screen Door Co. v. Lewis*, 184 Fed. 262, in action for injuries to and death of servant, answer to hypothetical question could not have affected issue of fact.

80 Cal. 41-46, 22 Pac. 80, PEOPLE v. MIZE.

Instruction Ignoring Essential Ingredient of specific intent to kill, given on trial for assault with intent to murder, is prejudicial error.

Approved in *People v. Mendenhall* (Cal.), 63 Pac. 675, instruction given on prosecution for assault with intent to murder, that the malice necessary to make a killing murder might be either express or implied, is erroneous; *State v. Williams*, 36 Wash. 149, 78 Pac. 782, instructions silent as to the necessity for the existence of actual intent were not cured by the giving of subsequent conflicting instructions.

To Constitute Assault With Intent to commit murder, there must be proved the intent to take life.

Approved in *State v. Rodriguez*, 31 Nev. 343, 102 Pac. 863, reaffirming rule; *Lo Toon v. Territory*, 16 Haw. 355, such intent may be inferred from the facts.

The Question of Intent must be Determined by the jury from all the circumstances.

Approved in *Horton v. People*, 47 Colo. 254, 107 Pac. 258, instruction that from the use by defendant of a weapon calculated to produce death it should be presumed death was intended was erroneous.

Rule That Burden of Proving Justification or mitigation shifts to defendant where killing is proved is confined to murder cases.

Reaffirmed in *People v. Jones*, 150 Cal. 371, 117 Pac. 182.

80 Cal. 46-52, 13 Am. St. Rep. 96, 22 Pac. 67, **PEOPLE v. SWALM.**

Wife's Consent to the Felonious Taking of property affords thief no defense.

Approved in *Reade v. De Lea*, 14 N. M. 451, 95 Pac. 133, upholding conveyance by husband of community property in which wife did not join.

Larceny. See note, 88 Am. St. Rep. 597.

Interest of Wife in Community Property. See note, 122 Am. St. Rep. 682.

80 Cal. 52-57, 22 Pac. 90, **PEOPLE v. DE LAY.**

Giving of Contract of Indemnity affords no defense to charge of embezzlement of trust funds.

Approved in *State v. Allen*, 21 S. D. 124, 110 N. W. 93, in prosecution for embezzlement of carriage and harness, evidence that a saddle was left as security for property taken was properly excluded.

Who may Commit Embezzlement. See note, 87 Am. St. Rep. 45.

80 Cal. 57-60, 22 Pac. 74, **SAN FRANCISCO v. ITSELL.**

Objection to Verification of Complaint cannot be heard in appellate court for first time.

Approved in *Moore v. Hupp*, 17 Idaho, 245, 105 Pac. 213, sufficiency of verification which omitted the words "of his own knowledge" was waived; *Pryor v. City of Walkerville*, 31 Mont. 624, 79 Pac. 242, applying rule where complaint was signed "Sarah A. Pryor (her X mark)" without the signature of a witness.

Municipal Authorities have No Power to dispose of property held in trust for public purposes.

Approved in *Tulare Irr. Dist. v. Collins*, 154 Cal. 442, 97 Pac. 1125, applying rule to land held by irrigation district under Wright Act and Bridgeford Act amendatory thereof (Stats. 1897, p. 263), which, because of change in plans of the district, became unnecessary to its irrigation scheme.

Who are Bound by Judgment for or against municipality or other governmental body or its officers. See note, 105 Am. St. Rep. 209.

80 Cal. 61-62, 22 Pac. 57, **BELLEGARDE v. SAN FRANCISCO BRIDGE CO.**

Where No Undertaking on Appeal has been filed as required by law, there is no appeal to be dismissed.

Reaffirmed in *Reay v. Butler* (Cal.), 25 Pac. 685.

80 Cal. 62-64, 22 Pac. 85, IN RE SKERRETT.

Executor is Only Absolved from giving appeal bond where object of appeal is to protect interests of estate.

Approved in *Ransier v. Hyndman*, 18 N. D. 199, 119 N. W. 545, applying rule to one who appealed from order revoking probate of will, and also his letters of administration.

Omission to Make an Order cannot be corrected by order nunc pro tunc after time for making it has expired.

Approved in *Klein v. Southern Pac. Co.*, 140 Fed. 216, discussing entry nunc pro tunc of order extending time for filing motion for new trial, where no such order was actually made in court.

Order Dispensing With Security on Appeal must be made within the time allowed for filing the bond.

Approved in *Crowley v. Superior Court*, 10 Cal. App. 346, 101 Pac. 936, party excepting to sufficiency of sureties on appeal bond may waive their justification, provided such waiver is made within five days; *Village of Hailey v. Riley*, 13 Idaho, 754, 92 Pac. 757, stipulations between counsel extending time to file briefs, made after expiration of time to file undertaking on appeal, did not waive such filing.

80 Cal. 65-68, 22 Pac. 69, DANGLARDE v. ELIAS.

If Acknowledgment of Instrument was Made as required by statute, certificate of officer is not necessary to its validity.

Approved in *Cordano v. Wright*, 159 Cal. 615, 115 Pac. 229, applying rule where certificate of acknowledgment to instrument set up in answer failed to show that acknowledgment was taken as required by statute, but its due execution was admitted by failure to file affidavit of denial as provided by section 448 of the Code of Civil Procedure.

80 Cal. 68-71, 22 Pac. 66, ONTARIO STATE BANK v. TIBBITS.

Failure of Corporation to File Copy of its articles is mere matter in abatement of action, to be specially pleaded.

Approved in *White Sewing Machine Co. v. Peterson*, 23 Okl. 362, 100 Pac. 513, it is not necessary to statement of cause of action by foreign corporation that complaint allege performance of statutory conditions precedent to doing business in the state.

Distinguished in *Valley Lumber Co. v. Driessel*, 13 Idaho, 672, 93 Pac. 768, 15 L. R. A. (n. s.) 299, complaint by foreign corporation must show compliance with statutes and Constitution relative to designating agent on whom process may be served, in order to state cause of action.

Matter in Abatement Must be Specially Pleaded, or such defense is waived.

Approved in *Riverdale Mining Co. v. Wicks*, 14 Cal. App. 531, 112 Pac. 898, where amendment to answer setting up failure to file copy of articles of incorporation was allowed on condition plaintiff might show such filing before close of case, it was properly allowed to show its capacity to maintain action; *Clark v. Oregon etc. R. R. Co.*, 29 Mont. 320, 74 Pac. 735, where defendant answered in abatement for misnomer, action of court in rendering judgment on merits without disposing of plea in abatement was erroneous.

80 Cal. 71-74, 22 Pac. 79, ESTATE OF ARMSTRONG.

When Homestead was Selected During Life of decedent, one may be set apart for surviving spouse though there are no minor children. Reaffirmed in Estate of Hessler, 2 Cal. Prob. 359.

80 Cal. 74-78, 21 Pac. 1134, GREENWOOD v. ADAMS.

Application to File Supplemental Answer is addressed to sound discretion of the court.

Approved in Reed & Co. v. Harshall, 12 Cal. App. 704, 108 Pac. 722, upholding refusal of court after trial and submission of cause to allow filing of amended answer setting up failure of foreign corporation to file with Secretary of State designation of person on whom process can be served.

Purchaser Under Void Tax Sale acquires no rights.

Approved in Wright v. Fox, 150 Cal. 681, 89 Pac. 833, assessment of city lots which failed to designate city or town, being void, all subsequent proceedings were likewise void; Hotchkiss v. Hansberger, 15 Cal. App. 612, 613, 115 Pac. 961, owner of property was entitled to decree quieting his title against purchaser at void tax sale without first paying him taxes, penalties and costs paid for the land.

80 Cal. 78-80, 22 Pac. 71, WHITING v. GARDNER.

In Description by Reference to Map and survey, survey controls in case of discrepancy.

Approved in Smith v. Glenn (Cal.), 62 Pac. 183, upholding exclusion of field-notes and memorandum-book of surveyor, where there was no evidence of any discrepancy between map and field-notes; Staub v. Hampton, 117 Tenn. 730, 101 S. W. 782, survey of land intended to be conveyed controlled description, though such land was not included in calls of deed.

80 Cal. 81-82, 22 Pac. 69, GREENBERG v. HOFF.

Where Findings of Jury on Special Issues are not signed, they are ineffectual for any purpose.

Disapproved in Stanard v. Sampson, 23 Okl. 29, 99 Pac. 802, where party against whom special issues were found failed to object to receiving of same unsigned, nor made request that same be signed, he waived right to complain of error.

80 Cal. 82-86, 22 Pac. 61, MARSHALL v. HANCOCK.

Party Asking Question Which Does not Indicate whether answer will be material, must make offer of what he expects to prove.

Approved in Norman v. Hopper, 38 Wash. 420, 80 Pac. 552, where record does not show that answers to questions relating to negotiations leading up to contract of sale were material, error will not be presumed.

Admissibility of Evidence Given in Former trial in civil case. See note, 91 Am. St. Rep. 200.

Competency of Handwritings as Standards for comparison. See note, 63 L. R. A. 435.

80 Cal. 86-90, 22 Pac. 76, DEAR v. VARNUM.

In Absence of Acts Amounting to Duress, payment of a tax is voluntary though made under protest.

Approved in *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 759, 103 Pac. 943, discussing what would constitute coercion sufficient to render payments involuntary in transaction whereby biscuit company, after expiration of its contract, was obliged to pay a higher price than formerly for much needed boxes; *Decker v. Perry* (Cal.), 35 Pac. 1019, complaint which fails to show that no sale of the property had been advertised or otherwise threatened before illegal assessment was paid does not state a cause of action; *Louisville v. Becker*, 139 Ky. 22, 129 S. W. 313, where taxes illegally assessed were paid before city could enforce their payment or impose penalty, in order to obtain rebate allowed by law, such payment was voluntary.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 428, 442.

80 Cal. 90-103, 13 Am. St. Rep. 101, 22 Pac. 57, **KARNS v. OLNEY.**

Contract of Sale in Legal Effect made by principal cannot be repudiated on ground agent had no written authority to sell.

Distinguished in *Thomas v. Rogers*, 108 Minn. 134, 133 Am. St. Rep. 421, 121 N. W. 631, oral direction to agent to accept an offer of purchase does not preclude principal from insisting contract of sale was invalid for want of written authority in agent to sell.

In Order to Bind Principal, ratification of unauthorized acts of agent must be with full knowledge of the facts.

Approved in *McGlassen v. Tyrrell*, 5 Ariz. 54, 44 Pac. 1088, acceptance of interest on note paid in advance to agent, without knowledge it was advance interest, did not ratify act of agent not authorized to accept it and release surety.

80 Cal. 104-110, 22 Pac. 64, **DUNN v. MACKEY.**

Attachment may Issue in Action for damages for breach of contract where the damages are ascertainable.

Approved in *Hale Bros. v. Milliken*, 142 Cal. 139, 75 Pac. 655, upholding rule where the damages claimed were for delay of three months in performance of contract to deliver steel for a building; *Ross v. Gold Ridge Min. Co.*, 14 Idaho, 694, 695, 95 Pac. 824, agreement to sell twenty-five thousand shares of stock after the 1st of September, 1906, at five cents a share clear, is a contract for the direct payment of money.

Agent is Liable for Breach of Contract to sell property for specified sum within specified time.

Approved in *Sprague v. Hart*, 11 Cal. App. 786, 106 Pac. 592, contract to resell land and repay plaintiff payments made by her on account of its purchase was not an agreement to repay only on condition of resale.

80 Cal. 114-118, 13 Am. St. Rep. 112, 22 Pac. 53, **FRESNO CANAL ETC. CO. v. ROWELL.**

A Covenant Does not Run With Land unless contained in some grant thereof.

Approved in *Pomona Land etc. Co. v. San Antonio Water Co.*, 152 Cal. 627, 93 Pac. 885, applying rule in action to determine conflicting claims of water companies under contract to save and develop natural flow of a stream which should be divided at a dam;

Hurxthal v. Boom Co., 53 W. Va. 93, 97 Am. St. Rep. 954, 44 S. E. 522, covenant to maintain and repair dams to supply water to mill and prevent accumulation of trash in mill-race, is not a covenant real.

What Covenants Run With the Land. See note, 82 Am. St. Rep. 669, 684.

Liability of Grantee on Covenants and conditions in deed. See note, 126 Am. St. Rep. 373.

Water Company's Lien for Water furnished to land is not dependent upon use of the water.

Approved in **Fresno Canal & Irr. Co. v. Hart**, 152 Cal. 451, 453, 92 Pac. 1010, 1011, upholding rule in suit on written contract for furnishing water, where question was when payments were to commence.

Agreement to Take Water for Use of land creates a lien enforceable against the land in hands of a subsequent owner.

Approved in **Fresno Canal etc. Co. v. Park**, 129 Cal. 450, 62 Pac. 88, upholding contract whereby water company agreed to furnish water for irrigation purposes, the water right to be appurtenant to the land, where no rates had been fixed by board of supervisors.

Distinguished in **Stanislaus Water Co. v. Bachman**, 152 Cal. 728, 93 Pac. 863, 15 L. R. A. (n.s.) 359, agreement by water company to furnish water to land owner from a river through its canal created no lien on the canal but was an agreement for sale of real property binding on successor of company.

80 Cal. 122-129, 22 Pac. 125, **PEOPLE v. OLSEN.**

Homicide in Commission of Unlawful Act. See notes, 68 L. R. A. 193; 63 L. R. A. 355, 357, 358, 367.

80 Cal. 129-132, 22 Pac. 124, **PEOPLE v. STEWART.**

"Slight Evidence" will not Justify a verdict of guilty.

Approved in **Painter v. Painter (Cal.)**, 36 Pac. 868, in suit against surviving partner for accounting, unsupported opinion of expert witness that irregularities found in books were indicative of fraud did not create substantial conflict.

80 Cal. 132-135, 22 Pac. 74, **DE CAZARA v. ORENA.**

Mortgagor cannot Quiet Title to mortgaged property without paying his debt, though debt be barred by statute of limitations.

Approved in **Pottkamp v. Buss (Cal.)**, 31 Pac. 1122, reaffirming rule; **Puckhaber v. Henry**, 152 Cal. 423, 125 Am. St. Rep. 75, 93 Pac. 116, pledgee of life insurance policy had right to collect amount thereof from insurer, where personal representative of beneficiary claimed same on ground indebtedness due pledgee was barred; **Cameron v. Ah Quong**, 8 Cal. App. 313, 96 Pac. 1026, in action of ejectment against tenant in possession, where complaint in intervention of mortgagee failed to state a cause of action, judgment in his favor could not be upheld; **Bacon v. Rice**, 14 Idaho, 114, 93 Pac. 512, in action to quiet title, where tax certificates introduced by defendant established a lien, plaintiff could not recover without discharging same; **Tracy v. Wheeler**, 15 N. D. 250, 107 N. W. 69, 6 L. R. A. (n.s.) 516, refusing to cancel mortgage where proceedings for foreclosure were barred, unless debt be first paid.

Distinguished in **Marshutz v. Seltzor**, 5 Cal. App. 143, 89 Pac. 878, in action to quiet title, defendant mortgagee cannot obtain affirmative relief upon a cross-complaint setting up such outlawed mortgage.

Quieting Title as Against Barred Encumbrance. See note, 6 L. R. A. (n. s.) 517, 519.

Conveyance of Land to Secure Payment of money does not pass the legal title.

Approved in *Murdock v. Clarke* (Cal.), 24 Pac. 274, upholding rule where grantee was put in possession under agreement to account for rents and profits.

80 Cal. 135-138, 22 Pac. 70, YERIAN v. LINKLETTER.

Gross Carelessness of Itself will not warrant a verdict for exemplary damages.

Approved in *Davis v. Hearst*, 160 Cal. 173, 116 Pac. 543, instruction in libel case that malice in law consisted in that which law regards as sufficient invasion of plaintiff's rights to sustain exemplary damages or willful disregard of plaintiff's rights, is erroneous; *Lothrop v. Golden* (Cal.), 57 Pac. 397, in action for conversion, instruction authorizing award of exemplary damages if taking was unlawful, though erroneous, did not mislead the jury.

80 Cal. 139-141, 22 Pac. 72, LEVERONE v. HILDRETH.

One Who Signs a Note After its execution, without new consideration, is not liable thereon.

Reaffirmed in *Leverone v. Hildreth* (Cal.), 42 Pac. 318.

80 Cal. 144-146, 22 Pac. 71, DE PEDRORENA v. SUPERIOR COURT.

Decree of Distribution is Subject to direct attack.

Approved in *Bacon v. Bacon*, 150 Cal. 486, 89 Pac. 320, upholding review by a court of equity of a decree of distribution given by reason of mistake.

80 Cal. 146-153, 22 Pac. 82, GOLDMAN v. BASHORE.

Assignments of Error must be Supported by substantive part of bill of exceptions.

Approved in *Estate of Higgins*, 156 Cal. 266, 104 Pac. 10, upholding rule where only reference to instructions complained of was in assignments of error at close of bill.

80 Cal. 153-160, 22 Pac. 129, PEOPLE v. CARROLL.

Conducting a Banking Game not Played for money constitutes no offense.

Approved in *Ex parte Williams* (Cal. App.), 87 Pac. 566, to set up and operate a slot-machine is not criminal unless same is played for money, checks, or other representative of value; *Proctor v. Territory*, 18 Okl. 382, 92 Pac. 391, information which failed to charge owner and operator of an open gambling-room with conducting games for money failed to charge a public offense.

Operating Any Device on Which Money is hazarded is conducting a banking game.

Approved in *State v. Hunter*, 106 La. 189, 30 So. 262, discussing what is meant by a "banking-house"; *State v. Duncan*, 40 Mont. 535, 107 Pac. 511, information need not state the particular name of the game of chance played.

In Absence of Specification of Insufficiency of evidence to prove venue, question of venue of offense charged is not presented.

Approved in *People v. Connelly* (Cal.), 38 Pac. 43, where evidence in bill of exceptions tended to prove where money was received and converted, venue was sufficiently proved.

80 Cal. 160-165, 22 Pac. 127, 549, **PEOPLE v. BUSHTON.**

Flight of a Person Immediately after committing a crime is a circumstance tending to prove guilt.

Reaffirmed in *People v. Coxe* (Cal.), 66 Pac. 725.

Every Person is Presumed to Intend what his acts indicate to have been his intention.

Approved in *People v. Petruzo*, 13 Cal. App. 580, 110 Pac. 328, where there was no controversy as to intent to kill, it was error to instruct jury guilt would follow from such intention; *People v. Grill*, 3 Cal. App. 519, 86 Pac. 615, instruction in homicide case as to intent was prejudicial to defendant in taking away from jury question of accidental killing.

Homicide by Misadventure. See note, 3 L. R. A. (n.s.) 1155.

Witness may be Impeached by Evidence that he has made at other times statements inconsistent with his testimony.

Approved in *Lanigan v. Neely*, 4 Cal. App. 777, 89 Pac. 448, upholding impeachment of witness by reference to his deposition taken before the trial which had been transcribed, but not read or subscribed by the witness.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 46.

One Charged With Murder is only required to produce such evidence as will create a reasonable doubt as to his guilt.

Approved in *People v. Eubanks*, 86 Cal. 297, 24 Pac. 1015, and *State v. Crean*, 43 Mont. 55, 114 Pac. 606, both reaffirming rule; *People v. Button* (Cal.), 38 Pac. 202, applying rule where one accused of murder commenced the combat but tried in good faith to withdraw before the homicide; *People v. Morris*, 3 Cal. App. 7, 84 Pac. 465, in prosecution for rape, instruction leading jury to believe defense of alibi must be proved by a preponderance of evidence was objectionable; *Anderson v. Territory*, 9 Ariz. 54, 76 Pac. 637, instruction charging jury it was necessary for defendant to establish his claim of self-defense "by a preponderance of the evidence" was erroneous; *State v. Hazlet*, 16 N. D. 434, 113 N. W. 377, applying rule to instruction relative to burden of proof as to questions of excusable and justifiable homicide.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n.s.) 490.

80 Cal. 166-181, 22 Pac. 86, **IN RE ROSE.**

Administrator is Entitled to Necessary traveling expenses incurred in transacting business of estate.

Reaffirmed in *Rice v. Tilton*, 14 Wyo. 116, 82 Pac. 580.

Advances Made to Heirs by Administrator cannot be charged as expenses of administration.

Approved in *Elizalde v. Murphy*, 4 Cal. App. 116, 87 Pac. 246, in action on the bond of a deceased administrator, he was not entitled to credit for payments made to widow as part of her distributive share.

Administrator is not Entitled to His Commissions until settlement of his final account.

Approved in *Estate of Hite*, 155 Cal. 459, 101 Pac. 452, the same rule is applicable to attorney's fees so far as the ordinary probate proceedings are concerned.

Administrator Who Carries on Business of deceased does so at his own risk.

Approved in *Copeland v. Fifield*, 180 Mass. 224, 62 N. E. 250, in action brought by creditor of a deceased person, assets in hands of administrator which accrued from continuance of business of intestate were new assets not barred by two years' limitation.

There is No Distinction Between a judgment and a final judgment.

Approved in *Mak-Saw-Ba Club v. Coffin*, 169 Ind. 211, 82 N. E. 463, judgment for costs in favor of public ditch construction commissioner against land owner was not a final judgment from which appeal could be taken; *Forrester v. Boston etc. Min. Co.*, 29 Mont. 408, 74 Pac. 1093, in action by stockholders to declare transfer by directors void, the fact that the decree allowing attorney's fees to plaintiffs contained a provision for an accounting did not render the allowance of attorney's fee premature.

80 Cal. 181-188, 22 Pac. 76, LAKESIDE DITCH CO. v. CRANE.

In Absence of Denial of Allegation that defendant has diverted water from plaintiff, refusal of proof that water was diverted by other ditches later in time of diversion than ditches of either party is proper.

Approved in *Carnes v. Dalton*, 56 Or. 666, 110 Pac. 174, where grantee of right to use irrigation ditch to convey water in excess of stated amount required for use of grantors depleted water, one of grantors may sue without making other grantors parties.

Acts Constituting Adverse Use of water right must be of such a nature as to give rise to cause of action.

Approved in *Perry v. Calkins*, 159 Cal. 178, 113 Pac. 138, use of water diverted from a natural stream by lower riparian appropriator is not adverse to upper user.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 718.

Finding as to Extent of Appropriation of water should be specific as to quantity.

Approved in *Rogers v. Overacker*, 4 Cal. App. 340, 87 Pac. 1110, judgment enjoining defendant from diverting water which gave no information as to quantity of water due plaintiff was fatally defective.

Where De Facto Existence of Corporation is shown, its existence cannot be collaterally questioned.

Approved in *Reclamation Dist. v. McPhee*, 13 Cal. App. 388, 109 Pac. 1108, upholding rule in action to foreclose lien of an assessment levied by a reclamation district.

Presumption as to Incorporation. See note, 22 L. R. A. 278.

Miscellaneous.—Cited in *Settlers' Ditch Co. v. Hayes* (Cal.), 22 Pac. 1152.

80 Cal. 189-194, 22 Pac. 62, HEILBRON v. THE '76 LAND AND WATER CO.

Diversion of Surplus Water will not be enjoined when no lower proprietor will be injured thereby.

Distinguished in *Huffner v. Sawday*, 153 Cal. 93, 94 Pac. 427, judgment enjoining diversion could not be complained of because

it did not reserve right to flood waters, where pleadings raised no issue as to right to take flood waters; *Anaheim Union Water Co. v. Fuller*, 150 Cal. 334, 88 Pac. 981, 11 L. R. A. (n. s.) 1062, lower riparian owner may enjoin unlawful diversion by nonriparian appropriators in order to preserve his riparian right.

Right of Riparian Owner to Prevent diversion of flood water. See note, 22 L. R. A. (n. s.) 392.

Each Riparian Owner has Right to a reasonable use of the water on his land.

Approved in *Turner v. James Canal Co.*, 155 Cal. 95, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, upper riparian owner is entitled to reasonable use of stream, although such use may interfere with right of lower proprietor.

Correlative Rights of Upper and Lower proprietors as to use and flow of stream. See note, 41 L. R. A. 739.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 725.

Power to Grant Mandatory Injunctions. See note, 20 L. R. A. 164.

80 Cal. 195-198, 22 Pac. 84, BOGART v. CROSBY.

Principal is Liable to Vendee for deposit made on purchase price of land.

Approved in *Larson v. O'Hara*, 98 Minn. 75, 116 Am. St. Rep. 342, 107 N. W. 823, where contract of sale was unenforceable because agent was without authority to execute it, principal was nevertheless liable for deposit money in hands of such agent.

Right to Recover from Agent Money paid him for principal. See note, 23 L. R. A. (n. s.) 554, 555, 558.

80 Cal. 199-200, 22 Pac. 66, PEOPLE v. GOODHUE.

A Judgment cannot be Vacated on motion after expiration of six months.

Approved in *People v. Harrison* (Cal.), 22 Pac. 1143, reaffirming rule; *Estate of Welch*, 3 Cal. Prob. 305, applying rule to order for family allowance.

Relief from Judgments Rendered on publication of process. See note, 16 L. R. A. 361.

80 Cal. 201-204, 22 Pac. 146, IN RE FIL KL.

Judgment of Imprisonment Unauthorized in part can be enforced as to portion court had right to pronounce.

Approved in *In re Sullivan*, 3 Cal. App. 195, 84 Pac. 781, judgment imposing fine for assault with deadly weapon, and also directing imprisonment as means of enforcing payment, was valid as to the fine.

Distinguished in *Matter of Smith*, 152 Cal. 568, 93 Pac. 192, judgment pronounced on holiday which was void for purpose of committing prisoner to state prison was not valid for purpose of vacating bench warrant issued on filing of information.

Character of Contempt for Violation of injunction to protect private rights. See note, 13 L. R. A. (n. s.) 594.

Right to Compel Prisoners to Labor. See note, 27 L. R. A. 596.

80 Cal. 205-207, 22 Pac. 139, PEOPLE v. ANDERSON.

Presumption of Ownership from Possession, if uncontradicted, is accepted as matter of proof.

Distinguished in *People v. Cleary*, 1 Cal. App. 52, 81 Pac. 754, where indictment failed to allege the ownership of money stolen, it could not be aided by the presumption of ownership from possession.

Nature and Elements of Crime of robbery. See note, 135 Am. St. Rep. 481.

Robbery by Taking from One Property belonging to another. See note, 67 L. R. A. 344.

80 Cal. 208-211, 13 Am. St. Rep. 116, 22 Pac. 141, **IN RE ACKERMAN.**

Upon Death of Either Spouse, homestead selected from community property vests in the survivor.

Approved in *Estate of Clavo*, 6 Cal. App. 777, 93 Pac. 295, homestead which vested absolutely in husband on death of his former wife could not continue as a homestead for benefit of second wife; *Fisher v. Bartholomew*, 4 Cal. App. 583, 88 Pac. 609, title of surviving spouse to homestead property was not affected by probate sale had under mortgage claim presented to administrator.

Property cannot be Set Apart as homestead which could not have been dedicated as such immediately preceding death of deceased.

Distinguished in *Estate of Pohlmann*, 2 Cal. App. 362, 84 Pac. 355, probate court is authorized to set apart any portion of estate which is suitable for a homestead, though deceased never resided upon it.

80 Cal. 211-215, 13 Am. St. Rep. 118, 22 Pac. 140, **PEOPLE v. DUNN.**

Powers Conferred on Administrative Agencies for purpose of aiding in execution of purpose of legislature is not a delegation of legislative functions.

Approved in *State v. Bryan*, 50 Fla. 370, 39 So. 954, upholding act delegating selection of place of location of University of Florida to state board of education and state board of control; *Codman v. Crocker*, 203 Mass. 155, 89 N. E. 180, 25 L. R. A. (n. s.) 980, upholding act leaving it to a commission to determine by which of two designated routes a railway tunnel should be constructed; *Evers v. Hudson*, 36 Mont. 152, 92 Pac. 468, upholding act designating those electors favoring the establishment of a county free high school as the persons who shall determine the location of such school; *Davenport v. Elrod*, 20 S. D. 577, 107 N. W. 835, upholding act authorizing state capitol commission to procure construction of capitol building; *State v. Evans*, 122 Tenn. 192, 122 S. W. 83, upholding amendment to act creating office of county superintendent of schools which provided board of education should ascertain whether applicants were qualified.

Act to Provide Site for Home for feeble-minded children and to erect buildings thereon has but one purpose.

Approved in *State v. Gordon*, 223 Mo. 25, 122 S. W. 1014, proposition to incur indebtedness for school district, part to be used in building schoolhouse in one ward and remainder in repairing schoolhouse in another ward, embraced a single subject.

Validity of Statute or Ordinance authorizing levy of taxes, incurring indebtedness, or appropriation of money, for two or more purposes. See note, 14 L. R. A. (n. s.) 520.

Conclusiveness of Enrolled Bill. See note, 23 L. R. A. 347.

80 Cal. 216-219, 22 Pac. 138, **EX PARTE CHAMBERS.**

Statute Providing for Adoption of minor children must be strictly pursued.

Approved in *Estate of Renton*, 3 Cal. Prob. 526, reaffirming rule; *Ferguson v. Herr*, 64 Neb. 657, 90 N. W. 628, adopted child does not inherit from foster parents in absence of statement by foster parents clearly indicating such intention.

80 Cal. 220-229, 22 Pac. 143, **PROLL v. DUNN.**

The Constitution Provides for No Set Form of words in which appropriations shall be made.

Approved in *State v. Eggers*, 29 Nev. 480, 91 Pac. 822, 16 L. R. A. (n. s.) 630, act creating state industrial and publicity commission made a sufficient appropriation for salary of chairman; *Menefee v. Askew*, 25 Okl. 628, 107 Pac. 161, applying rule to appropriation as to salary and traveling expenses of game and fish warden.

80 Cal. 233-236, 13 Am. St. Rep. 122, 22 Pac. 173, **PEOPLE v. FREEMAN.**

The Power of Appointment to Office is not essentially an executive function.

Approved in *Southern Pac. Co. v. Bartine*, 170 Fed. 746, act providing that governor, lieutenant-governor and attorney general shall constitute railroad board for purpose of appointing members of railroad commission thereby created is a valid exercise of legislative power; *Cox v. State*, 72 Ark. 98, 105 Am. St. Rep. 17, 78 S. W. 756, upholding act providing for the appointment by the legislature of a state capitol commission; *Attorney General v. Bolger*, 128 Mich. 360, 87 N. W. 368, upholding act abolishing board of commissioners of parks appointed by mayor, and providing for single commissioner to be appointed by city council; *Territory v. Albright*, 12 N. M. 323, 78 Pac. 213, and *Territory v. Gutierrez*, 12 N. M. 284, 78 Pac. 148, both holding void Laws of 1903, page 38, chapter 27, section 3, as amended by chapter 49, page 80, ousting existing officers and appointing new ones to take their places; *State v. Nash*, 66 Ohio St. 619, 64 N. E. 560, where duty of making appointment to fill vacancy in office of lieutenant-governor is conferred on governor, mandamus will issue commanding him to perform such duty; *Richardson v. Young*, 122 Tenn. 498, 521, 125 S. W. 669, 675, upholding act providing state board of elections shall be elected by joint vote of both houses of the General Assembly, instead of by the governor; *In re Appointment of Reviser*, 141 Wis. 615, 124 N. W. 678, upholding Laws of 1909, chapter 546, providing for appointment of a reviser of the statutes by the state library trustees.

Power of Appointment to Public Office. See note, 105 Am. St. Rep. 21.

80 Cal. 237-243, 22 Pac. 167, **SIMPSON v. SIMPSON.**

Effect of Divorce on Homestead Rights. See note, 23 L. R. A. 240.

80 Cal. 245-253, 13 Am. St. Rep. 147, 22 Pac. 184, **LAVESON v. STANDARD SOAP CO.**

Mortgagees' Right of Action Against Third Persons for invasion of their rights. See note, 109 Am. St. Rep. 445.

80 Cal. 257-266, 22 Pac. 195, **MILLER v. LUCO.**

In Action to Quiet Title, a cross-complaint by defendant claiming title in himself is unnecessary.

Approved in *Martin v. Molera*, 4 Cal. App. 301, 87 Pac. 1105, defendant in ejectment was entitled to file cross-complaint pleading judgment rendered in prior action between plaintiff and his predecessor in interest; *Bacon v. Rice*, 14 Idaho, 113, 93 Pac. 512, upholding cross-complaint where defendant sought to enforce equitable title against the plaintiff as holder of the legal title; dissenting opinion in *Hawley v. Griffin*, 121 Iowa, 704, 97 N. W. 91, majority holding in suit to quiet title by grantees in tax deeds, where heirs of deceased owner claimed right to redeem on ground owner was insane when property was sold, such defense could only be made by counterclaim.

Distinguished in *Johnson v. Taylor*, 150 Cal. 208, 119 Am. St. Rep. 181, 88 Pac. 907, 10 L. R. A. (n. s.) 818, where plaintiff did not attack cross-complaints filed by defendants, he consented to method of procedure followed.

Findings Need not be Made upon immaterial issues nor upon facts admitted by the pleadings.

Reaffirmed in *Fouch v. Bates*, 18 Idaho, 383, 384, 110 Pac. 268.

What Special Verdict Must Contain. See note, 24 L. R. A. (n. s.) 24, 26, 35, 37.

Party Moving for Nonsuit Must State precisely the grounds on which he relies.

Approved in *Coghlan v. Quartararo*, 15 Cal. App. 669, 115 Pac. 667, general statement that plaintiff has failed to prove its case is wholly insufficient.

Distinguished in *Estate of Higgins*, 156 Cal. 260, 104 Pac. 8, refusing to reverse because of error in granting nonsuit without formal motion, where no additional evidence in support of complaint could be produced.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 790.

80 Cal. 266-270, 22 Pac. 176, **PENNIE v. REIS.**

Enactment During Policeman's Term of office, changing pension regulations, does not violate his constitutional rights.

Approved in *State ex rel. Resch v. Trustees of Policemen's Pension Fund*, 121 Wis. 50, 98 N. W. 956, police officer who contributed out of his salary to pension fund acquired no contractual rights to pension under the statute.

Money Appropriated for the Pensioning of police officers is not a gift of public money.

Approved in *Board of Directors v. Nye*, 8 Cal. App. 545, 97 Pac. 215, upholding appropriation for support and maintenance of ex-army nurses and certain female relatives of veterans of Civil War.

Constitutional Provision that No Law shall be revised or amended by reference to its title does not apply to an independent act.

Approved in Application of Bunkers, 1 Cal. App. 65, 81 Pac. 749, construing Penal Code, section 86, as amended by act of April 6, 1880, as a new and original piece of legislation.

80 Cal. 271-274, 13 Am. St. Rep. 156, 22 Pac. 210, **BANNING v. BANNING.**

Certificate of Acknowledgment, When not Impeached for fraud or mistake, is conclusive of the facts stated therein.

Approved in First Nat. Bk. v. Glenn, 10 Idaho, 232, 109 Am. St. Rep. 204, 77 Pac. 625, facts constituted sufficient acknowledgment by married woman and justified notary in attaching his certificate.

Validity of Acknowledgment or Oath over telephone. See note, 30 L. R. A. (n. s.) 358.

Law of Telephone as Applied to contracts as evidence. See note, 127 Am. St. Rep. 555.

Evidence of Conversations by Telephone. See note, 17 L. R. A. 441.

Necessity and Sufficiency of Identification as foundation for admission of communication by telephone. See note, 6 L. R. A. (n. s.) 1184.

80 Cal. 275-281, 22 Pac. 231, **WEST COAST LUMBER CO. v. NEWKIRK.**

Lien Claimant is Only Required to state name of owner of property to be charged, if same is known to him.

Approved in Kelly v. Lemberger (Cal.), 46 Pac. 8, where claim of lien stated a certain person was owner and reputed owner, proof that he was reputed owner only was sufficient; Lucas v. Gobbi, 10 Cal. App. 651, 103 Pac. 158, mistake in name of owner did not affect validity of materialman's lien.

Cartage may be Considered as a Portion of the value of the materials and a lien allowed therefor.

Distinguished in Wood, Curtiss & Co. v. El Dorado etc. Co., 153 Cal. 233, 126 Am. St. Rep. 80, 94 Pac. 878, 16 L. R. A. (n. s.) 585, one who hired horses to contractors engaged in building railroad was not entitled to lien on railroad for amount due from contractor as such hire.

It is Harmless Error to Allow Proof of facts admitted by the pleadings.

Approved in Thornton-Thomas Co. v. Bretherton Co., 32 Mont. 93, 80 Pac. 13, reaffirming rule; Brandt v. Krogh, 14 Cal. App. 57, 111 Pac. 283, fact, in effect admitted by failure to deny, need not be proved.

In Absence of Disclaimer of Liability, owner is responsible for improvements on property with his knowledge at direction of lessee.

Reaffirmed in Cascaden v. Wimbish, 161 Fed. 244, 88 C. C. A. 277.

Power of Lessee or Vendee to Subject owner's interest to mechanics' liens. See note, 23 L. R. A. (n. s.) 618.

Party's Books of Account as evidence in own favor. See note, 52 L. R. A. 590.

Miscellaneous.—Cited in West Coast Lumber Co. v. Newkirk (Cal.), 22 Pac. 232.

80 Cal. 281-284, 22 Pac. 214, HUBBARD v. DUSY.

Monuments Established by United States survey are best evidence of where land should be.

Approved in *Lillis v. Urrutia*, 9 Cal. App. 559, 99 Pac. 992, where monument cannot be definitely identified and located, it must give way to more certain method of locating line; *Washington Rock Co. v. Young*, 29 Utah, 121, 110 Am. St. Rep. 666, 80 Pac. 386, on resurvey of land to establish lost boundary, original corners of government survey are conclusive, regardless of their correctness; *Stangair v. Roads*, 41 Wash. 584, 84 Pac. 406, where monument established by United States surveyor at corner in dispute was obliterated, measurements in field-notes of survey controlled.

80 Cal. 296-306, 22 Pac. 207, PEOPLE v. ELLIOTT.

Defendant Need Only Produce Sufficient proof of circumstances of mitigation to raise reasonable doubt as to his guilt.

Approved in *People v. Button* (Cal.), 38 Pac. 203, applying rule to instruction given in prosecution of one for murder who had commenced combat, but tried in good faith to withdraw.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 490.

80 Cal. 308-310, 22 Pac. 252, DRINKHOUSE v. SPRING VALLEY WATERWORKS.

Action for Injury to Real Property is triable in county where land is situated.

Approved in *Miller & Lux v. Kern County Land Co.* (Cal.), 65 Pac. 313, refusal to grant change of venue in action against corporation for injury to real estate brought in county where it had its principal place of business was error; *Las Animas etc. Land Co. v. Fatjo*, 9 Cal. App. 321, 99 Pac. 395, action for destruction by fire of buildings was an action for injury to real property on which they were located.

Liability for Damming Back Stream. See note, 59 L. R. A. 890.

80 Cal. 310-316, 22 Pac. 178, McSHANE v. CARTER.

Directors of Mining Company cannot Convey mining ground without consent of holders of two-thirds of the capital stock.

Approved in *Bennett v. Red Cloud Mining Co.*, 14 Cal. App. 730, 731, 113 Pac. 120, reaffirming rule; *Forrester v. Boston etc. Min. Co.*, 29 Mont. 401, 74 Pac. 1090, transfer by directors of corporation of all its property to a foreign corporation organized for purpose of receiving it was void.

Modified by *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 752, 753, 754, 755, 756, 137 Am. St. Rep. 165, 110 Pac. 130, 131, 132, mortgage authorized and executed by director of company who was holder of two-thirds of its capital stock was valid.

Validity of Conveyance by Corporation can be raised by anyone who connects himself with the title of the corporation.

Approved in *Bennett v. Red Cloud Mining Co.*, 14 Cal. App. 732, 113 Pac. 120, mortgagee of mining ground who failed to allege ratification by stockholders of the mortgage did not connect himself with the title; *Carlsbad Water Co. v. New*, 33 Colo. 392, 81 Pac. 35, in

suit to foreclose mortgage, mortgagor's trustee in bankruptcy had right to question its validity.

A Grant of a Thing Passes Whatever is necessary to its beneficial use and enjoyment.

Approved in *Rubio Cañon etc. Assn. v. Everett*, 154 Cal. 33, 96 Pac. 813, deed conveying land on which pumping plant was located together with appurtenances conveyed right of way for pipe-line incident thereto; *Crozer v. White*, 9 Cal. App. 620, 100 Pac. 133, deed conveying "my dwelling-house and lands appurtenant thereto," conveyed entire tract of land; *Park City Meat Co. v. Comstock etc. Min. Co.*, 36 Utah, 154, 103 Pac. 257, improvements and fixtures on ground on which mining company had mere easement constituted an appurtenance.

80 Cal. 317-319, 22 Pac. 253, MORGAN v. LONES.

What is Community Property. See notes, 126 Am. St. Rep. 117; 4 Cof. Prob. 59.

Real Property Granted by Government to citizen as separate or community property. See notes, 96 Am. St. Rep. 920; 26 L. R. A. (n. s.) 1118.

80 Cal. 320-322, 22 Pac. 194, PERKINS v. BROCK.

It is not Necessary That a Traverse should be in negative words.

Approved in *Simoneau v. Pacific Electric Ry.*, 159 Cal. 502, 115 Pac. 324, applying rule to answer in action against street railway company for damages; *Byxbee v. Dewey (Cal.)*, 47 Pac. 53, affirmative averments in answer were sufficient to negative plaintiff's allegations as to title and possession.

80 Cal. 323-330, 21 Pac. 4, 22 Pac. 186, 549, SMITH v. SMITH.

Two Actions Which Might have been stated in one petition under separate counts may be consolidated.

Approved in *Winters v. St. Louis etc. R. R. Co.*, 124 Mo. App. 603, 101 S. W. 1117, court had no power to order consolidation of two actions brought to recover damages for injury to stock.

Deed Absolute in Form Made to secure indebtedness is mere mortgage.

Approved in *Thompson v. Burns*, 15 Idaho, 583, 99 Pac. 114, re-affirming rule; *Murdock v. Clarke (Cal.)*, 24 Pac. 274, upholding rule where grantee was put in possession under an agreement to account for rents and profits.

Right of Permissive Possessor to acquire title by adverse possession. See note, 12 L. R. A. (n. s.) 1141.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 789.

80 Cal. 333-337, 22 Pac. 222, SOUTH YUBA WATER ETC. CO. v. ROSA.

One Acquiring Land Subsequent to the appropriation of water flowing across it takes same subject to such appropriation.

Approved in *Land v. Johnston*, 156 Cal. 256, 104 Pac. 450, applying rule where land, at time of such appropriation and for several years thereafter, was unoccupied public land.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

Failure of Corporation to Allege compliance with statutory conditions precedent is not failure to allege a cause of action.

Approved in *Bernheim Distilling Co. v. Elmore*, 12 Cal. App. 86, 106 Pac. 720, reaffirming rule; *Riverdale Mining Co. v. Wicks*, 14 Cal. App. 530, 112 Pac. 898, where disability was removed before close of case, plaintiff was properly allowed under the stipulation in this case to show its capacity to maintain action; *White Sewing Machine Co. v. Peterson*, 23 Okl. 362, 100 Pac. 513, foreign corporation need not allege performance of statutory conditions precedent to doing business in this state.

Failure of Corporation to Comply with requirements of code is mere matter in abatement to be specially pleaded.

Distinguished in *State v. Gray's Harbor & P. S. R. Co.*, 54 Wash. 538, 103 Pac. 812, petition of corporation in proceeding to condemn right of way, which failed to allege the whole or any of its capital stock had been subscribed, was insufficient.

Foreign Corporations Need not File record evidence of their incorporation in every county in which they have property.

Approved in *Niblein v. Caplice Commercial Co.*, 39 Mont. 337, 102 Pac. 568, Revised Codes, section 3823, relative to filing certified copy of copy of articles in county where corporation holds property, applies only to domestic corporations; *Helena Power Transmission Co. v. Spratt*, 35 Mont. 132, 88 Pac. 778, 8 L. R. A. (n. s.) 567, foreign corporation is not authorized to exercise the right of eminent domain.

80 Cal. 338-343, 22 Pac. 254, WELSH v. PLUMAS COUNTY.

Building of Toll Road Within Time required constituted an acceptance of the franchise.

Modified in *Welsh v. Plumas County*, 94 Cal. 369, 29 Pac. 720, taking possession of a public road, already built under act of March 17, 1866, was not an acceptance of the franchise.

80 Cal. 348-358, 22 Pac. 200, HALL v. ARNOTT.

Mortgagor cannot Quiet Title against mortgagee without paying unpaid, though outlawed, mortgage debt.

Approved in *Marshutz v. Seltzer*, 5 Cal. App. 143, 89 Pac. 878, upon a cross-complaint in action to quiet title, defendant mortgagee cannot by setting up his outlawed mortgage obtain affirmative relief.

Deed Absolute in Form, but Intended to secure indebtedness, is a mere mortgage.

Approved in *Murdock v. Clarke (Cal.)*, 24 Pac. 274, reaffirming rule.

Findings upon Issues not Presented by the pleadings must be disregarded.

Reaffirmed in *Deaner v. O'Hara*, 36 Colo. 478, 85 Pac. 1124.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 885.

80 Cal. 359-366, 22 Pac. 225, GIBSON v. TRINITY COUNTY.

The Superior Courts are Endowed by the constitution with general equity powers.

Approved in *Cerini v. De Long*, 7 Cal. App. 412, 94 Pac. 588, since act of March 14, 1907 (Stats. 1907, p. 260, c. 214), providing for county boundary line election, contains no provision for a contest thereof, court of equity has jurisdiction to review same; *Thompson v.*

Haskell, 24 Okl. 77, 102 Pac. 703, applying rule to election to detach certain territory from one county and annex it to another, where no provision was made for contesting such election; Coleman v. Board of Education, 131 Ga. 651, 63 S. E. 45, arguendo.

80 Cal. 367-368, 22 Pac. 211, DALY v. SOROCO.

Finding of Ownership and Right to possession is the finding of an ultimate fact.

Approved in Ybarra v. Sylvany (Cal.), 31 Pac. 1114, and Chaffee-Miller Land Co. v. Barber, 12 N. D. 485, 97 N. W. 852, both reaffirming rule; Vasey v. Campbell, 4 Cal. App. 454, 88 Pac. 509, in replevin, finding as to ownership and possession overcame the effect of other findings that the property was adapted to gambling games and a part was so used when seized; Dorris v. McManus, 4 Cal. App. 153, 87 Pac. 290, questioning whether court was called upon to find the evidence going to prove ownership, having found ownership.

80 Cal. 368-374, 13 Am. St. Rep. 169, 22 Pac. 261, 5 L. R. A. 467, NEWMAN v. BANK OF CALIFORNIA.

One Tenant in Common may Sue in ejectment and recover entire property against all persons save cotenants.

Approved in Illinois Steel Co. v. Konkell, 146 Wis. 571, 131 N. W. 847, reaffirming rule; Cassin v. Nicholson, 154 Cal. 503, 98 Pac. 193, recovery of judgment in ejectment by one of several tenants in common inured to the benefit of the others not suing; Horner v. Ellis, 75 Kan. 678, 121 Am. St. Rep. 446, 90 Pac. 276, tenant in common owning moiety of fee was entitled to recover possession against defendant in possession without title but having lien for taxes paid; dissenting opinion in Godfrey v. Rowland, 17 Haw. 590, 7 Ann. Cas. 993, majority reaffirming rule.

Disapproved in Williams v. Coal Creek Min. etc. Co., 115 Tenn. 580, 112 Am. St. Rep. 878, 93 S. W. 573, 6 L. R. A. (n. s.) 710, action in ejectment brought by part of the tenants in common entitled them to recover only the portion to which they showed title.

80 Cal. 375-378, 22 Pac. 189, YOUNGLOVE v. STEINMAN.

Corporations may Levy Assessments for purpose of making repairs necessary to continue business.

Approved in Carter, Rice & Co. v. Hano Co., 73 N. H. 589, 64 Atl. 202, upholding assessment of fully paid shares to satisfy corporate claims for which the shareholders are individually liable.

80 Cal. 381-385, 22 Pac. 233, IN RE BROWN.

Nonresident, Who Applies for and receives letters testamentary, must come to state and personally conduct business of estate.

Approved in Estate of King, 4 Cof. Prob. 19, request of next of kin named as executors for appointment of another as administrator, who is appointed and dies pending administration, does not deprive them of right to letters after such death; Hecht v. Carey, 13 Wyo. 163, 110 Am. St. Rep. 981, 78 Pac. 707, nonresident executor who had not permanently absented himself from place where business of estate was to be transacted was erroneously removed on ground of nonresidence.

Right of Nonresident to Act as executor or administrator. See notes, 113 Am. St. Rep. 563; 1 L. R. A. (n. s.) 342, 344.

80 Cal. 385-389, 22 Pac. 224, WIXSON v. DEVINE.

The Doctrine of "the Law of the Case" will not be unwarrantedly extended.

Approved in *Millsap v. Balfour*, 158 Cal. 714, 112 Pac. 451, on appeal from judgment foreclosing street assessment lien, statement on former appeal upon point not presented in record was obiter dicta; *Allen v. Bryant*, 155 Cal. 258, 100 Pac. 705, on second appeal, the doctrine of "the law of the case" was inapplicable where there was evidence on second trial not before court on first trial; *Tally v. Ganahl*, 151 Cal. 421, 90 Pac. 1050, question in action on contractor's bond was one to be governed by law of former decision; *Wixon v. Devine*, 91 Cal. 484, 27 Pac. 779, on third appeal, rights of plaintiff were settled by former decisions; *People's Lumber Co. v. Gillard*, 5 Cal. App. 438, 90 Pac. 557, in action on contractor's bond, decision of court as to validity of bond was not obiter, but was conclusive on parties on subsequent appeal; *Luco v. De Toro (Cal.)*, 34 Pac. 518, where supreme court remanded cause for failure to find upon an issue, its opinion on character of finding that should be drawn from the evidence was mere obiter, and not binding upon trial court.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 344.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 669.

80 Cal. 390-393, 22 Pac. 188, CARTER v. PAIGE.

Dissolvent Force of a Judgment is neutralized by perfected appeal.

Approved in *Primm v. Superior Court*, 3 Cal. App. 212, 84 Pac. 788, appeal from judgment for defendant in attachment suit continued the attachment in force.

When Action Sufficiently at an End to support suit for malicious prosecution. See note, 2 L. R. A. (n. s.) 950, 953.

80 Cal. 393-397, 22 Pac. 287, HEWES v. McLELLAN.

Tax Collector has Discretion to offer part or whole of the property, to be sold for taxes.

Approved in dissenting opinion in *Jacobs v. Buckalew*, 4 Ariz. 356, 42 Pac. 620, majority holding, under statute providing tax collector "may" designate portion of property to be sold for taxes, collector is bound to designate some portion of tract and offer it for sale first.

Regularity of Tax Proceedings will be Presumed in absence of showing to the contrary.

Approved in *Gibson v. Smith*, 24 S. D. 527, 124 N. W. 739, where deed did not recite procedure at sale necessarily inconsistent with the statute, it will be presumed statute was followed.

80 Cal. 397-408, 20 Pac. 563, 22 Pac. 198, DE NECOCHEA v. CURTIS.

Prior Appropriation of Water Right without compliance with code will be protected against subsequent appropriation.

Approved in *Nielson v. Parker*, 19 Idaho, 731, 115 Pac. 489, reaffirming rule; *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 211, 110 Pac. 930, where no rights intervened between date of posting of notice of appropriation and actual diversion for beneficial purposes, failure to follow code provisions was immaterial; *Lower Tule River Ditch Co. v. Angiola Water Co.*, 149 Cal. 499, 86 Pac. 1082, upholding appropriation by one who made cut in levee confining water to river

and diverted the water to his land, as against subsequent appropriation in manner provided by the code; *Morris v. Bean*, 146 Fed. 428, rights of appropriator who does not comply with statutory requirements relate back only to the completion of the work; *Sand Point etc. Co. v. Panhandle Development Co.*, 11 Idaho, 413, 83 Pac. 349, one who initiated his appropriation by posting and recording notice was entitled to have his rights date from time of posting and not from actual diversion.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

Water Flowing from Springs upon public lands is subject to appropriation.

Approved in *De Wolfskill v. Smith*, 5 Cal. App. 180, 89 Pac. 1003, water flowing from artesian wells produced through fruitless effort to discover oil was subject to appropriation.

Appropriation of Percolating Waters on public lands. See note, 30 L. R. A. 186.

Miscellaneous.—Cited in *Quinlan v. Calvert*, 31 Mont. 119, 77 Pac. 430.

80 Cal. 409-410, 22 Pac. 175, GOYHINECH v. GOYHINECH.

When Judgment or Order is Appealable, appeal cannot be taken from subsequent order refusing to set it aside.

Approved in *Continental Bldg. etc. Assn. v. Woolf*, 12 Cal. App. 728, 108 Pac. 730; *Green v. Thatcher*, 31 Colo. 364, 72 Pac. 1078; *Gregory v. Gregory (Cal.)*, 32 Pac. 531, all reaffirming rule; *Title Ins. etc. Co. v. California Dev. Co.*, 159 Cal. 487, 114 Pac. 839, applying rule to appeal from order denying intervenor's motion to vacate order appointing a receiver; *People v. Walker (Cal.)*, 61 Pac. 800, appeal will not lie from order refusing to discharge from imprisonment, nor from order denying motion to vacate judgment in prosecution for embezzlement; *Olson v. Mattison*, 16 N. D. 112, 112 N. W. 995, applying rule to appeal from order denying motion to set aside a judgment after trial on ground same was not supported by the special verdict on which it was based.

80 Cal. 410-411, 22 Pac. 175, GOYHINECH v. GOYHINECH.

Waiver of Findings will be Presumed where record does not show findings were not waived.

Approved in *Continental Bldg. etc. Assn. v. Woolf*, 12 Cal. App. 729, 108 Pac. 730, reaffirming rule.

80 Cal. 415-416, 22 Pac. 260, ROBINSON v. MERRILL.

Default Judgment may be Vacated by the court without imposing terms.

Approved in *Olsen v. Sargent County*, 15 N. D. 148, 107 N. W. 44, there was no abuse of discretion in setting aside judgment without allowing terms or costs to plaintiff.

80 Cal. 420-425, 22 Pac. 290, GODFREY v. MILLER.

Participation in Fraudulent Intent of debtor which will invalidate transfer to pay or secure debt as to other creditors. See note, 31 L. R. A. 650.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 466.

80 Cal. 426-439, 22 Pac. 180, ADAMS v. LAMBARD.

Only so Much of the Evidence as is necessary to explain grounds of motion for new trial should be inserted in statement.

Approved in Cahill v. Baird (Cal.), 70 Pac. 1062, where it was stipulated statement did not contain all the evidence, but same was stipulated to be correct and settled, and allowed by the judge, it was inferred all that was necessary was inserted.

Equity will Furnish Alternative Relief only when terms of trust cannot be specifically enforced.

Approved in Schultz v. McLean (Cal.), 25 Pac. 428, applying rule in suit to declare resulting trust because of fraud in procurement of conveyance, where no attempt was made to show trust cannot be executed according to its terms.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 109.

Liability of Executors, Trustees, etc., for compound interest. See note, 29 L. R. A. 627, 633.

Miscellaneous.—Cited in Chamberlain v. Chamberlain, 7 Cal. App. 639, 95 Pac. 661, where one was induced to convey his property in expectation it would be returned, upon false representations that it would be taken for debt of corporation of which he was a stockholder.

80 Cal. 440-446, 22 Pac. 302, HART v. BRITISH ETC. INS. CO.

Duty to Notify Insurer of Facts developing after application, but before delivery of policy or certificate. See note, 8 L. R. A. (n. s.) 985.

80 Cal. 448-451, 22 Pac. 189, SPOTTISWOOD v. WEIR.

Motion for New Trial on Ground of newly discovered evidence rests in sound discretion of court.

Approved in Estate of Dolbeer, 153 Cal. 664, 96 Pac. 271, upholding refusal to grant motion for new trial in proceeding to contest will admitted to probate where affidavits contained nothing which would justify granting it; Rauer's Law etc. Co. v. Bradbury, 3 Cal. App. 262, 84 Pac. 1009, upholding refusal of court to grant new trial on ground of accident or surprise unless satisfied different result would be reached.

Competency of Witnesses to Handwriting. See note, 63 L. R. A. 977.

80 Cal. 452-460, 22 Pac. 169, 338, 5 L. R. A. 577, BORN v. HORTSMANN.

Condition in Will Which will Tend to induce legatee to do lawful act in a lawful way is not against public policy.

Approved in Coe v. Hill, 201 Mass. 22, 86 N. E. 951, upholding will providing daughter's share should be in trust until death of her husband, or her permanent and legal separation from him; Ellis v. Birkhead, 30 Tex. Civ. App. 532, 71 S. W. 33, will conveying all of testator's property to third person in trust for testator's daughter, which provided in case she should be divorced from her husband said trust shall expire, was not against public policy.

Writ of Supersedeas will be Granted to stay proceedings in superior court while its action is under review.

Approved in *McAneny v. Superior Court*, 150 Cal. 9, 87 Pac. 1022, writ of prohibition to stay receivership proceedings to secure payment of alimony will not lie where there is a plain, adequate remedy by motion for writ of supersedeas.

Conditions in Restraint of Marriage. See note, 84 Am. St. Rep. 150.

80 Cal. 462-472, 22 Pac. 284, BRUSIE v. GATES.

It is the Duty of Sheriff to State in his return what acts he performed in serving writ of attachment.

Distinguished in *Griffin v. American Gold Min. Co.*, 136 Fed. 73, 68 C. C. A. 637, where marshal's return on attachment recited generally he had attached the property, without specifying the steps taken, it will be presumed he acted as required by code.

80 Cal. 472-482, 22 Pac. 299, HERBLICH v. McDONALD.

By Bill of Exceptions or Statement is the proper mode for bringing papers used on the hearing into the record on appeal.

Approved in *Descalso v. Duane* (Cal.), 33 Pac. 329, reaffirming rule; *Matter of Danford*, 157 Cal. 431, 108 Pac. 325, motion to vacate judgment, not being part of judgment-roll, could not be considered by supreme court when papers used on motion and action of court were not authenticated by bill of exceptions; *Linforth v. S. F. Gas & Electric Co.*, 156 Cal. 67, 103 Pac. 324, affidavits touching newly discovered evidence which were not authenticated by bill of exceptions should not be considered at all; *Manuel v. Flynn*, 5 Cal. App. 328, 90 Pac. 467, affidavits used on hearing of motion for new trial, not incorporated in bill of exceptions, could not be considered on appeal, though transcript contained stipulation of attorneys that the motion was heard on such papers; *Estate of Thayer*, 1 Cal. App. 106, 81 Pac. 659, on appeal from order settling account of executor, where transcript set forth decree of partial distribution, notice of appeal therefrom and remittitur, but same were not contained in bill of exceptions, they could not be considered.

80 Cal. 490-503, 22 Pac. 227, RICHARDSON v. LOUPE.

For Purpose of Bringing Suit for Partition, possession of executor is possession of the heirs.

Approved in *Field v. Leiter*, 16 Wyo. 44, 125 Am. St. Rep. 297, 90 Pac. 389, trustees and devisees under will may, pending settlement of estate, maintain action for partition against co-owners, with consent of executors in possession.

Power and Duty of Referee appointed under interlocutory decree in partition is to carry out directions of trial court.

Approved in *Richardson v. Ruddy*, 15 Idaho, 493, 98 Pac. 844, hearing on report of referees should be merely for purpose of ascertaining if they acted in accordance with decree of court.

Control of Guardian ad Litem or next friend over suit. See note, 16 L. R. A. 508.

80 Cal. 505-507, 22 Pac. 939, RICHARDSON v. TRAVELERS' INS. CO.

Complaint to Recover Sum Due which fails to allege nonpayment is fatally defective.

Approved in *Curtiss v. Bachman* (Cal.), 40 Pac. 802, complaint on injunction bond which failed to state plaintiff in injunction suit had failed or refused to pay the damages did not state cause of action; *Burke v. Dittus*, 8 Cal. App. 177, 96 Pac. 331, where there was not an entire failure to state nonpayment, averment was simply defective, and could be reached only by special demurrer.

Failure to Allege a Material Fact in a pleading cannot be cured by verdict.

Approved in *Arnold v. American Ins. Co.*, 148 Cal. 664, 84 Pac. 183, 25 L. R. A. (n. s.) 6, in action on fire policies, failure to allege houses insured were occupied as dwellings and furniture insured was contained in one of them was not cured by verdict and judgment.

80 Cal. 510-514, 22 Pac. 217, **SILVESTER v. COE QUARTZ MINE CO.**

Materials must Actually be Used in structure erected to entitle materialman to lien.

Approved in *Fuller v. Ryan*, 44 Wash. 387, 87 Pac. 486, reaffirming rule; *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 701, 118 Pac. 107, applying rule where owner abandons work; *California Powder Works v. Blue Tent etc. Gold Mine* (Cal.), 22 Pac. 393, right to lien for explosives furnished mine did not attach until materials were actually used in operating mine; *Allen v. Redward*, 10 Haw. 159, materialman was not entitled to lien for materials delivered at contractor's shop, and disposed of by contractor for his own benefit.

Mechanic's Lien on Mine Extends to whole mine and all its parts as a single structure.

Approved in *Park City Meat Co. v. Comstock Min. Co.*, 36 Utah, 163, 103 Pac. 261, it is sufficient to describe mine as a whole, or refer to mining claims by name or number in notice of lien.

Extent of Land to Which Mechanic's Lien will attach. See note, 26 L. R. A. (n. s.) 835.

80 Cal. 514-519, 22 Pac. 294, **HASSHAGEN v. HASSHAGEN.**

Parol Agreement of Trust is not Enforceable in absence of facts showing implied or constructive trust.

Approved in *Kinley v. Thelen*, 158 Cal. 183, 110 Pac. 516, conveyance of land subject to parol trust that same was held as security for indebtedness imposed no duty to make payment of taxes or other claims against the land; *Chamberlain v. Chamberlain*, 7 Cal. App. 636, 95 Pac. 660, where a stockholder was induced to convey land without consideration on promise to reconvey on demand, and through false representations that his property would be taken to pay debts of corporation, involuntary trust was created.

Oreation of Trusts in Land by Parol. See notes, 115 Am. St. Rep. 795; 5 Caf. Prob. 265.

80 Cal. 521-528, 22 Pac. 258, **TROUSCLAIR v. PACIFIC COAST STEAMSHIP CO.**

Negligence Per Se of Railroad will not render it liable for injury caused by contributory negligence of party injured.

Approved in *Wheeler v. Oregon R. R. Co.*, 16 Idaho, 394, 102 Pac. 853, noncompliance with statute requiring railroad company to ring

bell or blow whistle upon approaching street crossing does not prevent it from defending on ground of contributory negligence on part of plaintiff.

80 Cal. 528-530, 22 Pac. 294, **FORNEY v. FORNEY**.

It is not Necessary to Set Forth particular acts of intemperance in action for divorce on that ground.

Approved in Hubbell v. Hubbell, 7 Cal. App. 665, 95 Pac. 605, in suit for divorce on ground of extreme cruelty, only ultimate facts need be stated.

Drunkenness as Affecting Divorce. See note, 34 L. R. A. 452.

80 Cal. 530-538, 22 Pac. 275, **FRESNO CANAL & IRRIGATION CO. v. DUNBAR**.

Agreement to Pay for Water Right appurtenant to land creates a lien on the land for the price thereof.

Distinguished in Stanislaus Water Co. v. Bachman, 152 Cal. 728, 93 Pac. 863, 15 L. R. A. (n. s.) 359, agreement of water company to furnish land owner water from a river through its canal created no lien on the canal, but was an agreement to sell a right or interest in real property.

What Covenants Run With the Land. See note, 82 Am. St. Rep. 684.

Miscellaneous.—Cited in Fresno Canal & Irr. Co. v. Hart, 152 Cal. 451, 92 Pac. 1010.

80 Cal. 538-542, 22 Pac. 215, **PEOPLE v. FITZPATRICK**.

Refusal of Court to Permit Jury to inspect premises will not be reviewed in absence of clear showing of error.

Approved in Maloney v. King, 30 Mont. 172, 76 Pac. 9, applying rule in action for damages owing to removal of ore from mining claim, where court refused to permit jury to inspect the premises.

View by Jury of Property Alleged to be stolen is an unauthorized proceeding.

Approved in People v. Fagan (Cal.), 33 Pac. 847, in prosecution for larceny of cattle, it was error for court, jury and counsel to go to corral for purpose of viewing brands on certain cattle.

View by Jury. See note, 42 L. R. A. 371, 373, 376.

80 Cal. 544-545, 22 Pac. 217, **PEOPLE v. JOSELYN**.

Superior Court has Jurisdiction of Misdemeanors only when not otherwise provided for.

Approved in People v. Palermo Land & Water Co., 4 Cal. App. 720, 89 Pac. 725, superior court had no jurisdiction to try corporation for offense punishable by fine not exceeding two hundred dollars or imprisonment not exceeding one hundred days, or by both fine and imprisonment; Moore v. Orr, 30 Nev. 464, 98 Pac. 400, justice court had exclusive original jurisdiction of offense charged, and district court had only appellate jurisdiction.

80 Cal. 545-553, 22 Pac. 219, **JOHNSON v. McCONNELL**.

Property Rights in Dogs. See note, 40 L. R. A. 510.

Right to Kill Dogs. See note, 15 L. R. A. 251.

80 Cal. 553-559, 22 Pac. 339, **HUDEPOHL v. LIBERTY HILL ETC. WATER CO.**

Cotenants in Mines. See note, 91 Am. St. Rep. 854.

80 Cal. 565-570, 22 Pac. 256, 5 L. R. A. 580, **SCHMIDT v. BAUER.**

Owner Assumes No Duty to protect one who is on his premises by permission only.

Approved in *Herzog v. Hemphill*, 7 Cal. App. 118, 93 Pac. 900, reaffirming rule; *Hutchinson v. Cleveland-Cliff Iron Co.*, 141 Mich. 349, 104 N. W. 699, applying rule in action for negligence by one employed by contractor to cover pipes in certain part of mill, but who fell down hatchway he had no excuse for approaching.

Proprietor of Place Open to Public for trade is bound to keep same in reasonably safe condition.

Approved in *Burns v. Dunham*, 148 Cal. 210, 82 Pac. 960, discussing measure of care required of storekeeper, where one on the premises for purposes of business was injured through handling of goods in private passageway; *Shaw v. Goldman*, 116 Mo. App. 341, 92 S. W. 167, owner of premises not liable to one who went beyond limits of storeroom into which he came as a customer and fell down elevator shaft.

80 Cal. 570-572, 13 Am. St. Rep. 174, 22 Pac. 257, 5 L. R. A. 428, **TAPPAN v. ALBANY BREWING CO.**

Contract to Prevent Competition at judicial sale. See note, 111 Am. St. Rep. 403.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 524.

Use of Negative or Engraved Plates without consent of party paying therefor. See note, 50 L. R. A. 401.

80 Cal. 574-605, 13 Am. St. Rep. 175, 22 Pac. 266, 5 L. R. A. 498, **TREADWELL v. WHITTIER.**

Owners and Operators of Elevators Owe to their passengers the duty of exercising the highest degree of care.

Approved in *Belvedere Building Co. v. Bryan*, 103 Md. 535, 537, 538, 64 Atl. 49, 50, 51, reaffirming rule; *Kline v. Santa Barbara etc. Ry. Co.*, 150 Cal. 746, 90 Pac. 127, upholding instruction requiring of carrier of passengers the use of the utmost care that human foresight can suggest; *Shellaberger v. Fisher*, 143 Fed. 940, 75 C. C. A. 9, 5 L. R. A. (n. s.) 250, landlord who furnished automatic elevator for use of tenant and his family without an operator was liable for injuries sustained by child five or six years old who was operating same; *Southern Railway Co. v. Burgess*, 143 Ala. 370, 42 So. 37, upholding instruction in action for injuries to passenger requiring carrier to exercise the highest degree of care known to "very" careful persons; *O'Callaghan v. Dellwood Park Co.*, 242 Ill. 343, 134 Am. St. Rep. 331, 89 N. E. 1006, 26 L. R. A. (n. s.) 1054, the same degree of care is required of persons operating scenic railroad in amusement park; *Quimby v. Bee Bldg. Co.*, 87 Neb. 196, 138 Am. St. Rep. 477, 127 N. W. 120, and *Edwards v. Burke*, 36 Wash. 112, 78 Pac. 612, both holding the same degree of care applies to persons operating elevators as applies to railroads or other common carriers.

Disapproved in *Burgess v. Stowe*, 134 Mich. 210, 96 N. W. 31, owner of building having passenger elevator was only bound to use the care

required of an ordinarily prudent person in operating elevator; *Edwards v. Manufacturers' Bldg. Co.*, 27 R. I. 249, 114 Am. St. Rep. 37, 61 Atl. 646, 2 L. R. A. (n. s.) 744, landlord who maintains elevator for use of his tenants is not a common carrier, nor bound to exercise more than reasonable care.

Liability for Injury to Elevator Passenger. See notes, 25 L. R. A. 33; 2 L. R. A. (n. s.) 745, 748, 749, 751.

The Happening of an Injurious Accident is, in passenger cases, prima facie evidence of negligence on part of carrier.

Approved in *Dixon v. Pluns* (Cal.), 31 Pac. 932, upholding rule where one walking on public sidewalk was struck by chisel dropped by workman employed in repairing building; *Dinnigan v. Peterson*, 3 Cal. App. 767, 87 Pac. 219, where passenger was injured by overturning of stage-coach, negligence of coachman is presumable; *Renfro v. Fresno City Ry. Co.*, 2 Cal. App. 323, 84 Pac. 350, passenger injured by sudden jerking of car, which had almost come to a stop, was not required to explain cause of sudden movement of car; *Southern Pac. Co. v. Cavin*, 144 Fed. 351, 75 C. C. A. 350, upholding instruction casting upon carrier in personal injury case the burden of proving it was not guilty of negligence with reference to whole case; *Fox v. Philadelphia*, 208 Pa. 135, 57 Atl. 358, 65 L. R. A. 214, upholding rule in action for death of one killed through operation of elevator in a city building; *Laforrest v. O'Driscoll*, 26 R. I. 552, 59 Atl. 925, the falling of pieces of lumber from a car which was being unloaded does not raise presumption of negligence.

Distinguished in *Arnold v. Green*, 95 Md. 229, 52 Atl. 675, rule is inapplicable where there was an entire absence of evidence to raise a presumption of negligence on part of defendant.

Presumption of Negligence from Happening of accident causing personal injuries. See note, 113 Am. St. Rep. 1030.

Presumption of Negligence from Injury to passenger. See note, 13 L. R. A. (n. s.) 619.

Damages Necessarily Resulting from the Injury need not be specially pleaded.

Approved in *Zibbell v. Southern Pacific Co.*, 160 Cal. 252, 116 Pac. 519, and *San Antonio etc. Ry. Co. v. Beauchamp*, 54 Tex. Civ. App. 131, 133, 116 S. W. 1166, 1167, both reaffirming rule; *Zibbell v. Southern Pacific Co.*, 160 Cal. 249, 116 Pac. 518, admitting evidence of salaries paid trotting horse trainers in action for injuries to trainer; *Shaw v. Southern Pacific R. R. Co.*, 57 Cal. 242, 243, 107 Pac. 109, damages from loss of profits resulting from injury are special in their nature, and the facts must be particularly alleged; *Castino v. Ritzman*, 156 Cal. 588, 105 Pac. 739, general statement of whole amount of damage sustained was sufficient in action for damages for injuries to person; *Terrace Water Co. v. San Antonio etc. Co.*, 1 Cal. App. 513, 82 Pac. 563, applying rule in action for breach of contract to deliver electricity; *Loofbourow v. Utah Light & Ry. Co.*, 33 Utah, 483, 94 Pac. 983, under allegations of his complaint, plaintiff was entitled to offer evidence regarding his vocation, earnings, and loss thereof, in absence of special demurrer.

"Moral Certainty" is Produced When a Matter is proved by a preponderance of evidence.

Approved in *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 24, 116 Pac. 301, applying rule in action for conversion of corporate

stock; *People v. T. Wah Hing*, 15 Cal. App. 201, 114 Pac. 418, instruction defining moral certainty as that degree of proof which produces conviction in an unprejudiced mind, when read in connection with the other instructions given, was not erroneous.

Carriers of Passengers must Furnish such appliances as afford the greatest safety.

Valente v. Sierra Railway Co., 151 Cal. 543, 91 Pac. 484, in action for death, instruction that railroad companies are bound to use the best precautions in practical use to secure safety of passengers was too broad a statement; *Morgan v. Chesapeake & Ohio Ry. Co.*, 127 Ky. 439, 105 S. W. 963, 15 L. R. A. (n. s.) 790, carrier liable to passenger for injury caused by manufacturer's failure to make the tests known to car builders before the materials were put into car; *Kappes v. Brown Shoe Co.*, 116 Mo. App. 167, 90 S. W. 1161, proprietor of freight elevator is not required to provide it with such new inventions and appliances as would be essential to a passenger elevator; *Womble v. Grocery Co.*, 135 N. C. 485, 47 S. E. 497, question of negligence in original construction of freight elevator, the fall of which was cause of injury, was one for the jury.

Distinguished in *Watts v. Murphy*, 9 Cal. App. 568, 99 Pac. 1106, in action for death of one employed as janitor through operation of elevator, instruction imposing on owner same degree of care toward employees as toward passengers was erroneous.

Duty of Railroad Carrier to Furnish proper cars for passengers. See note, 31 L. R. A. 314.

Persons Operating Elevators in Buildings are common carriers of passengers.

Approved in *Ohio Valley Trust Co. v. Wernke*, 42 Ind. App. 334, 84 N. E. 1002, and *Cooper v. Century Realty Co.*, 224 Mo. 723, 123 S. W. 853, both holding company operating elevator in connection with an office building is a common carrier of passengers; *Orcutt v. Century Building Co.*, 201 Mo. 437, 99 S. W. 1064, 8 L. R. A. (n. s.) 929, one riding on freight elevator who was engaged in moving effects of tenant from the building was a passenger and not mere licensee.

Loss of Business Profits as Element of damages for breach of contract. See note, 133 Am. St. Rep. 799.

Res Ipsa Loquitur as Between Storekeeper and customer. See note, 16 L. R. A. (n. s.) 931.

80 Cal. 605-609, 22 Pac. 262, **REYNOLDS v. WILLARD.**

One Claiming Under Adverse Possession must prove payment of all taxes, or that none were levied and assessed.

Approved in *Allen v. Allen*, 159 Cal. 200, 113 Pac. 161, applying rule to grantor who was not claiming under his paper title but in hostility to his own deed; *Swank v. Sweetwater Irr. etc. Co.*, 15 Idaho, 360, 98 Pac. 299, upholding rule where it was claimed strip of land was exempt from taxation under statute exempting ditches.

80 Cal. 611-625, 22 Pac. 327, **LAMBERT v. HASKELL.**

Functions of Preliminary Injunction cease when final decree is made.

Approved in *Dondell v. Shoo*, 159 Cal. 455, 114 Pac. 582, in suit for a partnership accounting, injunction which was part of interlocu-

tory decree ordering accounting was an injunction pendente lite, which ended with entry of final decree; *Humphrey v. Buena Vista Water Co.*, 2 Cal. App. 542, 84 Pac. 297, where complaint was amended so as to cure fatal defect prior to hearing of motion to dissolve preliminary injunction, court was without power to dissolve it because of sustaining of demurrer.

Sureties on Injunction Bond are Liable for counsel fees expended in procuring dissolution of injunction.

Approved in *Miller v. Donovan*, 13 Idaho, 744, 92 Pac. 994, upholding recovery of attorneys' fees for services incurred on account of injunction.

Recovery on Injunction Bond of Attorneys' Fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 63, 66.

Contract must be Interpreted so as to make it operative, if possible.

Approved in *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 34, 100 Pac. 1074, agreement by which executor employed broker to sell land belonging to the estate was an individual contract of the executor.

Statutory Undertaking Beyond What is Required by statute is to that extent inoperative.

Approved in *Estate of McGinn*, 3 Cal. Prob. 129, applying rule to undertaking on appeal.

Recitals in Instrument Annexed to Pleading as an exhibit cannot serve as allegations of matters of substance.

Approved in *Lucas v. Rea* (Cal. App.), 101 Pac. 540, applying rule in suit to enforce mechanic's lien; *S. F. Sulphur Co. v. Aetna Indem. Co.*, 11 Cal. App. 698, 106 Pac. 112, in action on undertaking to discharge attachment, title of undertaking and recitals in body thereof that original action was brought against certain persons are not allegations of such fact.

If Contract Set Out is Uncertain, pleader must put some construction on it by averment.

Approved in *Hill v. McCoy*, 1 Cal. App. 161, 81 Pac. 1016, in action for broker's commissions, where complaint stated location of land which memorandum annexed failed to do, there was no variance between the two.

Written Instrument may be Pleaded by setting forth its substance in legal effect or by annexing or incorporating copy.

Approved in *Santa Rosa Bank v. Paxton*, 149 Cal. 198, 199, 86 Pac. 194, upholding rule where instrument was annexed as an exhibit and made part of complaint for purpose of aiding allegation.

Damages for Tort as Affected by loss of profits. See note, 52 L. R. A. 58.

80 Cal. 625-626, 22 Pac. 260, **IN RE JESSUP.**

Executor is Entitled to Allowance for fees paid attorney in litigating claim against estate.

Approved in *Estate of Riviere*, 8 Cal. App. 776, 98 Pac. 47, upholding allowance of attorneys' fees for services rendered before will was admitted to probate.

Executor cannot Represent Either Side in contest respecting rights of different claimants to distribution.

Approved in *Bruning v. Golden*, 159 Cal. 208, 64 N. E. 660, by bringing suit for accounting against an heir, which, if successful, would

increase interest in estate of other heirs, executor only took side of estate.

80 Cal. 626-629, 22 Pac. 296, **ROMINE v. CRALLE**.

It is Incumbent upon Appellant to show error affirmatively.

Approved in *Romine v. Cralle* (Cal.), 27 Pac. 21, reaffirming rule; *Boyer v. Pacific Mutual Life Ins. Co.*, 1 Cal. App. 55, 81 Pac. 672, uncertainty in record must be resolved against appellant.

80 Cal. 629-631, 22 Pac. 296, **MOULTON v. McDERMOTT**.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 789.

80 Cal. 631-635, 13 Am. St. Rep. 200, 22 Pac. 404, **ALBERTOLI v. BRANHAM**.

To Justify Attempt to Set Aside conveyance as made in fraud of creditors, it must appear debtor has no other property.

Approved in *Windhaus v. Bootz* (Cal.), 25 Pac. 404, gift of land by father to son was not void as against creditors, where evidence did not show grantor was not possessed of other property sufficient to pay his debts.

Overruled in *Bekins v. Dieterle*, 5 Cal. App. 695, 91 Pac. 175, where it appeared transfer to wife was made to defraud creditors of husband, such conveyance was void, regardless of question of other property.

In Pleading Fraud, the Facts constituting the fraud must be stated.

Approved in *Perreau v. Perreau*, 12 Cal. App. 128, 106 Pac. 730, upholding rule in action to obtain decree declaring title to real estate was held by son as trustee for estate of his deceased mother; *Virginia etc. Co. v. Glenwood Lumber Co.*, 5 Cal. App. 260, 90 Pac. 49, where complaint merely alleged conversion of lumber by defendant, evidence showing fraudulent purchase by a third party who sold to defendant was inadmissible; *Eaton v. Metz* (Cal.), 40 Pac. 948, in action in claim and delivery against officer on account of levy under attachment, averments of answer did not authorize admission of evidence of actual fraud; *Sukeforth v. Lord* (Cal.), 23 Pac. 298, in action for conversion of merchandise levied on under execution on judgment against third person, answer of defendant alleged a conclusion only and not the facts constituting the fraud.

Distinguished in *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 416, 95 Pac. 1031, in action for conversion of lumber, where plaintiff's ownership was denied, he could prove defendant's fraudulent acquisition of it under general allegation that the property was wrongfully converted.

Participation in Fraud of Vendor which will invalidate transfer for good consideration as against creditors. See note, 32 L. R. A. 49.

80 Cal. 636-647, 22 Pac. 401, **FALKNER v. HENDY**.

Miscellaneous.—Cited in *Steen v. Hendy* (Cal.), 38 Pac. 719, on second appeal.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 81 CALIFORNIA.

81 Cal. 1-9, 22 Pac. 515, 6 L. R. A. 219, NOUNNAN v. SUTTER COUNTY LAND CO.

Statements of Opinion, Though False, are not grounds for action for damages.

Approved in *Krasilnikoff v. Dundon*, 8 Cal. App. 412, 97 Pac. 174, applying rule to representation that boiler was best made, and able to perform work for which it was intended.

Distinguished in *Johnson v. Withers*, 9 Cal. App. 55, 98 Pac. 43, statement of seller as to quantity of mineral in mine based on mistaken report of expert, is matter of fact.

Expression of Opinion as Fraud. See note, 35 L. R. A. 439.

One Who Continues Work which he had contracted to perform, after discovery of falsity of representations as to amount and kind of work, thereby waives fraud.

Reaffirmed in *Baltimore & Ohio Ry. Co. v. Jolly*, 71 Ohio St. 129, 72 N. E. 895.

81 Cal. 9-10, 15 Am. St. Rep. 17, 22 Pac. 297, IN RE TRAYLOR.

Clause in Will Requiring Executors to purchase land and vest title in devisees, where land is not described, nor price fixed, is void for uncertainty.

Distinguished in *Dee v. Dee*, 212 Ill. 350, 72 N. E. 432, where it is possible to ascertain from will description and price of land, devise is good.

81 Cal. 11-13, 20 Pac. 81, 22 Pac. 293, WISE v. WALKER.

Grantee Who Purchases Pendente Lite from mortgagor, and who submits to accounting upon second trial of foreclosure suit, is bound by accounting.

Approved in *Staples v. May* (Cal.), 23 Pac. 712, where mining company permits receiver appointed on foreclosure of mortgage covering only part of property to work all property, and accepts benefit thereof, it cannot hold receiver as trespasser.

81 Cal. 14-19, 22 Cal. 264, QUINN v. QUINN.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 1020.

81 Cal. 39-42, 22 Pac. 264, BELOHER v. MURPHY.

General Statement That Motion for nonsuit is made on grounds of plaintiff's failure to prove any material allegation is insufficient.

Approved in *De Leonis v. Hammel*, 1 Cal. App. 396, 82 Pac. 352, nonsuit is erroneously granted where record fails to show specified ground for motion.

81 Cal. 44-55, 22 Pac. 304, RICHARDS v. DOWER.

Under Laws of Congress, Providing for exclusion of mine from townsite patent, mine must contain sufficient mineral to be profitably worked.

Approved in *Callahan v. James* (Cal.), 71 Pac. 105, 106, and *Richards v. Dower* (Cal.), 22 Pac. 308, both following rule.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 797, 798.

81 Cal. 56-58, 22 Pac. 297, DUNCAN v. THOMAS.

Application of Payments. See note, 96 Am. St. Rep. 55.

Statement of Claims Against Estates of decedents. See notes, 130 Am. St. Rep. 314; 5 Cal. Prob. 300.

81 Cal. 58-60, 22 Pac. 304, WILLSON v. TREADWELL.

Under Section 1941, Civil Code, Landlord is not bound to repair premises leased for business purposes.

Approved in *Tucker v. Bennett*, 15 Okl. 191, 81 Pac. 424, applying rule under sections 863, 864, *Wilson's Revised and Annotated Statutes of 1903*.

Landlord of Business Property is not Liable to employee of tenant for injuries resulting from defective stairway, where there is no covenant to repair.

Approved in *Angevine v. Knox-Goodrich* (Cal.), 31 Pac. 530, section 1941, Civil Code, lessor is not liable for injury to health of lessee resulting from defective sewer, in absence of notice of defect; *Morgan v. Sheppard*, 156 Ala. 408, 47 So. 149, holding landlord not liable for injuries to guest of tenant; *Bianchi v. Del Valle*, 117 La. 592, 42 So. 150, holding landlord not liable to tenant's wife, under article 2694, Civil Code.

Distinguished in *Burner v. Higman & Skinner Co.*, 127 Iowa, 589, 103 N. W. 805, where landlord leases building to several tenants, but retains degree of control over elevator, he is liable to licensees of tenants injured through defective elevator.

Liability of Landlord for Injuries to tenant's guests and servants from defects in premises. See note, 34 L. R. A. 610.

Liability of Landlord for Injury to Tenant from defect in premises. See note, 34 L. R. A. 825.

Liability to Third Persons of Lessors of personal property. See note, 92 Am. St. Rep. 503, 509, 511, 547.

Right of Servant to Recover Damages from third persons for injuries in performance of duties. See note, 46 L. R. A. 92.

81 Cal. 60-63, 15 Am. St. Rep. 19, 22 Pac. 407, O'HANLON v. DENVER.

Right to Cut Timber on Public Land. See note, 70 L. R. A. 875.

81 Cal. 64-69, 22 Pac. 333, DEWEY v. SUPERIOR COURT.

Injunction Which Merely Preserves Status Quo is not suspended by appeal.

Reaffirmed in *State v. Superior Court*, 39 Wash. 120, 109 Am. St. Rep. 862, 80 Pac. 1110, 1 L. R. A. (n. s.) 554.

Mandatory Injunction cannot be Enforced pending appeal.

Reaffirmed in *Clute v. Superior Court*, 155 Cal. 18, 123 Am. St. Rep. 54, 99 Pac. 363.

81 Cal. 70-80, 15 Am. St. Rep. 22, 22 Pac. 474, **PEOPLE v. REED.**

When Judgment is Based on General Finding which is made from matters before specifically found, which do not support general finding, judgment should be reversed.

Distinguished in *People v. McCue*, 150 Cal. 198, 88 Pac. 900, it is only where probative facts found are necessarily in conflict with ultimate facts found that former can prevail over latter.

What Constitutes Dedication to, and Acceptance of, a public street. See note, 129 Am. St. Rep. 619.

Public User as Acceptance of Highway. See note, 18 L. R. A. 510.

Effect of Treaties upon Alien's Right to inherit. See note, 32 L. R. A. 203.

81 Cal. 87-93, 22 Pac. 336, **WRIGHT v. ROSEBERRY.**

Upon Motion for Nonsuit, full effect must be given evidence erroneously admitted against objection, provided it is relevant.

Approved in *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 25, 116 Pac. 302, and *Non-Refillable Bottle Co. v. Robertson*, 8 Cal. App. 105, 96 Pac. 325, both reaffirming rule; *Archibald Estate v. Matteson*, 5 Cal. App. 445, 90 Pac. 725, holding motion for nonsuit assumes truth of evidence offered to support material allegations of complaint; *Doyle v. Eschen*, 5 Cal. App. 57, 89 Pac. 837, holding such evidence must be taken most strongly against defendant.

Error in Admitting Secondary Evidence is waived by failure to object in time.

Reaffirmed in *Filippini v. Trobock* (Cal.), 62 Pac. 1067.

81 Cal. 93-98, 22 Pac. 331, 5 L. R. A. 579, **MORGAN v. BALL.**

Attacks by Creditors on Conveyances made by husbands to wives. See note, 90 Am. St. Rep. 546.

81 Cal. 103-106, 22 Pac. 408, **EVANS v. DE LAY.**

Witness cannot be Impeached by evidence of particular wrongful acts.

Approved in *Clements v. McGinn* (Cal.), 33 Pac. 922, applying rule to question as to having been in jail.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 441.

81 Cal. 106-113, 22 Pac. 478, **ROBINSON v. NEVADA BANK.**

Error in Admitting Evidence without preliminary or connecting proof is cured by subsequent admission of such proof.

Reaffirmed in *People v. Smith*, 9 Cal. App. 648, 99 Pac. 1113.

81 Cal. 113-118, 22 Pac. 477, **PEOPLE v. BISHOP.**

Accused may be Cross-examined about any testimony given by him on direct examination, but not about new matter.

Reaffirmed in *State v. Smith*, 47 Or. 489, 83 Pac. 866.

81 Cal. 120-122, 22 Pac. 409, SMITH v. MATTHEWS.

Right to Action to Quiet Title cannot be barred while plaintiff remains in possession claiming to be owner.

Approved in *Cooper v. Rhea*, 82 Kan. 113, 136 Am. St. Rep. 100, 107 Pac. 800, holding statute of limitations not applicable to action to quiet title.

Applicability of Statute of Limitations to suit to remove cloud from title. See note, 29 L. R. A. (n. s.) 930.

81 Cal. 122-126, 22 Pac. 393, McROSE v. BOTTYER.

Act of Congress of 1866 (U. S. Comp. Stats. 1901, p. 1567) gave right of way for highways over public lands, and patent from United States is taken subject to such easement.

Approved in *Cosgriff v. Tri-State Tel. Co.*, 15 N. D. 217, 107 N. W. 527, 5 L. R. A. (n. s.) 1142, *Mills v. Glasscock*, 26 Okl. 127, 110 Pac. 378, and *Tholl v. Koles*, 65 Kan. 806, 70 Pac. 882, all holding that under above act, where statute of state declares section lines public highways, land passes into private ownership subject to easement.

Acceptance of Dedication Under Act of Congress of 1866 (U. S. Comp. Stats. 1901, p. 1567) may be effected by public user alone.

Reaffirmed in *Van Wanning v. Deeter*, 78 Neb. 283, 110 N. W. 704, and *Montgomery v. Somers*, 50 Or. 266, 90 Pac. 677.

Acceptance of Dedication of Public Land for highways under act of Congress of 1866 (U. S. Comp. Stats. 1901, p. 1567) relates back to date of dedication.

Reaffirmed in *Butte v. Mikosowitz*, 39 Mont. 355, 102 Pac. 595.

Right to Use Land as Public Highway is acquired when used adversely by public generally for more than twenty years.

Distinguished in *Rolling v. Emrich*, 122 Wis. 137, 99 N. W. 465, holding that desultory use by private persons as logging road is not sufficient.

Under Act of March 20, 1874 (Stats. 1874, p. 503), all roads used as such in county of Butte for five years are public highways.

Approved in *Town of Juliaetta v. Smith*, 12 Idaho, 294, 85 Pac. 925, applying rule to section 851, Revised Statutes of 1887; *Hughes v. Veal*, 84 Kan. 540, 114 Pac. 1083, holding evidence showed highway existed by dedication and acceptance.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 454.

81 Cal. 127-135, 22 Pac. 398, PENNIE v. HILDRETH.

It is not Necessary for Plaintiff in quiet title action to show title in himself.

Approved in *Shields v. Johnson*, 10 Idaho, 481, 79 Pac. 393, reaffirming rule; *Williams v. San Pedro*, 153 Cal. 49, 94 Pac. 236, defendant not in possession may defend quiet title suit by showing certificate of purchase under which plaintiff claims title is void, where latter shows no possession; *German-American Sav. Bank v. Gollmer*, 155 Cal. 687, 102 Pac. 933, 24 L. R. A. (n. s.) 1066, and *Johnson v. Hurst*, 10 Idaho, 326, 77 Pac. 791, both holding action may be maintained by owner of any interest of which law takes cognizance; *Blakemore v. Roberts*, 12 N. D. 401, 96 N. W. 1031, and *Ladd v. Mills*, 44 Or. 226, 75 Pac. 142, both holding action may be brought by ad-

ministrator; *Van Vranken v. Granite County*, 35 Mont. 431, 90 Pac. 166, holding possession under equitable title sufficient to support action; *Pollack Min. & Mill. Co. v. Davenport*, 31 Mont. 453, 78 Pac. 768, holding allegation of complaint that plaintiff "claims to be owner" and "claims title in fee" not objectionable when raised for first time on appeal.

In Action to Quiet Title, General denial merely puts in issue plaintiff's title.

Approved in *Dorris v. McManus*, 4 Cal. App. 150, 151, 87 Pac. 289, and *Hebden v. Bina*, 17 N. D. 243, 138 Am. St. Rep. 700, 116 N. W. 88, both reaffirming rule; *Hakalau Plantation Co. v. Kahuena*, 14 Haw. 194, holding that under general denial defendant may also prove own claim without pleading it.

Each Count in Complaint must State cause of action, and be complete in itself without reference to any other count.

Approved in *First Nat. Bk. v. D. S. B. Johnson Land Mtg. Co.*, 17 S. D. 528, 97 N. W. 749, reaffirming rule.

Effect of Legal Remedy upon Equitable Jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 73.

81 Cal. 135-141, 22 Pac. 396, **PEOPLE v. BUELNA.**

It is Larceny to Steal Cattle from agister, and information may allege property to be in agister.

Approved in *People v. Cain*, 7 Cal. App. 166, 93 Pac. 1039, it is larceny for owner of cattle to take them from agister entitled to hold under lien.

Whether Indictment Involving Felonious Taking may lay ownership in one in possession as agent or bailee. See note, 21 L. R. A. (n. s.) 312.

Section 485, Penal Code, Does not Create distinct kind of larceny, and information may be drawn under section 484, which defines larceny in general.

Approved in *Berry v. State*, 4 Okl. Cr. 205, 111 Pac. 677, applying rule in construing sections 2591, 2592, *Snyder's Compiled Laws*.

Larceny. See note, 88 Am. St. Rep. 592, 593.

Rights and Liabilities of Finder of Property. See note, 37 L. R. A. 126.

81 Cal. 142-145, 22 Pac. 482, **PEOPLE v. LANAGAN.**

It is Error to Charge That upon Proof of homicide by prosecution, burden of proof shifts to defendant to prove circumstances of mitigation or justification by preponderance of evidence.

Reaffirmed in *People v. Button* (Cal.), 39 Pac. 203.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 490.

Dying Declarations as Evidence. See note, 56 L. R. A. 375.

81 Cal. 145-147, 22 Pac. 484, **ORIENT INS. CO. v. REED.**

If One of Defendants in Interpleader suit claim increased sum, and plaintiff amend complaint so as to admit such to be due, judgment may be entered directing plaintiff to pay said sum into court and that defendants interplead.

Approved in *Smith v. Grand Lodge A. O. U. W.*, 124 Mo. App. 208, 101 S. W. 671, plaintiff may amend on remand after reversal of order authorizing interpleader.

Right of Interpleader. See note, 91 Am. St. Rep. 603.

81 Cal. 148-151, 22 Pac. 483, GARDNER v. STROEVER.

There is No Ground for Preliminary Injunction when acts complained of have already been performed.

Approved in Hatch v. Raney, 9 Cal. App. 717, 100 Pac. 887, reaffirming rule; Flood v. Goldstein Co., 158 Cal. 250, 110 Pac. 917, preliminary injunction will not lie to change possession of land where title is disputed.

Power to Grant Mandatory Injunctions. See note, 20 L. R. A. 162.

81 Cal. 154-157, 22 Pac. 514, HOLLOWAY v. McNEAR.

It is not Competent to Vary Written Contract certain in its terms by parol proof of custom.

Reaffirmed in Leonhart v. California Wine Assn., 5 Cal. App. 24, 89 Pac. 849.

81 Cal. 158-162, 22 Pac. 488, PEOPLE v. McKENNA.

Facts Constituting Fraud must be Pleaded with particularity.

Approved in Perreau v. Perreau, 12 Cal. App. 128, 106 Pac. 730, Dorris v. McManus, 3 Cal. App. 581, 86 Pac. 911, and Fox v. Hale etc. Silver Min. Co. (Cal.), 53 Pac. 36, all reaffirming rule.

Information for Obtaining Money under false pretenses which does not set forth facts constituting fraud nor state what representations were is deficient.

Distinguished in People v. Hines, 5 Cal. App. 124, 89 Pac. 859, information for obtaining money under false pretenses from person alleged to be owner, with intent to cheat him, and with original intent to cheat another, is not defective because it does not appear that he was successful as to such other, nor because it does not allege purpose for which money was paid.

General Rule That Information or Indictment is sufficient if it describes offense in words of statute is subject to qualification that accused must be apprised with reasonable certainty of nature of accusation.

Approved in Ex parte Goldman (Cal. App.), 88 Pac. 821, indictment alleging that accused, with knowledge that third person had stolen certain property, concealed property, and concealed from magistrate commission of felony, states no offense under section 496, Penal Code.

81 Cal. 163-170, 22 Pac. 547, IN RE ADAMS.

One Sentenced to State Prison is entitled to stay of execution pending application for certificate of probable cause for appeal.

Reaffirmed in People v. Lee, 9 Cal. App. 591, 99 Pac. 1111.

"Probable Cause for Appeal," as Used in section 1243, Penal Code, is not equivalent of "probable ground for reversal," but only that there is presented case that is debatable.

Approved in In re Neil, 12 Idaho, 751, 87 Pac. 881, applying rule under section 8048, Revised Statutes of 1887.

81 Cal. 170-181, 22 Pac. 509, 6 L. R. A. 588, KELLOGG v. HOWES.

Mechanic's Lien Law is Constitutional.

Approved in Chicago Lumber Co. v. Newcomb, 19 Colo. App. 276, 74 Pac. 790, applying rule to Laws of 1893, page 315, chapter 117; State v. Gregory, 170 Mo. 604, 71 S. W. 171, applying rule to Revised Statutes of 1899, section 4226.

Under Section 1183, Code of Civil Procedure, where contract is not recorded, liens may be enforced up to full value of labor or materials.

Approved in *Coghlan v. Quartararo*, 15 Cal. App. 667, 115 Pac. 666, and *Baker v. Lake Land Canal etc. Co.*, 7 Cal. App. 483, 94 Pac. 773, both reaffirming rule; *Merced Lumber Co. v. Bruschi*, 152 Cal. 375, 92 Pac. 846, holding personal judgment against owner erroneous.

Where Building Contract is Valid, it is measure of extent of owner's liability.

Approved in *Butler v. Ng Chung*, 160 Cal. 438, 117 Pac. 514, reaffirming rule; *Clark v. Beyrle*, 160 Cal. 314, 116 Pac. 742, subcontractor performing labor on tunnel on each of several sections let to same contractor under separate contracts cannot compel application of what is due on one of contracts to payment of demands accrued under another; *Stockton Lumber Co. v. Schuler*, 155 Cal. 413, 101 Pac. 308, holding lien attaches to money paid into court.

Limited in *Hoffman-Marks Co. v. Spires*, 154 Cal. 115, 116, 97 Pac. 153, 154, where contractor abandons contract, owner's liability is limited to contract price of work completed.

Distinguished in *Hampton v. Christensen*, 148 Cal. 735, 84 Pac. 202, owner may offset payments made before filing of liens.

Payment to Contractors or Subcontractors as affecting liens of subordinate claimants. See note, 20 L. R. A. 562, 565.

Right of Subcontractor or Materialman to personal judgment against owner. See note, 14 L. R. A. (n. s.) 1038.

81 Cal. 182-190, 15 Am. St. Rep. 38, 22 Pac. 648, WADSWORTH v. WADSWORTH.

Suit for Divorce is Suit in Equity.

Approved in *Miller v. Higgins*, 14 Cal. App. 163, 111 Pac. 406, where court has orally announced its decision relative to custody of child in divorce suit, prior to secretion of child by mother, equitable doctrine of relation will be invoked to protect father in custody of child; *Harding v. Harding*, 16 S. D. 412, 102 Am. St. Rep. 694, 92 N. W. 1081, court may award lien upon homestead to secure award of support to wife.

There may be Cross-complaint in Suit for divorce.

Approved in *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 494, 139 Am. St. Rep. 784, 74 Atl. 703, such right does not rest on consent of parties.

Cross-complaint in Action for Divorce. See note, 139 Am. St. Rep. 790.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 269.

81 Cal. 190-194, 22 Pac. 590, MONAGHAN v. PACIFIC ROLLING MILL CO.

Instruction must be Construed in Connection with all other instructions.

Approved in *De Witt v. Floriston etc. Paper Co.*, 7 Cal. App. 781, 96 Pac. 400, and *Hayden v. Consolidated Min. Co.*, 3 Cal. App. 138, 84 Pac. 423, both following rule.

In Order for Party to Avail Himself of misconduct of jury in talking about case before submission, where such act was known to him, he must object immediately.

Approved in *Zibbell v. Southern Pacific Co.*, 160 Cal. 253, 116 Pac. 520, applying rule where defeated party knew during trial that one of jurors had viewed premises; *Sheehan v. Hammond*, 2 Cal. App. 374, 84 Pac. 341, applying rule to publication of newspaper articles during trial charging defendant with subornation of perjury, where he did not inform court of such publication or show that articles were read by jury.

81 Cal. 200-202, 22 Pac. 592, PEOPLE v. BARTMAN.

Affidavit of Justification to Bail Bond containing unconnected words at end describing property, will not sustain charge of perjury.

Approved in *In re Lewis*, 3 Cal. App. 740, 86 Pac. 996, mere description of person as "incorrigible minor" in prayer of complaint for commitment to reform school is not averment.

81 Cal. 209-210, 22 Pac. 592, PEOPLE v. ROGERS.

In Information for Burglariously Entering store occupied by J. & H. with intent to commit larceny, it is not necessary to allege that J. & H. were partners or that they owned building or contents.

Reaffirmed in *State v. Golden*, 86 Minn. 208, 90 N. W. 399.

81 Cal. 214-217, 22 Pac. 546, TURNER v. REYNOLDS.

Appeal from Order Denying New Trial not taken within sixty days will be dismissed.

Reaffirmed in *Walbridge v. Cousins*, 2 Cal. App. 303, 83 Pac. 462.

81 Cal. 217-222, 15 Am. St. Rep. 47, 22 Pac. 551, GLEASON v. SPRAY.

Sections of Code in Pari Materia must be read together, and effect given to each and so construed as not to render nugatory restrictions of any section.

Approved in *People v. Nye*, 9 Cal. App. 164, 98 Pac. 246, applying rule to construction of Constitution; *Primm v. Superior Court*, 3 Cal. App. 212, 84 Pac. 788, applying rule in construction of sections 553 and 946, Code of Civil Procedure.

Abandonment of Homestead Has No Retroactive Effect and does not validate void deed executed by husband alone.

Approved in *Loomis v. Loomis*, 148 Cal. 154, 82 Pac. 681, 1 L. R. A. (n. s.) 312, reaffirming rule; *Hookway v. Thompson*, 56 Wash. 61, 105 Pac. 154, holding declaration of homestead has no retroactive effect.

Homestead cannot be Conveyed or Mortgaged by deed signed by husband alone.

Approved in *Cordano v. Wright*, 159 Cal. 619, 115 Pac. 231, holding deed ineffective unless jointly and concurrently executed and purporting by its terms to convey or encumber interest of both husband and wife; *Murphy v. Renner*, 99 Minn. 351, 116 Am. St. Rep. 418, 109 N. W. 594, 8 L. R. A. (n. s.) 565, extending rule to case where wife has abandoned husband and is living in adultery.

81 Cal. 236-239, 22 Pac. 598, TYLER v. STONE.

Extent of Rule That Parol Evidence is inadmissible to vary, etc., to written contract. See note, 17 L. R. A. 270.

81 Cal. 240-244, 22 Pac. 655, IN RE GILMORE.

General Devise of All Property of which testator dies possessed applies only to moiety of community property.

Qualified in Estate of Vogt, 154 Cal. 510, 98 Pac. 266, where intention of testator to dispose of entire community property clearly appears, widow is to put to election between provisions of law and will; In re Smith's Estate (Cal.), 38 Pac. 951, where will states that devise of entire community property is "made with full knowledge of property rights of husband and wife, and with knowledge and consent of my said wife," it indicates intention of testator to dispose of interest of wife.

Distinguished in Estate of Roach, 159 Cal. 262, 113 Pac. 374, where will gave all property, which was community, to wife for life and on her death after deducting portion to which she was legally entitled by law of California, remainder to brothers, "remainder" is half interest in whole of community.

Widow's Election Between Will and Dower or community property. See note, 92 Am. St. Rep. 705.

Admissibility of Testator's Declarations to Sustain, defeat or aid in construction of alleged will. See notes, 107 Am. St. Rep. 473; 4 Cal. Prob. 531.

81 Cal. 244-248, 22 Pac. 657, SCHURTZ v. ROMER.

Where Appeal is Taken from Judgment and from order denying new trial, latter will be dismissed where not referred to by appeal bond.

Approved in Field v. Andrada (Cal.), 37 Pac. 180, reaffirming rule; Little v. Thatcher, 151 Cal. 560, 91 Pac. 322, holding error incurable.

Under Section 939, Code of Civil Procedure, sufficiency of evidence cannot be considered on appeal from judgment, unless taken within sixty days from rendition of judgment, although taken within sixty days of entry.

Reaffirmed in Nelmes v. Wilson (Cal.), 34 Pac. 341.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 628.

81 Cal. 248-251, 22 Pac. 677, KERRIGAN v. SOUTHERN PAC. R. CO.

Liability of Initial Carrier for Torts or negligence of connecting lines. See note, 106 Am. St. Rep. 612.

81 Cal. 261-264, 22 Pac. 596, VON GLAHN v. BRENNAN.

Where Husband Tells Wife that she can have everything that she can earn, and she goes into business, earnings are her separate property.

Approved in Perkins v. Sunset Tel. and Tel. Co., 155 Cal. 719, 103 Pac. 194, courts may resort to circumstantial evidence to determine the existence or nonexistence of contract relative to property rights between husband and wife; Larson v. Larson, 15 Cal. App. 535, 115 Pac. 342, holding certain evidence sufficient to support judgment that earnings were separate property of widow.

Affidavits Used on Motion for New Trial must be incorporated in bill of exceptions.

Approved in Higginbotham v. State, 42 Fla. 580, 89 Am. St. Rep. 237, 29 So. 412, reaffirming rule; Manuel v. Flynn, 5 Cal. App. 328, 90 Pac. 467, bill of exceptions must be authenticated as required by rule XXIX of supreme court, and stipulation of attorneys to correctness of transcript is insufficient.

Cumulative Evidence as Ground for New Trial. See note, 14 L. R. A. 609.

Unlawful Detainer. See note, 120 Am. St. Rep. 50.

Denial of Tenancy as Waiver of Notice to quit or demand of possession. See note, 25 L. R. A. (n. s.) 105.

81 Cal. 265-268, 22 Pac. 855, **BARTON v. McDONALD.**

One Who Contracts to Repair Street is liable to third persons for injuries resulting from his negligence.

Approved in *Gay v. Engebretson*, 158 Cal. 24, 139 Am. St. Rep. 67, 109 Pac. 878, upholding city ordinance imposing such liability.

81 Cal. 270-275, 22 Pac. 663, **SHOWERS v. WADSWORTH.**

Judgment Against Indemnified is Conclusive against indemnifier where he was requested to defend.

Reaffirmed in *Great Northern Ry. Co. v. Akeley*, 88 Minn. 241, 92 N. W. 960.

81 Cal. 275-280, 22 Pac. 678, **PEOPLE v. TONIELLI.**

When Record on Appeal from Judgment in prosecution for extortion shows that trial took place in San Francisco and threatening letter was postmarked and received in San Francisco, venue is sufficiently proved.

Approved in *People v. Connelly* (Cal.), 38 Pac. 43, holding venue in prosecution for embezzlement sufficiently proved where evidence tends to prove money was received and converted in San Francisco.

Variance Between Information for Extortion and proof as to contents of threatening letter which does not alter sense of letter is immaterial.

Approved in *People v. Monroe* (Cal.), 33 Pac. 780, where information for forgery sets out instrument as addressed to city, fact that it was addressed to auditor does not constitute variance.

What Constitutes Extradition. See note, 116 Am. St. Rep. 459, 460, 467.

81 Cal. 280-289, 22 Pac. 856, **HARRIS v. FRANK.**

Whether Contract is Original Promise or guaranty is question for jury.

Reaffirmed in *Kesler v. Cheadle*, 12 Okl. 493, 72 Pac. 368.

Objection and Exceptions of Respondent have no place in record on appeal and presumptions are in favor of rulings and findings of court below.

Approved in *La Dow v. National Bldg. etc. Co.*, 11 Cal. App. 309, 104 Pac. 839, where appeal bond is not incorporated in record, it must be presumed that it was in due form.

If Any Credit is Given to Beneficiary or he was in any degree treated as liable for debt, promisor is chargeable only as guarantor.

Reaffirmed in *Storer v. Heitfeld*, 19 Idaho, 174, 113 Pac. 81.

Contract to Answer for or Pay Debt of another within statute of frauds. See note, 126 Am. St. Rep. 492.

Contemporary Promise to Pay Where Benefit inures to another as within statute of frauds. See note, 15 L. R. A. (n. s.) 215, 224.

81 Cal. 289-295, 22 Pac. 848, RAZZO v. VARNI.

Witness is not Required to State Grounds of estimate of damages, and if opposing counsel fail to cross-examine, he cannot object that grounds were not stated.

Approved in Cassin v. Cole, 153 Cal. 680, 96 Pac. 278, reaffirming rule; Ward v. Sherman, 155 Cal. 293, 100 Pac. 866, where plaintiff fails to cross-examine defendant's witnesses on issues respecting receipts and expenditures of defendant, he cannot object on appeal that evidence was indefinite.

Evidence is Admissible to Show that forcible trespass was accompanied by insult and fright to plaintiff's wife, and to show she was in condition where fright might cause illness.

Approved in Engle v. Simmons, 148 Ala. 95, 121 Am. St. Rep. 59, 41 So. 1024, 7 L. R. A. (n. s.) 96, where man entered house of pregnant woman and so frightened her by threats against absent husband that she suffered miscarriage, he is liable for her bodily pain; Sanders v. Cline, 22 Okl. 165, 101 Pac. 271, in action for wrongful eviction by landlord it is not error to admit evidence that weather was cold and that mother of plaintiff died two weeks later by reason of exposure, where court instructed jury that they could not consider damages accruing to other members of plaintiff's family.

Extent of Trespasser's Liability for consequential injuries. See note, 53 L. R. A. 633.

Duty to Provide Medical Assistance for servant. See note, 4 L. R. A. (n. s.) 68.

81 Cal. 296-301, 22 Pac. 859, BARRETT v. MARKET STREET RY. CO.

Tender of Five Dollar Gold Piece is reasonable tender for street-car fare.

Distinguished in Funderburg v. Augusta etc. R. R. Co., 81 S. C. 144, 150, 61 S. E. 1076, 1078, 21 L. R. A. (n. s.) 868, both holding tender of five dollars unreasonable where company has rule requiring conductor to make change only up to two dollars.

What is a Reasonable Sum Which may be Tendered in payment of fare. See note, 35 L. R. A. 489.

81 Cal. 302-303, 22 Pac. 673, BURKE v. MASCARICH.

Reckless Repetition by One Voter to Another of charge against candidate, without attempt to investigate, is not privileged.

Approved in Bee Publishing Co. v. Shields, 68 Neb. 760, 81 N. W. 302, publication by newspaper of rumors against office-holder, without investigation, not privileged.

81 Cal. 303-327, 22 Pac. 665, GRAVES v. MONO LAKE ETC. MIN. CO.

Certificates of Stock Indorsed in Blank pass by delivery, although not negotiable instruments.

Approved in Perkins v. Coroles, 157 Cal. 632, 137 Am. St. Rep. 158, 108 Pac. 713, purchaser of stock in no better position than purchaser of any other non-negotiable instrument; O'Dea v. Hollywood Cemetery Assn., 154 Cal. 72, 97 Pac. 8, stock represented by certificate subject to assessment for subscription calls, though in hands of purchaser without knowledge.

Resolution Passed by Vote of Interested Directors of corporation making allowances in own favor are voidable.

Approved in *Steele v. Gold Fissure etc. Min. Co.*, 42 Colo. 532, 126 Am. St. Rep. 177, 95 Pac. 351, disqualified directors cannot be counted in quorum; *Martin v. Santa Cruz Water Storage Co.*, 4 Ariz. 175, 36 Pac. 37, and *McConnell v. Combination Min. etc. Co.*, 30 Mont. 258, 104 Am. St. Rep. 703, 76 Pac. 200, both holding directors have no power to vote salary to any of their number; *Ritchie v. People's Tel. Co.*, 22 S. D. 606, 119 N. W. 992, director may not vote on resolution increasing his salary, and wife, also director, is likewise disqualified.

Directors may Recover upon Quantum Meruit value of service performed and money advanced to corporation.

Approved in *Shively v. Eureka Tellurium G. Min. Co.*, 5 Cal. App. 244, 89 Pac. 1076, holding former judgment against corporation upon notes issued directors upon own votes not bar to such suit.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 757.

81 Cal. 328-333, 22 Pac. 849, GREEN v. BROOKS.

In Action to Declare Trust and for accounting, fact that no personal judgment was rendered for plaintiff does not affect right to accounting.

Approved in *Title Insurance etc. Co. v. Ingersoll*, 158 Cal. 480, 111 Pac. 362, in suit for accounting, court may render personal judgment; *Hannah v. Canty*, 1 Cal. App. 227, 81 Pac. 1036, action to establish trust and for accounting involves amount due from plaintiff.

Disclosure of Information in Consideration for promise.

Approved in *Buhler v. Trombly*, 139 Mich. 572, 108 N. W. 344, agreement to continue in business and to reside near promisor is consideration for promise.

81 Cal. 334-339, 22 Pac. 682, 6 L. R. A. 591, DONOVAN v. JUDSON.

Covenant for Purchase Money is Independent of conveyance when day of payment is to happen or may happen before conveyance, or where time is fixed for payment and no time fixed for conveyance.

Approved in *Blunt v. Egeland*, 104 Minn. 353, 116 N. W. 654, tender of performance by plaintiff in action for breach of contract to sell land not necessary where first act of performance is cast upon defendant.

Action upon Independent Covenant to pay purchase money for land is barred four years from expiration of time for payment, without regard to time fixed for execution or tender of conveyance.

Distinguished in *Litchfield v. Cowley*, 34 Wash. 569, 76 Pac. 82, under 2 Ballinger's Annotated Codes, sections 4796, 4798, subdivision 2, where purchaser by written contract agreed to pay all taxes and assessments on land, action in 1902 by vendor to recover taxes and assessments payable prior to 1895 is barred.

81 Cal. 340-350, 22 Pac. 864, MILLARD v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.

Under Section 633, Code of Civil Procedure, it is not ground for reversal of judgment or for new trial that findings of fact are classified as conclusions of law.

Approved in *Gainsley v. Gainsley* (Cal.), 44 Pac. 456, where facts found are stated separately from conclusions of law, there is sufficient compliance with statute, although both are written on same paper.

Acceptance by Benefit Association of delinquent dues waives forfeiture of benefit certificate consequent to such delinquency.

Approved in *Pearson v. Anderburg*, 28 Utah, 504, 80 Pac. 310, reaffirming rule; *Himmelein v. Supreme Council* (Cal.), 33 Pac. 1132, holding plaintiff therein not bound by judgment in principal case.

81 Cal. 356-364, 22 Pac. 679, PEKIN MINING ETC. CO. v. KENNEDY.

Under Section 1, Act of April, 1880, concerning mining corporations, conveyance by mining corporation under corporate seal, not proved to have been ratified by two-thirds of stockholders, does not pass title.

Approved in *Bennett v. Red Cloud Mining Co.*, 14 Cal. App. 732, 113 Pac. 120, following rule; *Forrester v. Boston etc. Min. Co.*, 29 Mont. 402, 74 Pac. 1090, act ultra vires is void, not merely voidable.

Question of Want of Ratification of Deed by mining corporation may be raised by anyone who has interest in property.

Approved in *Bennett v. Red Cloud Mining Co.*, 14 Cal. App. 731, 113 Pac. 120, following rule; *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 753, 759, 137 Am. St. Rep. 165, 110 Pac. 130, 133, holding question may be raised by corporation or stockholders to avoid mortgage; *Carlsbad Water Co. v. New*, 33 Colo. 392, 81 Pac. 35, in suit to foreclose mortgage, it is competent for mortgagor's trustee in bankruptcy to question its validity.

Miscellaneous.—Cited in *Matter of Ogden*, 153 Cal. 347, 95 Pac. 161, for history of litigation.

81 Cal. 364-369, 22 Pac. 869, IN RE CALIFORNIA MUT. LIFE INS. CO.

Distribution of Assets of Insolvent Insurance Company. See note, 38 L. R. A. 109.

81 Cal. 370-377, 22 Pac. 880, GARDNER v. TATUM.

Defendant is Entitled to have Excessive verdict reduced or new trial granted without imposition of terms.

Approved in *Lorf v. City of Detroit*, 145 Mich. 267, 108 N. W. 662, on motion for new trial because of inadequate damages, court has no authority to grant new trial unless defendant pay plaintiff increased sum fixed by court; *Hall v. Northwestern R. R. Co.*, 81 S. C. 535, 62 S. E. 853, holding new trial cannot be made dependent on surrender of right of appeal.

Unlicensed Person cannot Recover for services rendered as physician.

Reaffirmed in *Roberts v. Levy* (Cal.), 31 Pac. 570.

Effect of Failure to Procure License for business on validity of contract therein. See note, 16 L. R. A. 425.

Civil Code, Section 1667, Declares that to be unlawful which is contrary to express provision of law or contrary to policy of express law.

Approved in *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 32, 77 Pac. 304, party cannot recover on contract made in consideration

that promisor hold office in corporation under conditions contrary to law.

Contracts, Consideration for Which has Partly Failed, or is partly illegal. See note, 117 Am. St. Rep. 507.

81 Cal. 378-398, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520, **KOHL v. LILIENTHAL.**

Under Section 309, Civil Code, there can be no distribution of capital stock of corporation except upon dissolution.

Approved in *Tapscott v. Mexican-Colorado etc. Co.*, 153 Cal. 668, 96 Pac. 273, where corporation has illegally distributed shares, remedy of stockholder is to compel restoration.

Distinguished in *Burne v. Lee*, 156 Cal. 228, 229, 104 Pac. 441, agreement made upon plaintiff's discovery of defendant's fraud in inducing him to purchase stock, by which defendant agreed to sell corporate property and return to plaintiff purchase price, retaining remainder, could be legally carried out by dissolving corporation; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 68, 97 Pac. 7, legality of stock thus issued cannot aid holders of valid stock in attacking assessment; dissenting opinion in *Smith v. Ferries etc. Ry. Co. (Cal.)*, 51 Pac. 725, holding that question of illegality of issue cannot be raised by plaintiff who is neither creditor nor stockholder.

Effect of Consolidation of Corporations. See note, 89 Am. St. Rep. 621.

Disposition of Proceeds of Sale of Corporation. See note, 103 Am. St. Rep. 571.

Power of Majority Stockholders to Dissolve Corporation. See note, 2 L. R. A. (n. s.) 495.

Miscellaneous.—Cited in *Turner v. Fidelity Loan Concern*, 2 Cal. App. 131, 83 Pac. 66, to point that where directors are sole beneficiaries, on adoption of incorporation agreement by corporation no objection to resolution adopting it can be urged because of interest of directors.

81 Cal. 398-407, 22 Pac. 871, **SCOTT v. WOOD.**

"Burden of Proof" may Mean Burden of meeting prima facie case, or burden of producing preponderance of evidence.

Approved in *Ruth v. Krone*, 10 Cal. App. 773, 103 Pac. 961, reaffirming rule; *French v. Pacific Electric Ry. Co.*, 1 Cal. App. 405, 82 Pac. 396, in action against railroad for personal injuries, burden is on plaintiff to show that injury was caused by act of carrier in operating, after which burden is on defendant to show absence of negligence.

Burden of Meeting Prima Facie Case may shift back and forth during trial.

Approved in *Bonneau v. North Shore R. R. Co.*, 152 Cal. 412, 125 Am. St. Rep. 68, 93 Pac. 109, and *Cody v. Market St. Ry. Co.*, 148 Cal. 93, 82 Pac. 667, both holding that in instruction that where plaintiff shows injury was caused by act of carrier in operating business, burden of proof is on carrier to show absence of negligence, "burden of proof" means burden of meeting prima facie case; *Osgood v. Los Angeles Traction Co.*, 137 Cal. 283, 92 Am. St. Rep. 171, 70 Pac. 171, in action against railway for injuries caused to plaintiff by collision between car of defendant and car of another company, burden of proof is on defendant to show absence of negligence; *Mod-*

ern Brotherhood of America v. Cummings, 68 Neb. 264, 94 N. W. 147, in action to recover on accident insurance policy, after plaintiff has proved prima facie case, burden is on defendant to introduce evidence to overcome it.

Disapproved in Southern Pac. Co. v. Cavin, 144 Fed. 351, 75 C. C. A. 350, burden of proof is on carrier to show that injury was unavoidable by human foresight.

Burden of Producing Preponderance of Evidence remains throughout trial upon party who has affirmative of issue.

Approved in Berger v. St. Louis Storage etc. Co., 136 Mo. App. 42, 116 S. W. 446, and Rapp v. Sarpy County, 71 Neb. 384, 98 N. W. 1043, both reaffirming rule; Valente v. Sierra Ry. Co., 151 Cal. 540, 91 Pac. 483, in action against railroad for injuries, instruction that carrier must show by preponderance of evidence that it was not negligent is erroneous; Gibbs v. Farmers & Merchants' Bank, 123 Iowa, 744, 99 N. W. 706, in action to recover amounts overpaid on note, where indorsements show overpayment, burden rests on plaintiff throughout case; Sewell v. Detroit United Ry. Co., 158 Mich. 411, 123 N. W. 4, Lincoln Traction Co. v. Webb, 73 Neb. 139, 119 Am. St. Rep. 879, 102 N. W. 259, and Klunk v. Hocking Valley Ry., 74 Ohio, 134, 77 N. E. 754, all applying rule to action against railroad for personal injuries; Woods v. Latta, 35 Mont. 17, 88 Pac. 404, in replevin, burden is on plaintiff to prove right to possession at time of commencement of action.

Burden of Proving Want of Consideration. See note, 135 Am. St. Rep. 767.

Relation of Res Ipsa Loquitur to burden of proof. See note, 16 L. R. A. (n. s.) 529.

It is Error to Instruct Jury That Fact once shown to exist is presumed to continue until contrary is shown.

Approved in In re Murphy's Estate, 43 Mont. 373, 116 Pac. 1009, reaffirming rule; People v. Crowe (Cal.), 34 Pac. 861, upholding instruction that "unless presumption is controverted by other facts, jury is bound to find according to such presumption"; Davis v. Hearst, 160 Cal. 177, 116 Pac. 545, arguendo.

81 Cal. 408-489, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, **IN RE JESSUP.**

Superior Court has Jurisdiction, upon petition for partial distribution of estate, under sections 1658, 1659, Code of Civil Procedure, to determine question of heirship, though right is claimed by reason of adoption of illegitimate child, without prior determination of that right under section 1664.

Denied in In re Fleming's Estate, 38 Mont. 60, 98 Pac. 649, holding court cannot determine question of heirship in proceedings for partial distribution under section 7669, Revised Codes, but such question must be first determined under sections 7670-7672.

For Purpose of Determining Paternity, resemblance of child and putative father, both being present in court, may be considered by jury.

Approved in State v. Danforth, 73 N. H. 218, 220, 111 Am. St. Rep. 600, 60 Atl. 841, 842, applying rule in prosecution for rape.

Resemblance as Evidence of Relationship. See note, 52 L. R. A. 501, 504.

Sections 230, 1387, Civil Code, should be strictly construed.

Distinguished in *Estate of Gird*, 157 Cal. 541, 137 Am. St. Rep. 131, 108 Pac. 502, holding language mere dictum, and not declarative of any rule of law.

Section 230, Civil Code, Providing for Acknowledgment of illegitimate child, should have fair construction.

Approved in *Thomas v. Estate of Thomas*, 64 Neb. 589, 90 N. W. 633, under section 31, chapter 23, Compiled Statutes, providing for acknowledgment of illegitimate child, no intention to make child heir, and no statement of illegitimacy need appear in written acknowledgment.

Under Section 230, Civil Code, Providing that father of illegitimate child, by publicly acknowledging it as his own and receiving it into his family, makes it legitimate, where father has no family, child may be made legitimate without being received into family.

Approved in *Estate of Blythe*, 4 Cal. Prob. 139, 140, 147, 148, 156, 159, reaffirming rule; *Estate of de Laveaga*, 4 Cal. Prob. 401, 405, 410, 422, 429, 434, 438, 439, discussing legitimation of child by father's acknowledgment.

Overruled in *Garner v. Judd* (Cal.), 64 Pac. 1076, holding contra.

Under Section 230, Civil Code, Providing that father of illegitimate child, by publicly acknowledging it as his own, and receiving it into his family, makes it legitimate, private acknowledgment is insufficient.

Distinguished in *Miller v. Pennington*, 218 Ill. 225, 75 N. E. 920, 1 L. R. A. (n. s.) 773, under Hurd's Revised Statutes of 1899, page 653, chapter 39, all that is required is that father shall own or admit child to be his.

"Appellate Jurisdiction" Means Right to review final judgments of courts of original jurisdiction.

Approved in *Estate of McVay*, 14 Idaho, 68, 93 Pac. 32, where statute provides that trial de novo shall be had in appellate court where appeal is on both law and fact, trial de novo means trial upon original papers and same issues; *In re Burnette*, 73 Kan. 615, 85 Pac. 577, jurisdiction to try causes de novo is original, not appellate.

Supreme Court may Act in All Cases by constitutional majority.

Approved in *Coffey v. Superior Court*, 2 Cal. App. 459, 83 Pac. 582, under section 758 et seq., Penal Code, majority of grand jury may (probably) present accusation.

Judgment of Court Having Jurisdiction is subject to attack only in manner prescribed by law.

Reaffirmed in *Philbrook v. Newman*, 148 Cal. 175, 82 Pac. 773.

Supreme Court may Modify, Revise, and correct its judgments at any time up to regular issuance of remittitur.

Approved in *Noel v. Smith*, 2 Cal. App. 162, 83 Pac. 169, under rule 34 of supreme court, judgment of district court of appeal does not become conclusive of rights of parties until remittitur is issued.

Compelling Accused to Exhibit Himself for identification. See note, 28 L. R. A. 702.

Photographs as Evidence. See notes, 35 L. R. A. 805; 15 L. R. A. (n. s.) 1162.

Miscellaneous.—Cited in *Estate of Jessup*, 2 Cal. Prob. 477, 478, 479, 488, 491, 492, 493, 499, 508, on retrial after reversal.

81 Cal. 489-501, 15 Am. St. Rep. 66, 22 Pac. 851, **PEOPLE v. McFADDEN**.

Whether General Law can be Made applicable depends upon questions of fact, of which legislature is exclusive judge.

Approved in *People v. Sacramento Drainage Dist.*, 155 Cal. 383, 103 Pac. 212, applying rule to act creating Sacramento drainage district (Stats. 1905, p. 443, c. 368); *Wheeler v. Herbert*, 152 Cal. 228, 233, 234, 92 Pac. 355, 357, applying rule to special law for change of boundary between two counties (Stats. 1907, p. 260, c. 214); *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 408, 105 Pac. 281, applying rule to act creating reclamation district (Stats. 1905, p. 717); *Board of Directors v. Nye*, 8 Cal. App. 543, 97 Pac. 214, applying rule to act providing for support, in manner different from others of such general class, of veteran soldiers and dependent relatives (Stats. 1897, p. 447, c. 274); *People v. Levee Dist. No. 6 (Cal.)*, 63 Pac. 344, applying rule to act providing new form of government for levee district (Stats. 1891, p. 235); *State v. Brown*, 24 Okl. 445, 103 Pac. 767, applying rule to act providing for proceeding for removal of officer (Sess. Laws, 1907-8, sec. 23, art. 3, c. 69, pp. 611, 612); *Oklahoma City v. Shields*, 22 Okl. 305, 100 Pac. 576, holding that declaring of emergency by legislature, when expressed in act that it is necessary for preservation of public peace, health, or safety (Acts 1908, p. 166, c. 10), is conclusive on courts.

Scope of Legislative Discretion in enacting special laws. See note, 14 L. R. A. 566.

Act of March 11, 1889, Providing for Forming of county of Orange out of part of county of Los Angeles, upon assent of two-thirds of electors, is valid, and not delegation of legislative power.

Approved in *Wheeler v. Herbert*, 152 Cal. 232, 92 Pac. 357, applying rule to act providing for change of county boundary lines when approved by vote of sixty per cent of electors resident in territory ninety days (Stats. 1907, p. 260, c. 214); *In re Pfahler*, 150 Cal. 90, 88 Pac. 278, 11 L. R. A. (n. s.) 1092, upholding that initiative provision in charter of Los Angeles as approved by legislature; *Jackson v. State*, 131 Ala. 25, 31 So. 381, applying rule to act of March 5, 1901, providing for change of county boundaries upon approval by two-thirds of electors; *Attorney General v. Springwells Tp. Board*, 143 Mich. 531, 107 N. W. 90, applying rule to act of 1905 providing for annexation of territory to Detroit upon approval by majority of qualified electors.

Constitutional Inhibition Against Special Legislation where general law can be made applicable. See note, 93 Am. St. Rep. 112.

Constitutionality of Local Option Laws. See note, 114 Am. St. Rep. 318, 320.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 163.

81 Cal. 502-506, 22 Pac. 875, **MOORE v. LENT**.

Miscellaneous.—Cited in *Shea v. Lent (Cal.)*, 22 Pac. 876.

81 Cal. 507-524, 22 Pac. 883, **JONES v. HANNA**.

Validity of Contracts in Business which it is misdemeanor to transact. See note, 12 L. R. A. (n. s.) 578, 581, 603.

81 Cal. 524-527, 22 Pac. 693, **EUREKA v. CROGHAN.**

Public User as Acceptance of Highway. See note, 18 L. R. A. 510.

81 Cal. 540-542, 21 Pac. 533, 22 Pac. 750, **FELTON v. MILLARD.**

Nonsuit is Properly Denied when there is any evidence tending to sustain plaintiff's case.

Approved in *The Union Ice Co. v. Doyle*, 6 Cal. App. 294, 92 Pac. 116, and *Archibald Estate v. Matteson*, 5 Cal. App. 446, 90 Pac. 725, both following rule; *Later v. Haywood*, 12 Idaho, 83, 85 Pac. 496, holding that by such motion defendant admits all facts of which there is evidence, and all facts which evidence tends to prove.

Title is not in Issue in Statutory Action of unlawful detainer, and evidence of title in defendant is not admissible for any purpose.

Distinguished in *Teich v. Arms*, 5 Cal. App. 478, 90 Pac. 963, lessor is not estopped to show that title of lessor has expired, been extinguished, or alienated from him by operation of law.

Notice to Quit may be Given by attorney by authority of landlord.

Approved in *McClung v. McPherson*, 47 Or. 85, 81 Pac. 571, question of attorney's authority cannot be raised when no objection was made to introduction of notice signed by attorney.

Right to Civil Action for Forcible Entry and detainer. See note, 121 Am. St. Rep. 405.

Unlawful Detainer. See note, 120 Am. St. Rep. 46.

81 Cal. 542-550, 22 Pac. 890, **RAISCH v. BOARD OF EDUCATION.**

To Supersede Remedy by Mandamus, party must not only have specific remedy, but one competent to afford relief upon very subject matter of application, and one which is equally convenient, beneficial and effective.

Approved in *Cornell Co. v. Barber*, 31 R. I. 385, 76 Atl. 811, holding remedy at law under General Laws of 1909, chapter 46, sections 13, 14, for recovery of claim against town, not so plain, adequate and complete as to preclude resort to mandamus.

81 Cal. 551-565, 15 Am. St. Rep. 76, 22 Pac. 892, 6 L. R. A. 792, **HUMPHREYS v. HOPKINS.**

Property of Railroad in Custody of Foreign Receiver, if brought into this state by him in course of business, is subject to attachment.

Approved in *Davis v. Cleveland etc. Ry. Co.*, 217 U. S. 175, 30 Sup. Ct. 468, 54 L. Ed. 719, 27 L. R. A. (n. s.) 823, cars and credits may be seized by authority of state court, notwithstanding connection with interstate commerce; *Choctaw Coal etc. Co. v. Williams-Echols Dry Goods Co.*, 75 Ark. 368, 87 S. W. 633, receiver of foreign corporation cannot defeat attachment levied at suit of resident creditor, before receiver acquires possession, on property of corporation within state; *De Rochemont v. N. Y. Central etc. R. R. Co.*, 75 N. H. 160, 139 Am. St. Rep. 673, 71 Atl. 869, Public Statutes of 1901, chapter 220, sections 1, 2, relating to attachment, is valid, and attachment of freight-car of railroad not in actual use cannot be stayed.

Exclusiveness of Jurisdiction by Appointment of receiver. See note, 20 L. R. A. 392.

Attachment of Foreign Railroad Cars. See notes, 104 Am. St. Rep. 663; 64 L. R. A. 502.

Rights of Receiver as to Property Outside of jurisdiction in which appointed. See note, 23 L. R. A. 54.

81 Cal. 566-570, PEOPLE v. BOWMAN.

Jury's Determination of Degree of Homicide will not be disturbed on appeal, when there is any evidence to support it.

Reaffirmed in *People v. Machuca*, 158 Cal. 64, 109 Pac. 887.

Evidence and Instructions as to Character of accused. See note, 20 L. R. A. 617.

Effect of Failure to Give Accused Opportunity to plead. See note, 13 L. R. A. (n. s.) 814.

81 Cal. 571-579, 22 Pac. 908, IN RE GRIDER.

Pending Administration of Estate, Successor of distributee who enters into possession of land under decree of partial distribution cannot acquire title by adverse possession as against those who are legally entitled as tenants in common.

Approved in *Webb v. Winter* (Cal.), 65 Pac. 1030, purchaser at foreclosure sale of widow's interest in property cannot acquire title by adverse possession to interest of testator, pending administration, or without notice that he claimed whole property.

Pretermitted Heirs. See note, 115 Am. St. Rep. 582.

81 Cal. 579-584, 22 Pac. 888, IN RE WALKERLY.

Probate Homestead Set Apart Under sections 1465, 1468, Code of Civil Procedure, is not limited to five thousand dollars, but is discretionary with court.

Approved in *Estate of Hessler*, 2 Cof. Prob. 356, 359, and *In re Walkerly's Estate* (Cal.), 22 Pac. 889, both following rule; *Estate of Grisel*, 3 Cof. Prob. 300, premises consisting of detached tracts will not be set aside as probate homestead though value of tracts in aggregate does not exceed five thousand dollars.

Distinguished in *Estate of Leahy*, 3 Cof. Prob. 369, discussing law of probate homesteads.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 50.

81 Cal. 584-588, 22 Pac. 933, McCARTHY v. MUTUAL RELIEF ASSN.

Revocability of License to Maintain Burden on land, after licensee has incurred expense. See note, 49 L. R. A. 522.

81 Cal. 588-590, 23 Pac. 227, LAREW v. NEWMAN.

Increase in Salary Does not Accrue in favor of one appointed to fill vacancy in unexpired term of incumbent.

Approved in *State v. Frear*, 138 Wis. 540, 120 N. W. 217, reaffirming rule; *Harrison v. Colgan*, 148 Cal. 75, 82 Pac. 677, justices of district courts of appeal, whose offices were created and whose terms began to run before increase was made in salary, although they were not appointed until after increase, are not entitled to increase; *Foreman v. People*, 209 Ill. 575, 71 N. E. 37, applying rule to case of officer elected to fill unexpired term.

Distinguished in *Harrold v. Barnum*, 8 Cal. App. 24, 96 Pac. 105, constitutional inhibition against increase of salary during term of office (Const., art. XI, sec. 9) does not apply to appointive officer who holds during pleasure of appointing power.

81 Cal. 590-596, 22 Pac. 919, BULLOCK v. ROUSE.

Under Revised Statutes, Section 2395, providing for sectionizing public lands, tract has no identity until survey is made and approved under authority of Congress.

Reaffirmed in *Smith v. Los Angeles*, 158 Cal. 708, 112 Pac. 310.

Miscellaneous.—Cited in *Smith v. Love*, 49 Fla. 242, 38 So. 380.

81 Cal. 596-603, 15 Am. St. Rep. 82, 22 Pac. 1126, LORD v. GOLDBERG.

Amount Sued for is Test of Jurisdiction.

Approved in *Pratt v. Welcome*, 6 Cal. App. 477, 92 Pac. 501, allegation, not finding of value, in claim and delivery, is test.

In Contract of Hiring, Agreement by employer that employment shall be permanent only means that it shall continue until one of parties, for good reason, should wish to terminate it.

Approved in *Davidson v. Laughlin* (Cal.), 68 Pac. 104, and *Davis v. Fidelity Fire Ins. Co.*, 208 Ill. 385, 70 N. E. 363, both following rule; *Sullivan v. Detroit etc. Ry.*, 135 Mich. 671, 106 Am. St. Rep. 403, 98 N. W. 759, 64 L. R. A. 673, contract to give permanent employment to attorney satisfied by employment for year at fixed salary.

Contract of Employment for Indefinite Period is terminable at will of either party.

Approved in *Faulkner v. Des Moines Drug Co.*, 117 Iowa, 122, 90 N. W. 586, contract that employment should continue until mutually agreed to be void is unenforceable for uncertainty as to duration; dissenting opinion in *Prescott v. Puget Sound Bridge etc. Co.*, 40 Wash. 357, 82 Pac. 608, majority holding that employee in action for breach could show duration of work.

81 Cal. 604-607, 22 Pac. 924, BARNUM v. BRIDGES.

Witness may Give Opinion as to Cost of clearing land.

Approved in *Croft v. Chicago, Rock Island etc. Ry. Co.*, 134 Iowa, 419, 109 N. W. 726, in action for loss of services of wife, witness, who was head of family in similar circumstances to that of plaintiff, may testify as to value of services.

81 Cal. 608-616, 22 Pac. 967, SOMERS v. SOMERS.

On Appeal from Order Heard on Affidavits, affidavits must be authenticated by bill of exceptions.

Approved in *Linforth v. S. F. Gas and Electric Co.*, 156 Cal. 67, 103 Pac. 324, *People v. Terrill*, 131 Cal. 114, 63 Pac. 141, and *Pereira v. City Savings Bank*, 128 Cal. 47, 60 Pac. 525, all reaffirming rules.

81 Cal. 616-618, 23 Pac. 418, PEOPLE v. RUSSELL.

Information Drawn Substantially in Language of statute defining offense is sufficient.

Approved in *State v. Keller*, 8 Idaho, 709, 70 Pac. 1054, holding it not necessary to aver criminal intent where offense is statutory, and such intent is not made element of crime; *State v. Rathbone*, 8 Idaho, 167, 67 Pac. 187, holding information which charges larceny in felonious taking of two mares.

81 Cal. 618-620, 22 Pac. 877, ARNOLD v. SAN JOSE.

In Absence of Statute, Municipal Corporation is not liable for personal injuries occasioned by defective street.

Reaffirmed in *Schindler v. Young*, 13 Cal. App. 21, 108 Pac. 734.

Distinguished in *Davoust v. City of Alameda*, 149 Cal. 75, 84 Pac. 763, 5 L. R. A. (n. s.) 536, holding city liable where injury arises from exercise of mere proprietary and private rights.

Denied in *Carson v. City of Genessee*, 9 Idaho, 254, 108 Am. St. Rep. 127, 74 Pac. 865, holding contra.

There is No Distinction, as Regards liability for negligence, between cases arising under charters making it duty of city as such, to keep streets in repair, and those which make it duty of city council.

Approved in *Davoust v. City of Alameda*, 149 Cal. 75, 84 Pac. 763, 5 L. R. A. (n. s.) 536, applying rule to duty to maintain lighting plant.

What Municipal Corporations are Answerable for injuries due to defects in streets and other public places. See note, 108 Am. St. Rep. 151.

Liability of Municipality for Defects or obstructions in streets. See note, 20 L. R. A. (n. s.) 516, 672.

81 Cal. 625-627, 22 Pac. 971, **HERMAN v. PARIS.**

Error in Attachment Proceedings is not ground for reversal of judgment or of order denying new trial.

Approved in *Nail v. Superior Court*, 11 Cal. App. 29, 103 Pac. 903, on appeal from justice's court to superior court on law and fact, order of justice refusing to dissolve attachment is not reviewable.

81 Cal. 631-633, 15 Am. St. Rep. 88, 22 Pac. 876, **O'NEIL v. MAGNER.**

If Promissory Note, Payable on Demand, with interest after date, is paid next day after execution, one day's interest is due and payable.

Reaffirmed in *Foster v. Beau De Zart*, 13 Cal. App. 56, 108 Pac. 877.

Promissory Note Payable on Demand is due at once, and no demand is necessary before suit.

Approved in *Ex parte Hourtz*, 2 Cal. App. 754, 84 Pac. 230, applying rule to action of indebitatus assumpsit.

Necessity of Demand to Start Running of statute of limitations. See note, 105 Am. St. Rep. 229.

In Case of Demand Note, Statute begins to run at once from time of execution.

Approved in *Darby v. Darby*, 120 La. 850, 45 So. 748, 14 L. R. A. (n. s.), 1208, reaffirming rule; *Sturdivant v. McCorley*, 83 Ark. 281, 103 S. W. 733, 11 L. R. A. (n. s.) 825, applying rule to case where money is borrowed without any time for payment specified.

Limitation of Actions on Obligations Payable on or after demand. See note, 136 Am. St. Rep. 471.

81 Cal. 634-641, 22 Pac. 863, **BRANDT v. CLARK.**

Where Vendor cannot Make Title to all land, purchaser has election to proceed with purchase pro tanto and to have abatement for deficiency.

Approved in *Townsend v. Blanchard*, 117 Iowa, 40, 90 N. W. 520, purchaser may have specific performance with abatement for homestead and wife's contingent right of dower.

Right of Vendee to Specific Performance with abatement from price where vendor unable to give clear title. See note, 10 L. R. A. (n. s.) 119.

81 Cal. 641-649, 22 Pac. 860, DAVIES-HENDERSON LUMBER CO. v. GOTTSCHALK.

Under Sections 1183, 1184, Code of Civil Procedure, where contract for construction of dwelling-house, contract value of which is more than one thousand dollars, is not recorded, materials furnished subcontractor are considered as though furnished at personal instance of owner.

Approved in *Baker v. Lake Land Canal etc. Co.*, 7 Cal. App. 483, 94 Pac. 773, applying rule to labor bestowed on canal.

Under Section 1187, Code of Civil Procedure, materialman need not, in his claim of lien, aver invalidity of contract between owner and contractor.

Approved in *Lucas v. Rea*, 10 Cal. App. 644, 102 Pac. 823, reaffirming rule; *Lucas v. Rea* (Cal. App.), 101 Pac. 539, upholding complaint by materialman against owner for materials furnished for building.

Under Section 1183, Code of Civil Procedure, where contract is void, owner does not become personally liable, only remedy of materialman being by foreclosure of lien.

Reaffirmed in *Gnekow v. Confer* (Cal.), 48 Pac. 332.

Right of Subcontractor or Materialman to personal judgment against owner. See note, 14 L. R. A. (n. s.) 1038.

Lien for Material Furnished Relates to time of furnishing materials, and is not defeated by filing declaration of homestead before lien is filed.

Approved in *Hookway v. Thompson*, 56 Wash. 62, 105 Pac. 155, declaration of homestead filed after execution of mortgage on property of husband, as unmarried man, though after his marriage, is ineffective as against mortgage.

81 Cal. 650-651, 22 Pac. 856, PEOPLE v. SAVERCOOL.

Information Which Charges Ultimate Facts constituting assault with deadly weapon, in language of section 245, Penal Code, is sufficient; while probative facts, such as intent, present ability, and kind of weapon, need not be alleged.

Approved in *Matter of Hughes*, 159 Cal. 362, 113 Pac. 685, and *People v. Weir*, 10 Cal. App. 461, 462, 102 Pac. 539, both following rule; *State v. De Long*, 89 Ark. 394, 117 S. W. 525, applying rule to indictment for assault with intent to commit murder, under Kirby's Digest, section 1588.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 82 CALIFORNIA.

82 Cal. 1-7, 22 Pac. 925, QUAY v. PRESIDIO & FERRIES R. R. CO.
Liability of Principal for Unauthorized Acts of agent. See note, 88 Am. St. Rep. 781.

Implied Powers Under Power of Attorney to transact business. See note, 4 L. R. A. (n. s.) 844.

82 Cal. 7-11, 22 Pac. 938, GRUWELL v. SEYBOLT.

Where Pleader Sets Forth Links in Chain of title, general allegation of ownership is mere conclusion from facts stated, and does not cure defects in chain relied on.

Approved in *Emerson v. Yosemite Gold Min. etc. Co.*, 149 Cal. 59, 85 Pac. 125, reaffirming rule; *Street v. Sederburg*, 41 Colo. 134, 92 Pac. 31, in replevin, allegation that plaintiff is entitled to immediate possession of property without alleging ownership held bad; *Paine v. British-Butte Min. Co.*, 41 Mont. 31, 108 Pac. 13, complaint in conversion not alleging general or special ownership held bad.

Distinguished in *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 309, 90 Pac. 206, allegation of ownership of note and mortgage held sufficient averment of ultimate fact, there being no attempt to allege order of court assigning it to plaintiff; *Dorris v. McManus*, 4 Cal. App. 153, 87 Pac. 289, general finding of title in plaintiffs and special findings as to deraignment of title held consistent and supported by evidence.

Homestead Declaration of Wife Alone on separate property of husband does not affect title, which vests in his heirs upon his death, subject to power of court to set it apart as probate homestead.

Reaffirmed in *Hanley v. Hanley*, 4 Cof. Prob. 475.

Law in Force at Time of Death Determines rights of survivor to homestead.

Reaffirmed in *Hannon v. Southern Pac. R. R. Co.*, 12 Cal. App. 353, 359, 107 Pac. 337, 339.

Order Setting Apart Homestead cannot be collaterally attacked unless court is without jurisdiction.

Reaffirmed in *Hanley v. Hanley*, 4 Cof. Prob. 480, 481.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 51.

Relief from Decrees of Courts having exclusive jurisdiction over estates of decedents, minors and incompetent persons. See notes, 106 Am. St. Rep. 645; 1 Cof. Prob. 269.

82 Cal. 14-19, 22 Pac. 1128, WHITE v. MERRILL.

Appellate Court will Pass upon Action of lower court, regardless of reasons assigned in opinion of lower court.

Approved in *Higgins v. Los Angeles Ry. Co.*, 5 Cal. App. 750, 91 Pac. 345, and *Grand Central Min. Co. v. Mammoth Min. Co.*, 29 Utah, 594, 83 Pac. 684, both following rule; *Davis v. Jacobson*, 13 N. D. 432, 101 N. W. 315, and *Morgan v. Robinson Co.*, 157 Cal. 351, 107 Pac. 697, both affirming order granting new trial on grounds assigned although other than grounds stated by trial court as reason for making order; *Burke v. Maguire*, 154 Cal. 461, 98 Pac. 23, appellate court not limited to ground on which lower court sustained demurrer, but can consider any ground properly stated in demurrer.

82 Cal. 32-34, 22 Pac. 878, JONES v. NICHOLL.

Promissory Note Payable on Demand is due at once, and suit thereon may be brought without previous demand.

Approved in *Ex parte Howitz*, 2 Cal. App. 754, 84 Pac. 230, following rule; *Wills v. Booth*, 6 Cal. App. 202, 91 Pac. 761, demand note must be presented for payment to maker within time limited in section 3135, Civil Code, to charge indorser; *Darby v. Darby*, 120 La. 850, 852, 45 So. 748, 14 L. R. A. (n. s.) 1208, prescription on demand note runs from date of note, and not from date of demand.

Limitation of Actions on Obligations Payable on or after demand. See note, 136 Am. St. Rep. 471.

82 Cal. 35-36, 22 Pac. 879, DAVIS v. DONNER.

Negative Action of Court in Declining to disturb its final decision is not appealable.

Distinguished in *Mills v. Smiley*, 9 Idaho, 323, 76 Pac. 785, one not party to action at time writ of assistance was granted could move to set aside order and appeal from order denying motion.

82 Cal. 42-46, 22 Pac. 932, SIDLINGER v. KERKOW.

Upon Foreclosure of Mechanic's Lien on building, failure of court to define exact extent of land necessary for building does not invalidate decree.

Reaffirmed in *Newell v. Brill*, 2 Cal. App. 64, 83 Pac. 77.

Right of Agent to Maintain Action for conversion of personalty. See note, 26 L. R. A. (n. s.) 840.

82 Cal. 46-51, 22 Pac. 1131, WAKEHAM v. BARKER.

Specific Performance cannot be Enforced for personal services.

Reaffirmed in *Stewart v. Pierce*, 116 Iowa, 744, 89 N. W. 238.

Specific Performance of Contracts Calling for services of a personal nature. See note, 140 Am. St. Rep. 63.

If Demurrer is Well Taken on Any Ground, appellate court will affirm order of lower court sustaining it.

Reaffirmed in *Burke v. Maguire*, 154 Cal. 461, 98 Pac. 23.

82 Cal. 68-72, 22 Pac. 1081, CHEVER v. CHING HONG POY.

Rights of Prior Grantee of Heir are not Affected by subsequent ordinary decree of distribution to heir in probate proceedings to which grantee was not party.

Approved in *Cooley v. Miller & Lux*, 156 Cal. 514, 515, 516, 517, 519, 105 Pac. 983, 984, 985, following rule; *Jenner v. Murphy*, 6 Cal. App. 439, 92 Pac. 407, distribution of interest of heirs to his transferee held not to affect lien thereon; *Hill v. Lawler* (Cal.), 45 Pac. 848, rights of grantee of widow not affected by decree in distribution conveying property to residuary legatees under stipulation between them and widow; *Ward v. Du Pree*, 16 S. D. 507, 94 N. W. 399, action by legatee to set aside release of her share of estate to other legatees on ground of fraud, and to restrain executor from proceeding with administration of estate, held not within jurisdiction of county court; *Coats v. Harris*, 9 Idaho, 468, 75 Pac. 245, decree in distribution of probate court will not defeat action of one not an heir and not party to proceedings in settling estate.

82 Cal. 72-76, 22 Pac. 874, McCORMACK v. SILSBY.

Adverse Possession for Requisite Time and Character extinguishes homestead.

Reaffirmed in *Donnelly v. Tregaskis*, 154 Cal. 264, 97 Pac. 423.

82 Cal. 77-84, 22 Pac. 979, OVERACRE v. BLAKE.

Where One of Two Innocent Persons must suffer by act of third, he by whose negligence it happened must be the sufferer.

Approved in *Schultz v. McLean* (Cal.), 25 Pac. 428, refusing to rescind sale on ground of fraud where only fraud shown was that of plaintiff's agent; *State v. Grundon*, 90 Mo. App. 272, and *Kleinpeter v. Castro*, 11 Cal. App. 86, 103 Pac. 1091, both holding notary liable for making false certificate of acknowledgment of forged deed, party signing being an impostor.

Notary is not Required to Certify as to ownership of property conveyed in deed acknowledged before him.

Reaffirmed in *Homan v. Wayer*, 9 Cal. App. 126, 98 Pac. 81.

Liability of Notaries. See note, 82 Am. St. Rep. 383.

When Facts are Clearly Settled Question of negligence is one of law for court.

Approved in *Brounton v. Southern Pac. Co.*, 2 Cal. App. 177, 83 Pac. 267, undisputed facts held to show absence of negligence.

82 Cal. 84-87, 22 Pac. 1136, WRISTEN v. BOWLES.

Proposal may be Revoked at Any Time before acceptance is communicated to proposer.

Approved in *Marsh v. Lott*, 8 Cal. App. 388, 97 Pac. 164, option not supported by consideration revocable at any time notwithstanding promise to contrary.

To Constitute Binding Contract there must be proposal unqualifiedly assented to.

Approved in *German Sav. & Loan Soc. v. McLellan*, 154 Cal. 716, 99 Pac. 196, refusing specific performance of contract to convey spring on ground, minds of parties did not meet as to identity of spring; *Johnson-Locke Mercantile Co. v. Howard* (Cal.), 65 Pac. 956, correspondence concerning sale of raisin crop considered and held to amount to contract; *Harris Bros. v. Reynolds*, 17 N. D. 19, 21, 114 N. W. 370, 371, correspondence considered and held not to show acceptance of proposal to sell land.

Qualified Acceptance of Proposal is new proposal.

Approved in *Beiseker v. Amberson*, 17 N. D. 219, 116 N. W. 95, *Philip Wolf & Co. v. King*, 1 Cal. App. 751, 82 Pac. 1055, and *Hunkins-*

Willis Co. v. Los Angeles etc. Co., 155 Cal. 46, 99 Pac. 371, all holding facts did not show proposal squarely assented to.

82 Cal. 88-95, 22 Pac. 1134, RANKIN v. SISTERS OF MEROY.

Plaintiff Need not Reply to New Matter or affirmative defense set up in answer but may meet it by any competent proof.

Approved in **Baker v. Baker**, 9 Cal. App. 740, 100 Pac. 894, in quiet title suit, where defendant pleaded plaintiff's deed in escrow to be delivered on plaintiff's death, plaintiff could avoid deed by competent proof without replying to defense set up.

82 Cal. 96-101, 23 Pac. 6, MORAN v. GARDEMEYER.

Mortgage Given to Secure Future Advances does not authorize mortgagee to buy up outstanding notes of mortgagor and hold same as secured by mortgage.

Approved in **Provident etc. Assn. v. Shaffer**, 2 Cal. App. 218, 83 Pac. 275, payment by mortgagee of debt of mortgagor held not secured by mortgage to cover future advances; **Wright v. Voorhees**, 131 Iowa, 410, 117 Am. St. Rep. 429, 108 N. W. 758, chattel mortgage providing it should cover "future acquisitions to above-described property" held insufficient to include all future acquisitions of property by mortgagor.

Presentation and Allowance of Mortgage Claim against estate of deceased does not preclude subsequent action for foreclosure of mortgage.

Approved in **First Nat. Bk. v. Glenn**, 10 Idaho, 237, 109 Am. St. Rep. 204, 77 Pac. 627, mortgage may be foreclosed although allowed and approved when recourse to other property of estate is waived.

82 Cal. 104-107, 23 Pac. 8, MILLER v. PRENTICE.

Certificate of Purchase of State School Land may be impeached by defendant in ejectment actually occupying land by proof that plaintiff could not legally acquire title.

Approved in **Boggs v. Ganeard**, 148 Cal. 718, 84 Pac. 198, issuance of certificate on payment of purchase price held not to preclude inquiry as to applicant's right.

82 Cal. 107-108, 22 Pac. 934, PEOPLE v. MILLER.

Common-law Rule That Husband and wife, being one person, cannot be prosecuted for conspiracy between them alone, has not been changed by codes.

Distinguished in **Jones v. Monson**, 137 Wis. 485, 129 Am. St. Rep. 1082, 119 N. W. 182, action lies against husband and wife for damages for executed conspiracy to commit wrong, gist being damages and not conspiracy.

Disapproved in **Smith v. State**, 48 Tex. Cr. 239, 89 S. W. 821, holding husband and wife may be guilty of conspiring together to commit homicide.

82 Cal. 109-110, 22 Pac. 1086, EX PARTE ROSS.

Prisoner is not Entitled to Dismissal, when, by reason of mistrial, case is continued and not brought to trial within sixty days after filing of information.

Approved in **Application of Yung**, 7 Cal. App. 773, 96 Pac. 24, and **State v. Morgan**, 84 Kan. 627, 114 Pac. 847, both reaffirming rule.

Right to Speedy Trial. See note, 85 Am. St. Rep. 195, 197, 203.
Delay of Prosecution as Ground for discharge. See note, 56 L. R. A. 520, 541.

82 Cal. 110-114, 23 Pac. 37, IN RE SPENCER.

Remarriage of Wife Does not of Itself avoid previous decree for alimony.

Approved in *Cohen v. Cohen*, 150 Cal. 104, 88 Pac. 270, holding husband entitled to order vacating decree for permanent alimony upon remarriage of wife.

82 Cal. 114-118, 22 Pac. 1037, 6 L. R. A. 833, BANK OF MENDOCINO v. BAKER.

Intended Purchaser of Land with sufficient knowledge of facts to put him on inquiry as to adverse right is presumed to have made such inquiry.

Approved in *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 318, 119 Am. St. Rep. 199, 88 Pac. 363, 8 L. R. A. (n. s.) 682, rule applies in actions to quiet title under McEnerney Act.

Possession of Land as Notice of Title. See notes, 104 Am. St. Rep. 344; 13 L. R. A. (n. s.) 80.

82 Cal. 119-122, 23 Pac. 35, MURRAY v. WHITE.

It is Sufficient That Instructions construed together correctly state law of case.

Approved in *De Witt v. Floriston Pulp and Paper Co.*, 7 Cal. App. 781, 96 Pac. 400, instruction as to duty of employer held not to have misled jury though not stated in single complete instruction.

82 Cal. 122-128, 23 Pac. 271, HANNAN v. McNICKLE.

Vendee cannot Remain in Possession under contract of sale without payment of installments due, although he has made valuable improvements.

Approved in *Gervaise v. Brookins*, 156 Cal. 108, 103 Pac. 331, vendee could not remain in possession, though he had made valuable improvements, and though vendor could not deliver good title without payment of installments of purchase price as they fell due; *Miller v. Waddingham* (Cal.), 25 Pac. 690, vendee who has not paid entire purchase price cannot remove temporary houses built on land.

Distinguished in *Gumaer v. Draper*, 33 Colo. 127, 79 Pac. 1041, where time of payment was not of essence of contract for sale of land, fact that vendee failed to make payments according to terms held not to prevent specific performance.

When Vendor may Recover Possession from vendee. See note, 107 Am. St. Rep. 728, 730.

What are Betterments, and Allowance Therefor. See note, 81 Am. St. Rep. 177.

82 Cal. 128-131, 23 Pac. 42, NEYLAN v. GREEN.

Exceptions are Deemed Waived when not argued and brief simply refers to folio of record where they are found.

Reaffirmed in *Bell v. Staacke*, 151 Cal. 548, 91 Pac. 324.

82 Cal. 132-135, 23 Pac. 36, SAUNDERSON v. BROADWELL.

What Constitutes a Transaction a Sale. See note, 94 Am. St. Rep. 231.

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 345, 353.

Preference by Mortgage or Sale as assignment for creditors. See note, 37 L. R. A. 340.

82 Cal. 135-138, 23 Pac. 41, DAVIS v. MCGREW.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 95.

82 Cal. 144-153, 23 Pac. 139, JEWELL v. MCKAY.

Counsel Fees are Properly Allowed in suit to foreclose mechanic's lien.

Approved in *Pyramid Land etc. Co. v. Pierce*, 30 Nev. 246, 95 Pac. 213, upholding act providing for allowance of counsel fees to party recovering damages for unlawful grazing of stock on his land; *Thompson v. Wise Boy etc. Co.*, 9 Idaho, 370, 74 Pac. 961, and *Genest v. Las Vegas etc. Assn.*, 11 N. M. 271, 67 Pac. 748, both upholding act providing for allowance of attorneys' fees to successful plaintiff in mechanic's lien suit.

82 Cal. 153-159, 22 Pac. 935, SMITHERS v. FITCH.

Petition for Highway Bearing Name of Owner of land is not evidence of dedication of any part of his land for highway.

Approved in *Smith v. Glenn* (Cal.), 62 Pac. 183, declarations of owner at time of making survey that it was for convenience in conveying held admissible in action to abate fence across strip of land claimed to be highway.

Maintenance of Gates Across Roadway by owner rebuts dedication to public use.

Approved in *Hibberd v. Mellville* (Cal.), 33 Pac. 202, frequent change of location of roadway by owner held to rebut dedication.

When Trespass Already Committed by Road Overseer in removing obstructions from alleged highway which has no legal existence would probably be indefinitely repeated, injunction will issue to avoid multiplicity of actions.

Approved in *Barbee v. Shannon*, 1 Ind. Ter. 214, 40 S. W. 588, when defendants placed fence across plaintiff's land and threatened to exclude his lessee, injunction would issue to avoid multiplicity of suits.

Distinguished in *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 236, 87 N. E. 51, injunction did not lie to restrain large number of persons injured in same accident from bringing separate damage suits.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 746.

Injunction Against Repeated Trespass. See note, 13 L. R. A. (n. s.) 177.

Injunctive Relief as to Fences or Gates. See note, 7 L. R. A. (n. s.) 65.

Personal Liability of Highway Officers for acts in excess of authority. See note, 13 L. R. A. (n. s.) 235.

82 Cal. 163-167, 22 Pac. 1138, WHITE v. WHITNEY.

Shop-book of Original Entries is receivable in evidence as prima facie proof of account in tradesman's favor when supported by his oath.

Approved in *Hurwitz v. Gross*, 5 Cal. App. 620, 91 Pac. 111, applying rule to records of corporation.

Admissibility in Evidence of Books of Account. See notes, 138 Am. St. Rep. 441, 465; 52 L. R. A. 548.

82 Cal. 167-169, 16 Am. St. Rep. 98, 22 Pac. 1086, **CARTER v. MULREIN.**

Sureties on Injunction Bond are Entitled to stand upon precise terms of contract.

Approved in *Elmore v. Thaggard*, 130 Ga. 708, 61 S. E. 928, sureties on bond of building contractor held not bound to meet extra expense of completion after abandonment by contractor, when architect's certificate of such expense was not furnished in accordance with terms of contract.

82 Cal. 170-173, 22 Pac. 1082, **TRAVERSO v. TATE.**

Findings Contrary to Admissions of Pleadings will not support judgment.

Reaffirmed in *Williams v. Pratt*, 10 Cal. App. 631, 103 Pac. 154.

82 Cal. 174-181, 16 Am. St. Rep. 101, 22 Pac. 1082, **RICHARDSON v. BUTLER.**

Miscellaneous.—Cited in *Richardson v. Dunne* (Cal.), 31 Pac. 737, on another appeal.

82 Cal. 182, 22 Pac. 1120, **PEOPLE v. LAWRENCE.**

Superior Court of City and County of San Francisco has no jurisdiction to try person charged with misdemeanor.

Approved in *People v. Palermo Land & Water Co.*, 4 Cal. App. 720, 89 Pac. 725, justice's court held to have jurisdiction of misdemeanor of water company in refusing to furnish water in accordance with county ordinance; *Moore v. Orr*, 30 Nev. 464, 98 Pac. 400, district court has no jurisdiction of misdemeanor.

82 Cal. 183-184, 23 Pac. 118, **IN RE WILLIAMS.**

Appellate Court will not Change Amount of bail fixed by lower court unless discretion was clearly abused.

Approved in *Ex parte Ruef*, 7 Cal. App. 752, 96 Pac. 25, where bail was fixed at reasonable sum on first indictment, same sum on numerous successive similar indictments held excessive.

82 Cal. 184-187, 23 Pac. 45, **GOLDEN GATE ETC. MIN. CO. v. JOSHUA HENDY MACH. WORKS.**

Necessity and Character of Title or possession to sustain action for trespass. See note, 30 L. R. A. (n. s.) 261.

82 Cal. 187-192, 23 Pac. 43, **ALLEN v. NAPA COUNTY.**

Constable Making Arrest Outside County is entitled to fees for taking prisoner before magistrate as well as for going to make arrest.

Reaffirmed in *Monahan v. San Diego County* (Cal.), 29 Pac. 417.

Power of Officials to Act, as Determined by place of performance. See note, 33 L. R. A. 92.

82 Cal. 193-198, 23 Pac. 12, **WAINWRIGHT v. WESKE.**

Rescission of Contract for Fraud will not be adjudged in absence of showing of damage.

Approved in *Jakway v. Proudft*, 76 Neb. 66, 106 N. W. 1041, and *Sonnesyn v. Akin*, 14 N. D. 256, 104 N. W. 1029, both following rule.

82 Cal. 202-209, 22 Pac. 1118, **WOODARD v. WRIGHT.**

What are Betterments, and Allowance Therefor. See note, 81 Am. St. Rep. 189.

82 Cal. 209-213, 22 Pac. 1137, **KRAMER v. HALSEY.**

Promise to Repay Money Paid at Special instance and request of defendant need not be alleged in pleading.

Approved in *Wo Sing & Co. v. Kwong Chong Wai Co.*, 16 Haw. 19, and *Pioneer Hardware Co. v. Farrin*, 55 Or. 593, 107 Pac. 457, both holding complaint for goods sold and delivered not defective for not alleging promise to pay.

Demurrer on Ground of Limitations Lies only when it clearly appears on face of complaint that action is barred.

Reaffirmed in *Keegin v. Joyce*, 9 Cal. App. 208, 98 Pac. 396.

82 Cal. 214-218, 23 Pac. 14, **HAGENMEYER v. BOARD OF EDUCATION.**

Notice Mailed on 11th of Month held to give board of equalization jurisdiction to act on proposed change specified in notice on 18th, such being one week's notice required.

Approved in *Petition of Los Angeles Trust Co.*, 158 Cal. 608, 112 Pac. 58, publication of petition for change of name commenced July 27th and completed August 24th, held to be for four weeks; *Reclamation Dist. v. McPhee*, 13 Cal. App. 385, 109 Pac. 1107, four publications from March 11th to April 3d held not to be for four weeks; *Cosgriff v. Election Commissioners*, 151 Cal. 410, 91 Pac. 99, certificate of nomination filed October 17th held to be filed twenty days before election held November 6th.

First and Last Days in Computation of Time. See note, 49 L. R. A. 236.

Where Record Does not Show Affirmative Proof that board of equalization did not act upon evidence before it, its order is conclusive it acted on such evidence as was necessary.

Reaffirmed in *Hampson v. Dysart*, 6 Ariz. 103, 53 Pac. 583.

82 Cal. 226-238, 16 Am. St. Rep. 108, 22 Pac. 1145, **LUBBOOK v. McMANN.**

Levy of Execution upon Whole of Property claimed as homestead confers no right, though there was second dwelling thereon which might separately be subject to execution.

Approved in *Boggs v. Dunn*, 160 Cal. 286, 287, 116 Pac. 745, reaffirming rule; *Hohn v. Pauly*, 11 Cal. App. 731, 106 Pac. 268, such levy of no effect where it was not contended judgment was within provisions of section 1241, Civil Code.

Distinguished in *Smith v. Guckenheimer & Sons*, 42 Fla. 49, 27 So. 904, dividing vertically stores with dwelling of family above and setting aside section as homestead exemption; *Adams v. Adams*, 183 Mo. 404, 82 S. W. 68, homestead claim on house not vitiated by fact that it contained two separate apartments one of which was rented.

82 Cal. 238-244, 22 Pac. 1039, **PEOPLE v. BINGHAM.**

Charter Provision That Board of Supervisors shall be judge of election returns and qualification of members does not exclude right

of superior court to proceed by quo warranto to oust usurper from board.

Approved in *McGregor v. Board of Trustees*, 159 Cal. 445, 114 Pac. 568, granting writ of mandate to compel town trustees to exercise jurisdiction in proceeding to hear election contest for town treasurer.

Provision for Testing Election of Officer before municipal body as exclusive remedy. See note, 26 L. R. A. (n. s.) 208, 210.

82 Cal. 245-249, 23 Pac. 38, EX PARTE STERNES.

Appellate Court, on Petition for Habeas Corpus, will inquire into probable cause for detention, when prisoner is held upon information only.

Approved in *Ex parte Vice*, 5 Cal. App. 154, 89 Pac. 983, discharging on habeas corpus prisoner held on information filed more than three years after alleged embezzlement was committed; *In re Vandiveer*, 4 Cal. App. 652, 88 Pac. 993, and *Ex parte Heacock*, 8 Cal. App. 421, 97 Pac. 77, both holding facts shown before committing magistrate furnished sufficient probable cause; *Ex parte Show*, 4 Okl. Cr. 423, 113 Pac. 1066, habeas corpus lies when indictment charges no crime of any kind.

Distinguished in *In re Knudtson*, 10 Idaho, 681, 79 Pac. 642, prisoner cannot raise question of commitment not being on probable cause after conviction.

Prisoner's Right to Discharge on Habeas Corpus after commitment and before trial. See note, 100 Am. St. Rep. 33.

District Attorney in Filing Information acts as mere ministerial officer.

Approved in *People v. Helm*, 152 Cal. 548, 93 Pac. 106, upholding information filed on legal holiday.

Miscellaneous.—Cited in *Ex parte Lee* (Cal.), 23 Pac. 40, and *Ex parte Sternes* (Cal.), 23 Pac. 40, both companion cases.

82 Cal. 250-263, 23 Pac. 127, CASTAGNINO v. BALLETTA.

Common Counts may be Used if contract has been partly performed and extinguished by acts of defendant.

Approved in *Brown v. Crown Gold Milling Co.*, 150 Cal. 384, 89 Pac. 90, employee wrongfully discharged could sue on quantum meruit; *Donegan v. Houston*, 5 Cal. App. 630, 90 Pac. 1074, general rules of common counts apply to recover for work done within two years for which defendant agreed to pay specified sum.

Where Contract is Fully Performed by plaintiff and nothing remains but payment of money due, and complaint declares on common counts, special contract is admissible as evidence of admission of standard of value.

Reaffirmed in *Naylor v. Adams*, 15 Cal. App. 556, 115 Pac. 339, and *Boyd v. Bargagliotti*, 12 Cal. App. 237, 107 Pac. 154.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 346.

82 Cal. 263-272, 21 Pac. 843, 22 Pac. 1083, CASE v. MANUFACTURERS' FIRE ETC. INS. CO.

Where Fire Policy Provides for Arbitration on written request of either party in case of differences, it is waived if no demand for arbitration is made within reasonable time.

Reaffirmed in *Winchester v. North British etc. Co.*, 160 Cal. 5, 7, 116 Pac. 65, 66.

Arbitration as Condition Precedent to action on insurance policy. See note, 15 L. R. A. (n. s.) 1063, 1065.

Conclusiveness of Proof of Loss as against insured or his beneficiaries. See note, 44 L. R. A. 857.

82 Cal. 273-275, 23 Pac. 124, **EX PARTE NEUSTADT.**

Offense of Obtaining Money Under False Pretenses held to be within jurisdiction of superior court.

Approved in *Moore v. Orr*, 30 Nev. 465, 98 Pac. 400, justice's court held to have jurisdiction of offense of keeping disorderly house.

82 Cal. 284-286, 16 Am. St. Rep. 114, 23 Pac. 125, **HAYNE v. JUSTICE'S COURT.**

Prohibition Lies to Prevent Court from Proceeding to trial of cause against express prohibition of statute.

Approved in *Huntington v. Superior Court*, 5 Cal. App. 295, 90 Pac. 145, writ lies to prevent second trial upon charge of murder caused by abortion, notwithstanding proposed limitation of penalty to manslaughter.

Writ of Prohibition. See note, 111 Am. St. Rep. 937.

Right to Attach Property in Hands of assignee for creditors. See note, 20 L. R. A. 596.

82 Cal. 286-339, 16 Am. St. Rep. 116, 22 Pac. 910, 1046, 6 L. R. A. 756, **SPRING VALLEY WATERWORKS v. SAN FRANCISCO.**

Act of Fixing Water Rates by Board of supervisors is within control of courts.

Approved in *Inglin v. Hoppin*, 156 Cal. 489, 105 Pac. 585, court has power to enforce, by mandamus, right to establishment of independent reclamation district; *Union Transportation Co. v. Bassett* (Cal.), 46 Pac. 910, courts may review regulations of harbor commissioners in respect to reasonableness; *Philadelphia & R. Ry. Co. v. Interstate Commerce Com.*, 174 Fed. 689, court cannot set aside order of Interstate Commerce Commission fixing rates, unless commission has transcended its power or exercised it without due regard to law.

Power of Judiciary to Fix Rates of public service corporations. See note, 8 L. R. A. (n. s.) 530.

Board of Supervisors Authorized to Fix water rates must exercise judgment and discretion in determining what is fair and reasonable.

Approved in *Woodruff v. East Orange*, 71 N. J. Eq. 432, 64 Atl. 471, and *Contra Costa Water Co. v. Oakland*, 159 Cal. 347, 113 Pac. 679, both holding water rates to be fairly and reasonably fixed.

Power of State and Municipal Corporations to regulate rates charged by public service corporations. See note, 129 Am. St. Rep. 354.

Legislative Power to Fix Tolls, rates, or prices. See note, 33 L. R. A. 182.

Establishment and Regulation of Municipal water supply. See note, 61 L. R. A. 101, 104, 105, 112, 114.

Supervisors are not Bound to Give Notice to water company of intention to fix rates.

Approved in Home Telephone etc. Co. v. Los Angeles, 155 Fed. 581, city council not bound to give notice to telephone company of intention to fix rates.

Expense of Water Meters cannot be Imposed on consumers.

Distinguished in Cooper v. Goodland, 80 Kan. 124, 102 Pac. 246, 23 L. R. A. (n. s.) 410, upholding ordinance providing consumers shall furnish meters; Shaw Stocking Co. v. Lowell, 99 Mass. 120, 85 N. E. 91, 18 L. R. A. (n. s.) 746, upholding ordinance requiring person desiring private fire protection to install meters; State ex rel. Hallauer v. Gosnell, 116 Wis. 615, 93 N. W. 545, 61 L. R. A. 33, holding ordinance requiring consumers using service pipes of certain diameter to furnish meter not to be unreasonable discrimination.

Municipal Corporation can be Bound by injunction.

Approved in San Francisco etc. Co. v. San Francisco, 164 Fed. 888, restraining order issued in suit against city by consumer of gas to restrain enforcement of ordinance fixing price held to bind all consumers, though not parties to action; Spring Valley Waterworks v. San Francisco, 124 Fed. 603, in suit to enjoin enforcement of ordinance reducing water rates, rate payers are represented by city and are bound by proceedings, and injunction issued therein.

It is not Sufficient to Aver Fraud in general terms; facts relied on must be alleged.

Approved in Estate of Goodspeed, 2 Cal. Prob. 149, Thomason v. De Greayer (Cal.), 31 Pac. 567, and Clarkson v. Hoyt (Cal.), 36 Pac. 384, all holding allegations of fraud to be conclusions only.

Miscellaneous.—Cited in Goldtree v. San Diego, 8 Cal. App. 510, 97 Pac. 218, to point that court may render judgment against particular fund in city treasury.

82 Cal. 339-347, 22 Pac. 929, EX PARTE AH YOU.

Police Court Established by Freeholders' Charter has no legal existence.

Cited in Graham v. Fresno, 151 Cal. 469, 91 Pac. 148, under constitutional amendment of 1896, provisions of city charter are supreme as to police courts.

Distinguished in People v. Sands (Cal.), 35 Pac. 332, valid provision for filling vacancies in city justice's court established by legislature can be made by city charter.

82 Cal. 351-412, 16 Am. St. Rep. 137, 23 Pac. 16, COLTON v. STANFORD.

Where Facts upon Which Speculative Agreement, which is fair and free, is founded turn out otherwise than as anticipated, parties cannot be relieved of results.

Distinguished in Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 723, 103 Pac. 195, release of claim of damages made by person of enfeebled mind held not to come within rule of speculative contracts.

One Who Claims His Conduct has been influenced by false statements of another must allege, in action for damages, that he relied on them.

Approved in Burke v. Maguire, 154 Cal. 467, 98 Pac. 25, following rule; Henry v. Continental Bldg. etc. Assn., 156 Cal. 675, 105 Pac. 963, opinion of person cannot amount to fraudulent statement of what is not true; Brandt v. Krogh, 14 Cal. App. 49, 111 Pac. 279, opinion

based on alleged facts known by party, stating them to be nonexistent, held sufficient positive representation of fact to hold party for fraud.

When Purchaser Makes Independent Investigation, and means are fully open, he cannot demand rescission of contract on ground of fraud.

Approved in *Pittsburg Life etc. Co. v. Northern etc. Ins. Co.*, 140 Fed. 894, following rule; *Curran v. Smith*, 149 Fed. 951, 81 C. C. A. 537, and *Smith v. Curran*, 138 Fed. 158, both holding defendants who had made extended independent investigation of engineering plan could not defend breach of contract in relation thereto on ground they were induced to make contract by reason of plaintiff's false representations.

Concealment of Material Facts may Amount to fraud where one party has right to information from another.

Approved in *Oliver v. Oliver*, 118 Ga. 371, 45 S. E. 235, director purchasing stock of stockholder at low rate when he knew of contemplated sale by company which would greatly advance stock held chargeable with fraud.

Right to Rely upon Representations made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 600.

Power to Cancel Contract Should be Exercised with great caution.

Approved in *Greenawalt v. Rogers*, 151 Cal. 634, 635, 91 Pac. 527, 528, refusing to cancel contract when misrepresentation was not material.

82 Cal. 413-420, 22 Pac. 1140, **MOTT v. MOTT.**

Action cannot be Dismissed by Plaintiff after cross-complaint has been filed.

Reaffirmed in *Frost v. Idaho Irr. Co.*, 19 Idaho, 380, 114 Pac. 40.

82 Cal. 425-426, 22 Pac. 1113, **BIENENFELD v. FRESNO MILLING CO.**

Appellate Court will Dismiss Appeal of Which it has no jurisdiction on its own motion.

Approved in *Porco v. State Bd. of Barber Examiners (Cal.)*, 73 Pac. 168, dismissing appeal in action to compel state board of barber examiners to issue license, when act creating board was repealed pending appeal.

82 Cal. 427-454, 23 Pac. 276, 7 L. R. A. 799, **WHITE v. WHITE.**

Man and Woman Cohabiting Together as husband and wife are presumed to have entered into marriage.

Reaffirmed in *Ollschlager's Estate v. Widmer*, 55 Or. 151, 105 Pac. 719.

Cohabitation and Repute Do not Make Marriage, but are merely evidence from which it may be inferred marriage was entered into.

Approved in *Estate of Blythe*, 4 Cof. Prob. 298, 300, holding marriage not proven by cohabitation.

Cohabitation Illicit in Beginning Raises no presumption of marriage.

Approved in *Kieffer v. Smith*, 16 S. D. 433, 93 N. W. 643, and *Weidenhoft v. Primm*, 16 Wyo. 360, 94 Pac. 459, both following rule.

Cohabitation Originally Unlawful as Proof of marriage. See note, 14 L. R. A. 364.

Where Public Offense is Involved, Consent to marriage cannot be proven by evidence of cohabitation and repute of marriage.

Approved in *People v. Le Doux*, 155 Cal. 548, 102 Pac. 522, in bigamy charge, proof of character of alleged clergyman signing marriage certificate held essential.

Common-law Marriages. See notes, 124 Am. St. Rep. 119; 3 Cof. Prob. 211.

It is in Discretion of Court to Allow leading questions.

Reaffirmed in *Josephson v. Sigfusson*, 13 N. D. 318, 100 N. W. 705.

Admission of Irrelevant Testimony, when cause is tried by court, is not ground for reversal unless it appears court relied on such evidence.

Reaffirmed in *Stewart v. Douglass*, 9 Cal. App. 715, 100 Pac. 712.

Entries in Family Bible or other religious book as evidence. See note, 41 L. R. A. 449.

82 Cal. 454-455, 22 Pac. 1113, **EX PARTE MILLER.**

Erroneous Denial of Jury Trial in case of misdemeanor in justice's court is not ground for habeas corpus proceedings.

Approved in *Ex parte Blake*, 155 Cal. 587, 102 Pac. 270, statute of limitations against criminal charge not ground for release on habeas corpus; *Goodman v. Superior Court*, 8 Cal. App. 233, 96 Pac. 395, writ of review does not lie to annul order denying jury trial in case in which jury trial might be waived; *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 250, 91 Pac. 1018, prohibition does not lie to restrain condemnation proceeding of which court has jurisdiction because court decided question of necessity of taking land after verdict as to value; *Winnovich v. Emery*, 33 Utah, 359, 93 Pac. 993, evidence adduced before magistrate on commitment of prisoner cannot be reviewed on habeas corpus proceedings.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 188.

82 Cal. 471-474, 23 Pac. 202, **DOWNING v. LE DU.**

Jury Trial is not Matter of Right on foreclosure of mortgage.

Approved in *Van Valkenburgh v. Oldham*, 12 Cal. App. 579, 108 Pac. 45, following rule; *Coghlan v. Quartararo*, 15 Cal. App. 666, 115 Pac. 666, in mechanic's lien suit, owner not personally sued held not entitled to demand jury trial; *Taylor v. Ford (Cal.)*, 24 Pac. 943, defendant answering complaint in action brought under section 1050, Code of Civil Procedure, and setting up legal claim as defense, held not entitled to jury trial.

Recital in Findings of Waiver of Jury cannot prevail against showing in bill of exceptions that jury was demanded and denied.

Approved in *Mendocino County v. Peters*, 2 Cal. App. 27, 82 Pac. 1123, recital in bill of exceptions that notice of intention to move for new trial was seasonably served held to prevail over notice itself which showed it was served and filed too late.

82 Cal. 474-480, 23 Pac. 118, **SCHURTZ v. ROMER.**

Parties to Written Instrument are Bound by its terms, and evidence of previous oral negotiations are only admissible to explain ambiguities.

Approved in *Peterson v. Chaix*, 5 Cal. App. 534, 90 Cal. 951, "more or less" held not such ambiguity as to admit evidence of previous negotiations.

Extent of Rule That Parol Evidence is inadmissible to vary written contract. See note, 17 L. R. A. 271.

82 Cal. 480-482, 23 Pac. 126, LANDERS v. LANDERS.

Mandamus Lies to Compel Trial Judge to settle bill of exceptions when he wrongfully refuses to do so.

Reaffirmed in *Brode v. Gostin*, 158 Cal. 701, 112 Pac. 281.

82 Cal. 483-496, 22 Pac. 1042, KENNEDY v. BOARD OF EDUCATION.

Section 1793, Political Code, Protects Teachers elected by boards of education from removal except for cause.

Approved in *Barthel v. Board of Education*, 153 Cal. 379, 95 Pac. 893, probationary teacher not holding city certificate dropped from department only upon adverse report of classification committee; *Loehr v. Board of Education*, 12 Cal. App. 673, 675, 676, 108 Pac. 326, 327, transfer of teacher from one primary grade to another, though salary was reduced, held to be within powers of San Francisco board of education; *Bates v. Board of Education*, 139 Cal. 148, 72 Pac. 908, holding board of education could consolidate classes in interest of economy and determine what teacher should be placed on unassigned list; *Taylor v. Marshall*, 12 Cal. App. 552, 107 Pac. 1013, section 1793 held not to apply to city not having board of education; *Harby v. Board of Education*, 2 Cal. App. 420, 83 Pac. 1082, vice-principal of city school discharged without cause entitled to mandamus to compel restoration to position; *Bradley v. Board of Education*, 1 Cal. App. 213, 81 Pac. 1037, holders of special city certificates specified in section 1793 are not within protection of tenure of office clause in favor of holders of city certificates in general; *McKenzie v. Board of Education*, 1 Cal. App. 407, 82 Pac. 393, board of education has jurisdiction to hear and determine charges made in writing against teacher by citizens.

Distinguished in *Ewin v. Ind. School Dist. No. 8*, 10 Idaho, 113, 77 Pac. 225, section 84, Laws of 1899, empowers board to discharge teacher without specifying cause.

Mandamus Lies to Compel Board of Education to restore teacher in public schools who is unlawfully dismissed.

Distinguished in *State v. Medical College*, 128 Wis. 13, 116 Am. St. Rep. 21, 106 N. W. 118, 3 L. R. A. (n. s.), 1115, writ does not lie to compel educational institution to grant diploma to student on fulfillment of certain conditions.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 879.

Duties, Performance of Which may be compelled by mandamus. See note, 125 Am. St. Rep. 498.

Mandamus to Restore to Office one illegally removed. See note, 19 L. R. A. (n. s.), 53, 56, 81.

82 Cal. 497-501, 23 Pac. 130, THOMPSON v. SOUTHERN CALIFORNIA MOTOR R. CO.

Deed is not Void for Uncertainty when extrinsic evidence can make it clear.

Approved in *Abercrombie v. Simmons*, 71 Kan. 541, 114 Am. St. Rep. 509, 81 Pac. 210, 1 L. R. A. (n. s.) 806, deed not void for indefiniteness of description.

82 Cal. 502-512, 23 Pac. 50, 227, WARD v. OLAY.

Uncertainty is not Ground for Sustaining general demurrer.

Reaffirmed in *The Union Ice Co. v. Doyle*, 6 Cal. App. 288, 92 Pac. 114, and *Yordi v. Yordi*, 6 Cal. App. 32, 91 Pac. 353.

Copy of Note Sued on Annexed to Complaint and referred to therein is part of complaint.

Approved in *Santa Rosa Bank v. Paxton*, 149 Cal. 198, 199, 86 Pac. 194, following rule; *Ex parte Howitz*, 2 Cal. App. 755, 84 Pac. 230, copy of complaint attached to affidavit for arrest in civil action held part of affidavit; *Whiteacre v. Nichols*, 17 Okl. 391, 87 Pac. 866, instrument sued on annexed to petition held part thereof.

Distinguished in *Ahlers v. Smiley*, 11 Cal. App. 346, 104 Pac. 998, in action for damages of breach of contract want of averment of contract in complaint held not to be supplied by inference from attached exhibit setting forth record of former suit between parties in which it was found contract was entered into and therein set forth; *Lucas v. Rea* (Cal. App.), 101 Pac. 540, averment in complaint on mechanic's lien in reference to contents of notice of lien attached held insufficient to justify recovery.

Court may Set Aside Stipulation Entered into under mistake as to legal effect.

Approved in *Dent v. Superior Court*, 7 Cal. App. 684, 95 Pac. 673, relieving mistake in law as to statutory change of practice; *Sherman v. Southern Pac. Co.*, 31 Nev. 289, 102 Pac. 258, setting aside default on ground of excusable neglect of attorney; *Butler v. Chamberlain*, 66 Neb. 180, 92 N. W. 155, setting aside stipulation improvidently made and standing in way of substantial justice.

Finding That Certain Balance is Due and owing on note states conclusion of law, and does not cover issue of nonpayment, but is sufficient if findings show no part was paid except collateral note.

Approved in *First State Bank v. Blackinton*, 16 Cal. App. 142, 116 Pac. 312, where complaint on note alleges payment of interest up to specified date but there is no allegation as to nonpayment of interest thereafter, judgment for further interest is erroneous; *Treis v. Berlin Dye Works etc. Co.*, 11 Cal. App. 423, 105 Pac. 276, finding that claim "was due and owing" held to sufficiently imply nonpayment at date of finding, in absence of finding to contrary; *Stewart v. Burbridge*, 10 Cal. App. 624, 102 Pac. 962, holding finding sufficient that claim was "due and owing" at date of finding.

82 Cal. 513-518, 23 Pac. 187, BODE v. TRIMMER.

In Proceedings to Contest Right to purchase state lands, title is assumed to be in state.

Cited in *Miller v. Engle*, 3 Cal. App. 330, 85 Pac. 160, *arguendo*.

Alien by Birth is Presumed to Continue such until his citizenship is shown.

Approved in *Ehrlich v. Weber*, 114 Tenn. 717, 88 S. W. 189, long residence does not overcome presumption.

Presumption of Citizenship from Residence. See note, 8 L. R. A. (n. s.) 1245.

82 Cal. 518-523, 23 Pac. 190, EX PARTE WEDLEIGH.

Judgment of Imprisonment for Nonpayment of fine imposed on conviction for felony is void.

Approved in *In re Sullivan*, 3 Cal. App. 194, 84 Pac. 781, holding void portion of judgment directing imprisonment for nonpayment of fine imposed on conviction of assault with deadly weapon.

Distinguished in *In re Johnson*, 6 Cal. App. 737, 93 Pac. 200, upholding on habeas corpus proceedings similar judgment rendered on conviction for misdemeanor.

Provisions of Statute Allowing Credits or deductions from term of imprisonment enter into and form part of sentence.

Reaffirmed in *Fite v. State*, 114 Tenn. 657, 88 S. W. 943, 1 L. R. A. (n. s.) 520, and *McCoy v. Reid*, 172 Ind. 186, 87 N. E. 1087.

Statute Allowing Deduction from Term of imprisonment for good conduct is valid.

Approved in *Ex parte Ridley*, 3 Okl. Cr. 361, 106 Pac. 553, and *People v. Joyce*, 246 Ill. 135, 92 N. E. 612, both upholding similar statutes.

Constitutionality of Statutory Credits for good behavior. See note, 1 L. R. A. (n. s.) 522.

Reduction of Prisoner's Term by Allowance for good behavior. See note, 34 L. R. A. 509.

82 Cal. 523-529, 23 Pac. 48, **HITCHCOCK v. CARUTHERS.**

Number and Agreement of Jurors necessary to valid verdict. See note, 43 L. R. A. 74.

Slander and Libel in Charging Woman with unchastity. See note, 24 L. R. A. (n. s.) 611.

82 Cal. 533-547, 23 Pac. 217, **SMITH v. TAYLOR.**

Contract to be Susceptible of Specific Performance must be certain in its terms.

Approved in *Meyer v. Lincoln Realty Co.*, 14 Cal. App. 757, 758, 113 Pac. 333, vague contract for lease held unenforceable; *Elliott v. Elliott*, 3 Alaska, 363, enforcing specific performance of grubstake contract; *Marks v. Gates*, 2 Alaska, 527, contract for sale of land held too vague to warrant specific performance.

Under Contract for Good Title, Abstract to be furnished by vendor, vendee is not required to investigate as to facts aliunde not disclosed by abstract.

Approved in *Whelan v. Rossiter*, 1 Cal. App. 706, 82 Pac. 1084, following rule; *Lessenich v. Sellers*, 119 Iowa, 320, 93 N. W. 350, one who had agreed to purchase land only if abstract showed perfect title could refuse without pointing out specific objections in abstract showing defective title; *Crosby v. Wynkoop*, 56 Wash. 477, 106 Pac. 176, where vendor agreed to convey good title as shown by abstract, and claimed under deed from persons claiming to be heirs of another, and nothing of record showed them to be heirs, vendee was not bound to accept.

Court cannot Change Its Findings after entry of judgment without granting new trial.

Approved in *Brown v. Capital Townsite Co.*, 21 Okl. 590, 96 Pac. 589, following rule.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 233.

Extent of Rule That Parol Evidence is inadmissible to vary written contract. See note, 17 L. R. A. 271.

Miscellaneous.—Cited in *Carscaddon v. Taylor* (Cal.), 23 Pac. 220, and *Good v. Taylor* (Cal.), 23 Pac. 220, both companion cases.

82 Cal. 548-550, 23 Pac. 12, SILVERMAN v. GUNDELFINGER.

Substantial Compliance With Law as to statement in petition of value of property sought to be sold at probate sale is sufficient as against collateral attack.

Approved in *Plains Land & Imp. Co. v. Lynch*, 38 Mont. 284, 129 Am. St. Rep. 645, 99 Pac. 851, holding petition, though indefinite, contained sufficient averment of present value to sustain sale.

82 Cal. 550-557, 22 Pac. 1115, BATES v. GERBER.

Interest is not Recoverable on Interest on overdue city bonds.

Approved in *Hewel v. Hogin* (Cal. App.), 84 Pac. 1005, and *Hewel v. Hogin*, 3 Cal. App. 255, 84 Pac. 1007, both applying rule to irrigation bonds; *Meyer v. San Francisco*, 150 Cal. 138, 139, 88 Pac. 725, 10 L. B. A. (n. s.) 110, interest not allowed on Dupont street bonds after maturity.

82 Cal. 557-562, 22 Pac. 1125, STOHR v. SAN FRANCISCO MUSICAL FUND SOCIETY.

By-law of Mutual Benefit Corporation cannot retroactively affect payments of sick benefits due before its enactment.

Approved in *Boinstein v. District Grand Lodge No. 4*, 2 Cal. App. 632, 84 Pac. 274, by-law reducing amount payable on certificate could not affect rights of holder of certificate, when passed without his knowledge or consent; *Allen v. Merrimack Co. Odd Fellows' Mut. Relief Assn.*, 72 N. H. 527, 57 Atl. 923, in action on benefit policy, evidence held to show plaintiff knew of change in by-laws and assented thereto by acquiescence.

Contract of Member With Mutual Benefit Association is subject to modification by change in by-laws of association.

Approved in *Woodmen of the World v. Woods*, 34 Colo. 22, 81 Pac. 267, benefit certificate forfeited for failure to comply with by-laws as altered; *Ross v. Brotherhood of America*, 120 Iowa, 694, 95 N. W. 208, by-law of mutual benefit society defining broken arm or leg held binding on those who became members before its enactment; *Hall v. Western Travelers' Accident Assn.*, 69 Neb. 603, 96 N. W. 171, assured held bound by reasonable amendment to by-laws; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 811, 90 N. W. 927, by-law providing company shall not be liable for loss occurring while member is in default held reasonable and binding on assured though passed after he became member; dissenting opinion in *Rodrigues v. Portuguese M. B. Soc.*, 18 Haw. 327, majority holding amendment to by-laws extending time during which member must have contributed before he could receive certain benefits applied to such member, though time first limited had expired before by-law was passed.

Distinguished in *Farmers' Mutual etc. Assn. v. Slattery*, 115 Iowa, 415, 88 N. W. 951, farmer not bound by change in by-laws of hail insurance association, providing for suspension of policy on failure to pay assessments, when he claimed not as member of association, but by independent contract; *Russ v. Supreme Council American Legion of Honor*, 110 La. 590, 98 Am. St. Rep. 469, 34 So. 698, benefit certificate issued by mutual aid society held contract which could be changed only by consent of parties, and change in by-laws cannot serve to reduce amount agreed to be paid.

Criticised in *Lewine v. Knights of Pythias*, 122 Mo. App. 562, 563, 99 S. W. 826, by-law limiting benefits in case of suicide held unrea-

sonable when no mention of suicide was made in application or by-laws at time assured became member.

Effect of Changes in By-laws of beneficial association as against pre-existing members. See note, 83 Am. St. Rep. 711, 712, 715.

82 Cal. 562-563, 22 Pac. 1118, DAVIS v. CITY OF SACRAMENTO.

Interest cannot be Recovered on Interest on overdue city bonds.

Approved in Meyer v. San Francisco, 150 Cal. 138, 88 Pac. 725, 10 L. R. A. (n. s.) 110, interest not allowed after their maturity on Dupont street bonds.

82 Cal. 564-570, 23 Pac. 146, BURROWS v. BURROWS.

Failure to Post and Record Notice of appropriation will not vitiate prior actual appropriation of waters flowing on public domain as against riparian owner who subsequently settles upon and obtains patent to land below point of diversion.

Approved in Lower Tule River Ditch Co. v. Angiola Water Co., 149 Cal. 499, 86 Pac. 1082, and Duckworth v. Watsonville Water & Light Co., 158 Cal. 211, 110 Pac. 930, both holding actual appropriation without posting may be made when no intervening rights exist to take effect by relation to prior posting; Morris v. Bean, 146 Fed. 428, effect of statute requiring recording of claim held to be to preclude appropriator from claiming by doctrine of relation to time work was begun as against one who does comply with statutory requirements.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

82 Cal. 570-575, 23 Pac. 189, PRENTICE v. MILLER.

Each Party in Contest of Right to Purchase state lands must set forth and prove that he has strictly complied with law.

Reaffirmed in Moran v. Bonyng, 157 Cal. 297, 107 Pac. 314.

Distinguished in Bieber v. Lambert, 152 Cal. 564, 93 Pac. 97, in such action, for purpose of defeating plaintiff's claim, defendant may rely on proof made by plaintiffs.

82 Cal. 577-584, 23 Pac. 198, SHAIN v. FORBES.

When Party Moves for Nonsuit, grounds must be precisely stated, and no other grounds can be considered in passing upon motion on appeal.

Approved in Mackel v. Bartlett, 33 Mont. 132, 82 Pac. 798, refusing to consider sufficiency of complaint on appeal from order of nonsuit, when not made ground of motion.

Where Two Persons are Sued Jointly on joint contract, several judgments may be given for or against them.

Approved in Redwood City Salt Co. v. Whitney, 153 Cal. 423, 95 Pac. 886, individual judgment may be given against partner on partnership debt, when partners are jointly sued; Morgan v. Righetti (Cal.), 45 Pac. 260, where two persons were sued on alleged partnership debt, on finding they were not partners, but debt was that of one alone, judgment could be rendered against him.

82 Cal. 585-588, 23 Pac. 145, PEOPLE v. MAHLMAN.

Information Charging Embezzlement: substantially following language of statute is sufficient.

Approved in *Hinds v. Territory*, 8 Ariz. 377, 76 Pac. 470, indictment for embezzlement held defective in not setting out trust relation under which property was misappropriated.

82 Cal. 595-599, 23 Pac. 133, 375, **DURGIN v. NEAL**.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 730.

82 Cal. 600-604, 23 Pac. 134, **LANKERSHIN RANCH ETC. CO. v. HERBERGER**.

Duty of Corporation to Transfer Stock on their books. See note, 136 Am. St. Rep. 1032.

82 Cal. 604-607, 23 Pac. 132, **WITKOWSKI v. HERN**.

Answering to Amended Complaint is Waiver of objection that it alleges new cause of action.

Approved in *Choctaw etc. R. R. Co. v. Hickey*, 81 Ark. 588, 99 S. W. 842, defendant who, after refusal to strike out amended complaint alleging new cause of action, filed answer thereto, held to have waived summons and consented to bringing new action.

Acts for Which Sureties on Official Bonds are liable. See note, 91 Am. St. Rep. 542.

82 Cal. 607-610, 23 Pac. 116, **PEOPLE v. NAYLOR**.

Indictments for Perjury. See note, 124 Am. St. Rep. 669.

82 Cal. 611-613, 23 Pac. 120, **YOUNGMAN v. TONNER**.

Orders Setting Aside Default and Allowing answer as to part of claim upon condition of payment of undisputed part is valid.

Approved in *McCarty v. Wilson*, 2 Cal. App. 157, 83 Pac. 171, upholding order allowing service of draft of bill of exceptions after time in election contest on condition contestee surrender office pending appeal.

82 Cal. 613-617, 23 Pac. 143, **POWELSON v. LOCKWOOD**.

Regularity of Proceedings of Court within its jurisdiction is not reviewable on application for writ of prohibition.

Approved in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1017, writ does not lie to restrain condemnation proceedings, because court determined necessity for taking after jury found as to value; *Hamberger v. Police Court*, 12 Cal. App. 154, 155, 106 Pac. 895, denying writ to prevent police court from trying civil action for money judgment; *State v. Williams*, 117 Mo. App. 568, 92 S. W. 153, writ does not lie to prevent trial court, having jurisdiction to try relators for gambling, from placing them on trial second time after they were once in jeopardy; *State v. Morse*, 27 Utah, 341, 75 Pac. 741, writ does not lie to restrain criminal proceedings on ground examination before magistrate was not in lawful form, when decision was within jurisdiction of trial court.

Denial of Jury in Trial for Misdemeanor in justice's court is not error that can be corrected by writ of prohibition.

Approved in *Goodman v. Superior Court*, 8 Cal. App. 233, 96 Pac. 395, writ of review does not lie when jury trial is denied on appeal from justice's court because of failure to demand same within time fixed by superior court rule.

Distinguished in dissenting opinion in *Hamberger v. Police Court*, 12 Cal. App. 157, 160, 107 Pac. 614, 615, majority holding as properly sustained demurrer to application to superior court for writ of prohibition to police court to prevent it from trying civil action for money judgment.

Writ of Prohibition. See note, 111 Am. St. Rep. 952.

82 Cal. 617-619, 23 Pac. 121, PEOPLE v. RYAN.

After Plea of Guilty is Withdrawn and plea of not guilty substituted, former plea cannot be proven at trial as admission or confession.

Approved in *State v. Abrams*, 131 Iowa, 483, 108 N. W. 1043, admission made in trial in justice's court that accused carried concealed weapon held not to amount to confession in open court so as to justify conviction on trial in superior court.

82 Cal. 621-628, 23 Pac. 193, DREYFUS v. HIRT.

When There is No Agreement for Apportionment of rent between lessor and grantee of part of reversion, lessor is entitled to collect whole rent, even after notice of grant.

Approved in *Teich v. Arms*, 5 Cal. App. 481, 90 Pac. 965, where land leased was sold to state for taxes and lessor's right to redeem was foreclosed by sale to another, such person has right to receive rents, and tenant must attorn to him.

Agreement to Surrender Part of Leased Premises for purpose of giving clear title to purchasers of such part does not have effect to cancel whole lease.

Approved in *Hughes v. Farmers' Nat. Bk.*, 83 Vt. 394, 76 Atl. 35, acceptance of new lease covering part of premises under original lease held to be surrender of old lease to extent of part included in new.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 54, 98.

82 Cal. 628-630, 23 Pac. 120, SAYWARD v. HOUGHTON.

Right of Defendant to Change of Place of trial is not affected by joinder of unnecessary defendant.

Approved in *Bartley v. Fraser*, 16 Cal. App. 566, 117 Pac. 685, *Hannon v. Nuevo Land Co.*, 14 Cal. App. 704, 112 Pac. 1105, *Anaheim O. F. Hall Assn. v. Mitchell*, 6 Cal. App. 433, 92 Pac. 332, and *Read v. San Diego Union Co. (Cal.)*, 65 Pac. 568, all reaffirming rule.

Distinguished in *Hellman v. Logan*, 148 Cal. 61, 82 Pac. 849, in action on note and to foreclose corporate stock pledged as security, where corporation was joined as party necessary to full relief, principal defendant cannot have venue changed from county of residence of corporation; *Cochrane v. McDonald*, 4 Cal. Prob. 539, denying change of venue to county where real estate was situated, when basis of action was fraud and collusion, and certain necessary parties who opposed change resided in county where action was brought.

In Action to Compel Individual to perform contract to transfer shares of corporate stock, corporation is not necessary party.

Reaffirmed in *Sherwood v. Wallin*, 1 Cal. App. 537, 82 Pac. 568.

Specific Performance of Contract for Sale of Stock. See note, 50 L. R. A. 512.

82 Cal. 631-634, 23 Pac. 56, 7 L. R. A. 127, HANSON v. GRAHAM.

What is Nonresidence for Purpose of Attachment. See note, 19 L. R. A. 665.

82 Cal. 635-636, 23 Pac. 40, 382, WHITEY v. ROWELL.

When Mortgage Sought to be Foreclosed is annexed to complaint, description therein is sufficient for all purposes of suit.

Approved in *Santa Rosa Bank v. Paxton*, 149 Cal. 198, 200, 86 Pac. 194, power of attorney to execute notes annexed to complaint on notes held to be well pleaded; *Hackfeld v. Monsarrat*, 18 Haw. 334, bill to foreclose mortgage setting out metes and bounds and attaching copy of mortgage held sufficient as to title and description on demurrer.

82 Cal. 636-640, 23 Pac. 53, 7 L. R. A. 224, ADAMS v. SEAMAN.

Negotiable Instrument must be Made payable in money only, and without any condition not certain of fulfillment.

Approved in *Cornish v. Woolverton*, 32 Mont. 469, 470, 108 Am. St. Rep. 598, 81 Pac. 8, note providing that both principal and interest shall bear increased rate of interest when due held not negotiable; *Cotton v. John Deere Plow Co.*, 14 Okl. 607, 78 Pac. 321, stipulation for attorney's fee in case of legal action on note held to destroy negotiability; *Randolph v. Hudson*, 12 Okl. 526, 74 Pac. 949, note providing for interest from date if not paid at maturity held not negotiable.

Agreements and Conditions Destroying negotiability of writing. See note, 125 Am. St. Rep. 207.

82 Cal. 640-642, 23 Pac. 122, BRANDT v. PHILLIPPI.

Party Leasing Land may Maintain Ejectment against party in possession without right.

Approved in *Vatuone v. Cannobio*, 4 Cal. App. 425, 88 Pac. 375, owner, having made new lease, could maintain ejectment against former lessees who held over.

Landlord's Duty to Put Tenant in possession. See note, 134 Am. St. Rep. 922.

82 Cal. 642-645, 23 Pac. 278, CONNOLLY v. HINGLEY.

Vendee in Possession Under Contract of Purchase who has not performed his contract, but is in default without excuse, cannot set up equitable defense to action of ejectment by vendor.

Approved in *Miller v. Waddingham (Cal.)*, 25 Pac. 690, vendee who has not paid entire purchase price cannot remove temporary houses built by him on land.

Distinguished in *Gumaer v. Draper*, 33 Colo. 127, 79 Pac. 1041, where time of payment was not of essence of contract, default by vendee held not to preclude specific performance being granted on his cross-complaint to vendor's suit in ejectment.

When Vendor may Recover Possession from vendee. See note, 107 Am. St. Rep. 727.

82 Cal. 647-650, 23 Pac. 136, TRIMMER v. BODE.

Certificate of Purchase of State Land is void if applicant did not possess qualifications of citizenship and was not actual settler.

Approved in *Boggs v. Ganeard*, 148 Cal. 718, 84 Pac. 198, certificate of purchase held void on ground holder was not settler.

82 Cal. 650-654, 16 Am. St. Rep. 178, 23 Pac. 62, **HYMAN v. COLEMAN**.

Limitations Run Against Liability of stockholders from time debt was contracted, and renewal of notes does not extend time.

Approved in *O'Neill v. Quarnstrom*, 6 Cal. App. 473, 92 Pac. 392, giving of note held not to toll statute as to stockholder.

Stockholders are Liable for Debts of Corporation as principals, and right of action against each accrues at same time.

Approved in *Anderson v. Schloesser*, 153 Cal. 222, 94 Pac. 886, following rule; *Miller v. Lane*, 160 Cal. 93, 116 Pac. 60, limitations against action in this state to enforce stockholders' liability under Colorado law runs from commencement of suit in Colorado by creditors against stockholders.

Time of Accrual of Right of Action as to stockholder's liability. See note, 10 L. R. A. (n. s.) 903.

82 Cal. 654-658, 23 Pac. 210, **WHITE v. SOTO**.

Amended Complaint Based on Same Action relates back to time of filing original complaint.

Reaffirmed in *Humphry v. Buena Vista Water Co.*, 2 Cal. App. 542, 84 Pac. 247.

82 Cal. 659, 23 Pac. 195, **WATERMAN v. BOLTINGHOUSE**.

Broker With Exclusive Contract to Sell Land cannot recover commission when owner sells within life of contract, unless he has produced purchaser ready to buy under terms of contract.

Approved in *Wiggins v. Wilson*, 55 Fla. 355, 45 So. 1014, and *Hallstead v. Perrigo*, 87 Neb. 131, 126 N. W. 1079, both following rule; *Logan v. McMullen*, 4 Cal. App. 156, 87 Pac. 286, contract not proven so as to entitle broker to commission.

When Real Estate Broker is Considered as procuring cause of sale or exchange. See note, 44 L. R. A. 350.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 619.

Broker's Right to Make Sale as Exclusive of owner's. See note, 24 L. R. A. (n. s.) 281.

Mutuality of Contract Giving Real Estate Broker exclusive authority or promising him commissions in case of sale by anyone else, but not in terms imposing any obligation upon him. See note, 19 L. R. A. (n. s.) 601.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 83 CALIFORNIA.

83 Cal. 1-6, 23 Pac. 220, GEER v. SIBLEY.

Where General Finding is Drawn as conclusion from special findings which are inconsistent with it, judgment supported by general finding but not by special findings will be reversed on appeal.

Approved in *People v. McCue*, 150 Cal. 198, 88 Pac. 900, holding finding of ultimate fact prevailed where not inconsistent with probative facts found.

Distinguished in *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 110, 93 Pac. 902, finding against ownership of easement reserved in deed, and nature of it, from construction of deed is not finding of ultimate fact, but conclusion of law, and may be examined from judgment-roll alone.

83 Cal. 7-9, 23 Pac. 58, HOLTON v. NOBLE.

In Action to Recover Rent on Lease, representations of lessor as to amount certain crops would produce are matter of opinion and not fraudulent.

Approved in *Williamson v. Holt*, 147 N. C. 523, 61 S. E. 387, 17 L. R. A. (n. s.) 240, alleged false representations as to capacity of ice plant not ground for setoff in suit for purchase price, when purchaser had thoroughly examined plant.

Expression of Opinion as Fraud. See note, 35 L. R. A. 438.

Fraud Without Damages is not ground for action.

Approved in *United Real Estate etc. Co. v. Barnes*, 159 Cal. 246, 113 Pac. 169, reaffirming rule; *Woodson v. Winchester*, 16 Cal. App. 476, 117 Pac. 567, applying rule where in foreclosure of right to purchase under contract of sale answer did not allege damage from false statements of plaintiff.

Accord of Claim not Consummated by satisfaction cannot be pleaded as defense thereto.

Approved in *Hogan v. Burns* (Cal.), 33 Pac. 632, payments pleaded in defense as accord and satisfaction of certain claims held not to be made in satisfaction.

Accord and Satisfaction. See notes, 100 Am. St. Rep. 422; 20 L. R. A. 786.

83 Cal. 10-11, 17 Am. St. Rep. 209, 23 Pac. 196, HESPERIA LAND & WATER CO v. ROGERS.

Omission to Use Easement When not Needed does not break continuity of user.

Approved in *Collins v. Gray*, 3 Cal. App. 725, 86 Pac. 985, *Silva v. Hawn*, 10 Cal. App. 551, 102 Pac. 955, and *Strong v. Baldwin*, 154 Cal. 162, 129 Am. St. Rep. 149, 97 Pac. 183, all holding continuity of possession of ditch not broken by reason of not being used when water was not needed for irrigation; *Dummer v. United States Gypsum Co.*, 153 Mich. 634, 636, 117 N. W. 322, in determining right to easement for railway spur track, considerable periods of time during which it was not used cannot be considered.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 730.

83 Cal. 18-23, 23 Pac. 215, VAUGHN v. CALIFORNIA CENT. BY. CO.

Applicability of Rule as to Safe Place, where servants engaged in removing dangerous conditions. See note, 25 L. R. A. (n. s.) 323.

83 Cal. 23-29, 23 Pac. 212, BOREHAM v. BYRNE.

Declaration of Homestead must State declarant and family reside on premises.

Approved in *Jones v. Gunn*, 149 Cal. 689, 87 Pac. 578, homestead declaration on certain land and "other lands" not specifically described held not to comply with statute.

Use of Instructions in Argument of counsel to jury lies in discretion of court.

Reaffirmed in *People v. Denomme* (Cal.), 56 Pac. 99.

83 Cal. 30-32, 23 Pac. 214, JOHNSTON v. McDUFFEE.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 741.

83 Cal. 39-43, 23 Pac. 192, NIDEVER v. AYERS.

Holder of Equitable Title cannot Bring action to quiet title against holder of legal title.

Approved in *Buchner v. Malloy*, 155 Cal. 255, 100 Pac. 688, reaffirming rule; *Mitchell v. Moses*, 16 Cal. App. 599, 117 Pac. 687, applying rule where wife sued husband's tenant in ejectment and husband intervened with cross-complaint to quiet title against wife.

Disapproved in *Coleman v. Jaggars*, 12 Idaho, 120, 118 Am. St. Rep. 207, 85 Pac. 895, action to quiet title may be maintained by one not in possession and not holding legal title.

Quitclaim Deed is as Effectual to transfer title as deed of bargain and sale, and supports decree quieting grantee's title.

Approved in *Myers v. Oceanside*, 7 Cal. App. 93, 93 Pac. 688, following rule; *Korporal v. Robinson*, 38 Ind. App. 113, 78 N. E. 85, quitclaim deed held to convey only interest of grantor at time of conveyance.

Quitclaim Deeds. See note, 105 Am. St. Rep. 860.

Effect of Quitclaim in Otherwise Perfect record title. See note, 29 L. R. A. 34.

83 Cal. 51-56, 23 Pac. 274, RHORER v. BILA.

Purchaser cannot Remain in Possession of lands under contract and at same time refuse to pay purchase price.

Approved in *Livesly v. Muckle*, 46 Okl. 424, 80 Pac. 903, and *Gervaise v. Brookins*, 156 Cal. 107, 103 Pac. 331, both holding vendee bound to pay purchase price or surrender possession, even though vendor's title failed; *Spies v. Butts*, 59 W. Va. 399, 400, 53 S. E. 902, 903, holding where vendee remained in possession without paying purchase price and cut standing timber, vendor had right to hold manufactured product on premises as security for purchase money due.

Right of Grantee in Possession to Question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 371.

83 Cal. 56-65, 23 Pac. 225, **CULLEN v. SPRIGG.**

Deed Describing Land Granted as Being Certain acreage in specified block, according to official map, is not void for uncertainty, but conveys undivided interest, and creates tenancy in common.

Approved in *Baldwin v. Foster*, 157 Cal. 647, 108 Pac. 716, persons having floating grants held tenants in common and entitled to partition as such.

Contract must Receive Such Interpretation as will make it lawful and operative if it can be done without violating intention of parties.

Approved in *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 34, 100 Pac. 1074, agreement of administrator to pay commission for sale of property of estate held to be his individual contract.

Recital in Deed That It is in Consideration of certain sum, and that grantee is to do certain things, is not an estate upon condition.

Approved in *Shaw v. Caldwell*, 16 Cal. App. 6, 115 Pac. 943, holding agreement in bargain and sale deed of interest in mine that grantee may work mine for certain period on certain shares is not condition subsequent; *Hawley v. Kafitz*, 148 Cal. 395, 113 Am. St. Rep. 282, 83 Pac. 249, 3 L. R. A. (n. s.) 741, condition in deed requiring grantee to build house in certain time held to be personal covenant only.

Miscellaneous.—Cited in *Sullivan v. Lumsden*, 118 Cal. 666, 50 Pac. 778, historically referring to principal case.

83 Cal. 66-69, 23 Pac. 206, **MANN v. HIGGINS.**

Contracts by Telegraph. See note, 110 Am. St. Rep. 761.

83 Cal. 70-83, 23 Pac. 183, **RUSSELL v. McDOWELL.**

Pro Rata Apportionment of Illegal Votes by superior court among candidates upheld.

Reaffirmed in *People v. Davidson*, 2 Cal. App. 107, 83 Pac. 164.

Where Number of Votes Cast in Certain precincts greatly exceeded number of resident voters, and election officers are shown not to have sworn voters as to residence, presumption of fraud arises.

Approved in *People v. Davidson*, 2 Cal. App. 105, 106, 107, 83 Pac. 163, 164, presumption of fraud held to arise where votes counted greatly exceeded ballots cast; *Chatham v. Mansfield*, 1 Cal. App. 305, 82 Pac. 346, where ballots were received by clerk in broken envelopes, and were so kept that others might have had access to them, they are prima facie impeached.

Only Provisions of Election Law relating to time and place of elections, qualifications of voters, and such others as are essential to its validity, are mandatory; all others are directory.

Approved in *Starkweather v. Dawson*, 14 Cal. App. 673, 112 Pac. 739, rejection of ballots cast held to be violation of directory provision only and court could count them for proper candidate; *Johnstone v. Robertson*, 8 Ariz. 366, 76 Pac. 466, holding provisions for fixing place of election are mandatory, and votes cast at election, where polling place was changed not in accordance with statute, cannot be counted; *Elvick v. Groves*, 17 N. D. 566, 118 N. W. 230, holding void election held by resolution of majority of voters at place other than that fixed by county commissioners; *Town of Grove v. Haskell*, 24 Okl. 721, 104 Pac. 61, holding where ballots were different in form and detail from those prescribed by statute, but were uniformly distributed throughout county and cast by voters in good faith, election would not, in absence of fraud, be annulled; *Rampendahl v. Crump*, 24 Okl. 889, 105 Pac. 207, rejecting ballots cast at election where every law governing election, excepting those as to time and place, were flagrantly and willfully violated; *Kirkpatrick v. Deegans*, 53 W. Va. 287, 44 S. E. 470, requirement that clerk shall write name on back of ballot before delivery to voter is mandatory, and ballot not so indorsed is void.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 49, 56, 57, 85.

83 Cal. 83-84, 23 Pac. 126, **HYDE v. THORNTON**; S. C., **HYDE v. BOYLE**, 105 Cal. 102, 38 Pac. 643.

Miscellaneous.—Cited in *Green v. Thornton*, 8 Cal. App. 162, 96 Pac. 383, historically referring to principal case.

83 Cal. 84-96, 21 Pac. 1102, 23 Pac. 875, **PAIGE v. ROCKY FORD CANAL ETC. CO.**

Party Using Natural Stream as conduit cannot take out more than he turns in.

Approved in *Campbell v. Flannery*, 29 Mont. 250, 74 Pac. 452, and *Miller v. Wheeler*, 54 Wash. 437, 103 Pac. 644, 23 L. R. A. (n. s.) 1065, both following rule.

Natural Watercourse may be Used as conduit by appropriator of water from main stream to point of diversion for use.

Approved in *Wutchumna Water Co. v. Pogue*, 151 Cal. 111, 90 Pac. 364, appropriator of waters of main stream could conduct water down branch of stream to point of diversion.

Use of Natural Stream to Convey appropriated water. See note, 51 L. R. A. 931.

Riparian Owner is Entitled to Benefit of removal of obstruction to flow in channel of natural watercourse.

Approved in *Cloyes v. Middlebury Electric Co.*, 80 Vt. 123, 66 Atl. 1044, 11 L. R. A. (n. s.) 693, where stream channel at falls was lowered to drain upper riparian lands by assessment on riparian owners, and land was improved, power company was estopped to alter fall of stream to injury of riparian owners.

Distinguished in *Beaverhead Canal Co. v. Dillon Elec. L. & P. Co.*, 34 Mont. 140, 85 Pac. 882, prior appropriator of particular quantity of water of stream not entitled to benefit of subsequent flow of spring and seepage waters finding their way into stream.

Rights in Stream as Affected by Act of God or natural change of course. See note, 30 L. R. A. 820.

Rights Acquired in an Artificial Condition of a body of water. See note, 50 L. R. A. 839.

Liability of Water Companies. See note, 81 Am. St. Rep. 494.

83 Cal. 96-101, 23 Pac. 196, GIDDINGS v. '76 LAND ETC. CO.

Under Code, All Entries on Actual Possession of another are unlawful, and question of good and bad faith does not affect right of recovery.

Reaffirmed in *Lasserot v. Gamble* (Cal.), 46 Pac. 919.

Right to Civil Action for Forcible Entry and detainer. See note, 121 Am. St. Rep. 387, 389, 392, 400.

Forcible Entry and Detainer Against One forcibly dispossessing peaceable possessor in asserting lawful right to possession. See note, 8 L. R. A. (n. s.) 427.

83 Cal. 101-110, 22 Pac. 55, 23 Pac. 359, OUCAMONGA FRUIT LAND CO. v. MOIR.

Patent Void for Want of Authority to issue may be collaterally attacked.

Approved in *Williams v. San Pedro*, 153 Cal. 48, 52, 94 Pac. 236, 237, holding certificate of purchase to state tide lands, void for want of authority to issue, subject to collateral attack by defendants not connected with title.

83 Cal. 111-125, 17 Am. St. Rep. 217, 23 Pac. 1, 7 L. R. A. 348, PEOPLE ex rel. MORGAN v. HAYNE.

Power of Supreme Court Commissioners to examine causes and report facts or conclusions is not judicial.

Approved in *Kaiser Land etc. Co. v. Curry*, 155 Cal. 657, 103 Pac. 348, functions of Secretary of State in determining what corporations come within description given in section 7 of act of March 29, 1905, are not judicial; *Huneke v. Huneke*, 12 Cal. App. 205, 107 Pac. 134, order directing referees to find in regard to property rights in divorce held not to give judicial powers when findings have no efficacy until acted on by court.

Every Presumption is in Favor of validity of statute.

Approved in *Brookings County v. Murphy*, 23 S. D. 322, 121 N. W. 797, following rule; *In re Finley*, 1 Cal. App. 200, 81 Pac. 1042, upholding statute providing death penalty for person undergoing life sentence who commits assault with deadly weapon; *In re Spencer*, 149 Cal. 402, 117 Am. St. Rep. 137, 86 Pac. 808, upholding child labor act.

83 Cal. 126-129, 23 Pac. 65, FULWEILER v. HOG'S BACK CONSOLIDATED MINING CO.

Sworn Answer Positively Denying Material allegations of complaint is sufficient affidavit of merits to set aside default.

Reaffirmed in *Montijo v. Sherer*, 5 Cal. App. 739, 91 Pac. 262.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 270.

83 Cal. 136-138, 23 Pac. 284, SWASEY v. ADAIR.

Mistake as to Date of Judgment Does not Invalidate appeal when it is clear what judgment was intended.

Reaffirmed in *Foss v. Johnstone*, 158 Cal. 123, 110 Pac. 296.

Insertion in Transcript of Copy of Bond on appeal, certified by county clerk, does not satisfy requirement of section 953 Code of Civil Procedure, that clerk or attorneys must certify undertaking in due form has been filed.

Approved in *Jones v. Iverson* (Cal.), 31 Pac. 626, section 953, not complied with by general certificate that record is correct.

83 Cal. 138-147, 17 Am. St. Rep. 223, 23 Pac. 229, PEOPLE v. MULLINGS.

Defendant in Murder Case Testifying in his own behalf and denying fact that he killed deceased is subject to wide latitude in cross-examination.

Approved in *People v. Maughs*, 8 Cal. App. 117, 96 Pac. 412, where defendant testified only as to self-defense, prosecution could cross-examine him as to all circumstances leading up to homicide; *State v. Miller*, 190 Mo. 464, 89 S. W. 382, where one accused of establishing lottery testified he was never employed by a lottery company, he was properly cross-examined to show he had made business of selling tickets for such company.

Communications Between Husband and Wife are incompetent against either.

Approved in *Humphrey v. Pope*, 1 Cal. App. 378, 82 Pac. 225, in action for damages for alienation of affections of husband, declarations of husband to wife as to relations with defendant are privileged.

Persistent Questions as to Privileged Communications, asked defendant, are ground for reversal of conviction when existence of damaging facts was thus strongly suggested to jury.

Approved in *State v. Irwin*, 9 Idaho, 41, 71 Pac. 609, 60 L. R. A. 716, reversing judgment in rape case because of repeated asking of questions as to conduct of accused with other girls; *State v. Roscum*, 119 Iowa, 333, 93 N. W. 296, repeated efforts of prosecuting attorney to introduce evidence of other and distinct offenses held ground for reversal; *State v. Rogers*, 31 Mont. 7, 8, 77 Pac. 295, 296, questions addressed to witness jointly indicted with defendant to show fishing trip was for purpose of robbery, held improper as tending to degrade witness and defendant, though answered in negative.

Counsel's Right to Refer in Argument to witness' refusal to testify as evidence of defendant's guilt. See note, 121 Am. St. Rep. 807.

83 Cal. 147-149, 23 Pac. 285, EMERSON v. WHITAKER.

Replevin by or Against One in Adverse Possession of land for things severed. See note, 69 L. R. A. 734.

83 Cal. 149-153, 23 Pac. 364, 1112, PEOPLE ex rel. KERN CO. v. BAKER.

Proceeding Submitting Vote on Bonds for two distinct purposes without segregating amounts for each purpose is invalid.

Reaffirmed in *Stern v. City of Fargo*, 18 N. D. 301, 122 N. W. 408.

Distinguished in *Clark v. Los Angeles*, 160 Cal. 321, 322, 116 Pac. 968, upholding bond ordinance for harbor improvement bonds describing harbor improvements in two parts.

83 Cal. 155-159, 23 Pac. 294, OLEGHORN v. ZUMWALT.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 821, 845, 848.

83 Cal. 159-163, 23 Pac. 225, JUE FOOK SAM v. LORD.

Statement on Motion for New Trial cannot be used on appeal from judgment unless used on hearing of motion for new trial.

Disapproved in *Steve v. Bonners Ferry etc. Co.*, 13 Idaho, 394, 92 Pac. 366, such statement may be used on appeal from judgment, whether used on motion for new trial or not.

83 Cal. 163-167, 23 Pac. 374, DE NOON v. MORRISON.

Question Whether Assessment Work Done by owner of two mining claims held in common was done for benefit of both is one of fact for jury.

Approved in *Big Three Min. etc. Co. v. Hamilton*, 157 Cal. 135, 137 Am. St. Rep. 118, 107 Pac. 304, upholding verdict that work was for benefit of one claim only.

Distinguished in *Hain v. Mattes*, 34 Colo. 352, 83 Pac. 130, work done on tunnel may apply on mining location though person doing it does not own continuous strip from portal of tunnel to such location.

83 Cal. 167-172, 23 Pac. 290, KITTS v. AUSTIN.

Person Relying on Naked Possession of public lands is mere trespasser as against those claiming under government title.

Approved in dissenting opinion in *Balsz v. Liebenow*, 4 Ariz. 234, 235, 236, 36 Pac. 211, 212, majority holding receiver's receipt to one making homestead filing did not entitle holder to maintain ejectment against one in possession, though receipt was issued after contest in which he was given right of possession.

Party in Naked Possession of Public Land seeking to quiet title against homestead claim cannot show in rebuttal that third person resides on land as qualified pre-emptor.

Approved in *Dondero v. O'Hara*, 3 Cal. App. 637, 86 Pac. 987, in ejectment for ditch, defendants, who were trespassers, could not justify by showing title outstanding in third person.

83 Cal. 173-181, 23 Pac. 286, GRAHAM v. LARIMER.

Where Defendant Proves Consideration of note sued on is illegal, prima facie case of notice to indorsee is made out.

Approved in *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 769, 770, 118 Pac. 95, *Union Collection Co. v. Buckman*, 150 Cal. 162, 119 Am. St. Rep. 164, 88 Pac. 709, 9 L. R. A. 568, and *La Tournoux v. Gilliss*, 1 Cal. App. 552, 82 Pac. 629, all following rule.

Refusal of Cross-examination on Matters covered by examination in chief as ground for reversal or new trial. See note, 25 L. R. A. (n. s.) 684.

83 Cal. 181-185, 23 Pac. 289, CLARK v. BROWN.

Action to Dissolve Mining Partnership need not be brought in county where mine is situated when determination of partner's respective estates in realty is not involved.

Approved in *Cochrane v. McDonald*, 4 Cal. Prob. 544, denying change of venue of trial to county where land was situated when interests of parties therein could not be disturbed by decree.

83 Cal. 185-187, 23 Pac. 286, EATON v. RICHERI.

Word "Sold" in Contract of Sale does not necessarily mean that conveyance must be made or title must pass.

Approved in *Christensen v. Cram*, 156 Cal. 634, 635, 105 Pac. 950, complaint alleging property was "sold" for stated sum and that balance is due thereon held sufficient to sustain judgment for plaintiff; *Estate of Goetz*, 13 Cal. App. 202, 109 Pac. 146, "sold" as used in contract of sale held not to conclusively show present conveyance; *Sanderson v. Wellsford*, 53 Tex. Civ. App. 641, 116 S. W. 385, land held to be "sold" within meaning of contract authorizing broker to sell land when agreement was entered into with purchaser which terminated in actual transfer of title.

83 Cal. 187-193, 23 Pac. 361, CARTER v. BACIGALUPE.

Statutes Do not Require Notice of mining claim to be either posted or recorded.

Approved in *McCleary v. Broadbush*, 14 Cal. App. 66, 111 Pac. 127, prior discovery need not be accompanied by prior posting of notice to vest claimant with prior right of location; *Anderson v. Caughey*, 3 Cal. App. 26, 84 Pac. 224, posting and recording only necessary by reason of local rules.

Notices of Mining Locations are to be liberally construed.

Approved in *Bonanza Mining Co. v. Golden Head Min. Co.*, 29 Utah, 166, 80 Pac. 738, notices considered and held sufficiently definite.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 832, 833, 836, 856, 867, 870.

Parol Evidence is Admissible to Explain and locate mine referred to in deed by name.

Approved in *Sponberg v. First Nat. Bank*, 15 Idaho, 676, 99 Pac. 713, admitting parol evidence to identify side of room referred to in lease.

Relocation of Mining Claim as Abandoned or forfeited. See note, 68 L. R. A. 834.

83 Cal. 194-197, 23 Pac. 355, STANTON v. FRENCH.

Exemption of Debtor's Property is waived by failure to claim it as exempt within reasonable time after seizure on execution.

Approved in *Williams v. Brown*, 137 Mich. 574, 100 N. W. 787, exemption waived by failure to notify officer attaching property.

Acceptance by Execution Debtor of Surplus of proceeds of sale after satisfaction of execution does not estop him from suing for seizure and sale of exempt property.

Reaffirmed in *Snow v. West*, 35 Utah, 211, 136 Am. St. Rep. 1047, 99 Pac. 676.

How Far Proceeds of Exempt Property retain exempt character. See note, 19 L. R. A. 39.

83 Cal. 198-201, 23 Pac. 311, WIEDEKIND v. TUOLUMNE COUNTY WATER CO.

Liability for Escape of Dangerous Substance stored on premises. See note, 15 L. R. A. (n. s.) 543.

83 Cal. 203-214, 23 Pac. 365, DOE v. SANGER.

Substantial Compliance With Section 2320, United States Revised Statutes, requiring end lines of lode claim to be parallel is all that is required.

Approved in *Price v. McIntosh*, 1 Alaska, 291, holding only limitation on size or shape of placer claim is that it must not exceed twenty acres.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 843, 846.

Right to Follow Vein or Lode on its dip beyond surface lines of location. See note, 53 L. R. A. 493.

83 Cal. 215-216, 17 Am. St. Rep. 230, 23 Pac. 292, BURGESS v. FAIRBANKS.

Vendor's Lien for Unpaid Purchase Price may be enforced against vendee's grantee who has notice of equity.

Approved in *Kuschel v. Hunter* (Cal.), 50 Pac. 398, vendor's lien held prior to lien of mechanic doing work with notice of vendor's lien, although vendor posts no notice of nonliability.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 186.

Negotiability as Affected by Uncertainty of time of maturity. See note, 1 L. R. A. (n. s.) 1120.

83 Cal. 217-219, 23 Pac. 293, 7 L. R. A. 622, RILEY v. SIMPSON.

Tenant Maintaining Nuisance upon Leased premises is liable for injury occasioned thereby.

Approved in *Lewy Art Co. v. Agricola*, 169 Ala. 68, 58 So. 148, tenants of storeroom liable for injury caused by fall of decayed awning.

Liability of Property Owner for Nuisance which he did not create. See note, 86 Am. St. Rep. 516.

Liability of Landlord to Third Person for condition of premises in possession of tenant. See note, 26 L. R. A. 200.

Owners of Building Who Consent to and aid in construction of awning by tenants are liable to third parties injured by its fall caused by giving way of supporting wall.

Approved in *Campbell v. Louisville Coal Min. Co.*, 39 Colo. 382, 89 Pac. 768, 10 L. R. A. (n. s.) 822, lessor of coal vein held liable for injury to surface soil when lessee, with lessor's knowledge, removed all supports; *Blickley v. Luce's Estate*, 148 Mich. 240, 111 N. W. 755, holding landlord liable for injury to tenant's property caused by fall of leased building during repairs ordered by landlord; *Freeholders of Hudson v. Woodcliff Land Co.*, 74 N. J. L. 361, 65 Atl. 846, lessor held liable for nuisance created by lessee when premises were leased for purpose necessary, result of which was nuisance.

Right to Maintain Awnings in Streets. See note, 26 L. R. A. 940.

Individual Liability for Falling Walls or buildings. See note, 34 L. R. A. 558.

Liability to Third Persons of Lessors of personal property. See note, 92 Am. St. Rep. 529, 536.

Location of Movable Property as affecting fire insurance. See note, 26 L. R. A. 256.

Miscellaneous.—Cited in *Catts v. Simpson* (Cal.), 23 Pac. 294, companion case.

83 Cal. 219-221, 23 Pac. 316, HIGGINS v. RAGSDALE.

Where Testimony of Plaintiff Tends to prove case, motion for nonsuit is properly denied.

Approved in *Bowley v. Mangrum & Otter*, 3 Cal. App. 232, 84 Pac. 997, plaintiff's evidence held sufficient to justify denial of motion for nonsuit.

Where Motion for Nonsuit for Deficiency of evidence is denied, and such deficiency is supplied by defendant's evidence, the ground of nonsuit is removed.

Reaffirmed in *Lowe v. San Francisco etc. Ry. Co.*, 154 Cal. 576, 98 Pac. 679.

83 Cal. 225-233, 23 Pac. 312, McGUIRE v. DREW.

Court may Refuse New Trial, sought on ground of excusable neglect to appear, when satisfied from affidavits different result would not be reached.

Reaffirmed in *Rauer's Law etc. Co. v. Bradbury*, 3 Cal. App. 262, 84 Pac. 1009.

"Surprise" Denotes Some Condition or situation in which party is unexpectedly placed to his injury, without fault or negligence on his part.

Approved in *Brandt v. Krogh*, 14 Cal. App. 60, 111 Pac. 284, denying new trial on ground of surprise when no resulting injury was shown; *Porter v. Anderson*, 14 Cal. App. 727, 113 Pac. 350, holding of erroneous view as to sufficiency of complaint, and discovery of correct view held not to amount to surprise; *State v. Innes*, 137 Mo. App. 426, 118 S. W. 1170, "surprise" and "accident" signify detrimental condition in which party is unexpectedly placed, and against which ordinary prudence would not have guarded.

Order is Direction of Court in Writing, not included in judgment, settling some question collateral to main issue, and necessary to be determined before final judgment.

Approved in *Dent v. Superior Court*, 7 Cal. App. 684, 95 Pac. 673, decision of court on sustaining demurrer is an order, on which judgment may be entered, but not judgment in itself.

Miscellaneous.—Cited in *Towle v. Clunie (Cal.)*, 23 Pac. 314, companion case.

83 Cal. 239-240, 23 Pac. 294, McMULLIN v. LEITCH.

Toll Road Becomes Public Highway at time of construction, subject to right to collect tolls for period limited by statute.

Approved in *State v. Scott Co. etc. Road Co.*, 207 Mo. 78, 105 S. W. 758, toll road corporation chartered for fifty years could not maintain gates or collect tolls after expiration of charter, nor could its successor or grantee.

Right to Take Tolls Without Franchise. See note, 37 L. R. A. 717.

83 Cal. 240-246, 23 Pac. 265, MULLER v. SOUTHERN PACIFIC BRANCH RY. CO.

In Condemnation Proceedings in Arriving at value of land, all its capabilities, or uses to which adapted, should be taken into consideration.

Approved in *Norfolk etc. Ry. Co. v. Davis*, 58 W. Va. 623, 52 S. E. 726, following rule; *Los Angeles v. Kerckhoff-Cuzner Co.*, 15 Cal. App. 677, 115 Pac. 655, speculative value due to proposed improvements cannot be considered; *Guyandot Valley Ry. Co. v. Buskirk*, 57 W. Va. 425, 110 Am. St. Rep. 785, 50 S. E. 524, appreciation of value due to proposed construction of railroad and common to adjacent property not an element to be considered in awarding damages.

Evidence of Bona Fide Offers Made for purchase of lot not taken abutting land taken by eminent domain is admissible to prove value of land not taken on issue of damages.

Disapproved in *Loloff v. Sterling*, 31 Colo. 108, 71 Pac. 1115, holding such offers not admissible.

Where Street is Taken for Railroad and abutting owner owns fee to center of street, measure of damages for taking street is value of owner's interest in land taken when railroad entered subject to easement for street.

Reaffirmed in *Taber v. New York etc. R. R. Co.*, 28 R. I. 275, 67 Atl. 12, following rule.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 297.

83 Cal. 246-264, 17 Am. St. Rep. 233, 23 Pac. 318, **FARNUM v. PHOENIX INS. CO.**

Express Provision in Insurance Policy against liability until premium is paid is waived by unconditional delivery of policy as executed contract under express or implied agreement that credit shall be given for premium.

Approved in *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 224, 107 Pac. 296, following rule; *Dargan v. Equitable Life Assurance Soc.*, 71 S. C. 359, 51 S. E. 126, evidence held sufficient to justify inference of jury of waiver of condition in application that contract of insurance should not take effect until first premium had been paid "during my good health"; *Mutual Reserve Life Ins. Co. v. Heidel*, 161 Fed. 538, 88 C. C. A. 477, extension of time of payment of first premium held to waive forfeiture for nonpayment.

Distinguished in *Palmer v. Continental Ins. Co. (Cal.)*, 61 Pac. 785, acknowledgment of receipt of premium in policy held not conclusive evidence of payment, when policy contained no stipulation it would not be binding until premium was actually paid; *Stringham v. Mutual Ins. Co.*, 44 Or. 460, 75 Pac. 826, acceptance of note of insured in payment of first premium and issuance of policy after insured became ill, but without knowledge of such illness, held not waiver of condition that first premium should be paid during good health.

Insurance Company cannot so Limit its capacity to contract by general stipulations against waiver of conditions, or that such must be in writing, that it cannot by its agents make oral waivers not forbidden by statute of frauds.

Approved in *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 233, 107 Pac. 300, stipulation as to prior chattel mortgage held waived by conduct of agent; *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 449, 119 Am. St. Rep. 234, 89 Pac. 106, increased hazard held to be orally waived by general agent; *Parrish v. Rosebud Min. & Mill. Co. (Cal.)*, 71 Pac. 695, where insurer's agent inserted false answers in application for fire policy, with knowledge of facts from insured, such answers constituted no defense to action on policy, though answers were declared warranties; *Allen v. Phoenix Assurance Co.*, 14 Idaho, 747, 95 Pac. 835, provision that no one shall be deemed agent of company in any matter relating to policy unless authorized in writing held waived by accepting application from one not so authorized, issuing policy thereon, and retaining premium paid; *Thresher Co. v. Shirmer*, 122 Iowa, 702, 98 N. W. 505, clause in con-

tract of sale of thresher that six days' retention should be conclusive evidence warranty was fulfilled, held waived by act of agent in advising retention for longer time, when notified of defects within six days; *Ball v. Royal Ins. Co.*, 129 Mo. App. 42, 107 S. W. 1099, requirement for appraisal held waived by insurer; *Spalding v. New Hampshire Fire Ins. Co.*, 71 N. H. 443, 52 Atl. 859, express provision in policy against other insurance without consent of insurer held waived when agent was informed of prior insurance before issuance of policy; *Wilson v. Commercial Union Assn.*, 51 S. C. 548, 64 Am. St. Rep. 700, 29 S. E. 248, condition avoiding policy if premises remained vacant more than ten days held waived by assurance of general agent, on notice of such vacancy, that policy would not be canceled without notice, no notice having been given; *Life Ins. Co. v. Fallow*, 110 Tenn. 733, 734, 77 S. W. 940, collection of premium on policy by subagent after maturity, and after loss, held to waive forfeiture for failure to pay at maturity; *Virginia Fire etc. Ins. Co. v. Richmond Mica Co.*, 102 Va. 437, 102 Am. St. Rep. 846, 46 S. E. 466, condition against transfer held waived when agent informed insured he need make no change in renewal of policy by reason of execution of contract of sale, and premiums were accepted for new policy.

Denial of Liability of Insurer upon other grounds is waiver of proofs of loss.

Approved in *Bank of Anderson v. Home Ins. Co.*, 14 Cal. App. 215, 220, 111 Pac. 509, 511, proofs of loss held waived by act of general agent denying liability; *Allen v. Phoenix Assur. Co.*, 12 Idaho, 663, 88 Pac. 247, 8 L. R. A. (n. s.) 903, refusal to adjust loss held to amount to waiver of proof of loss; *Cullen v. Insurance Co. of North America*, 126 Mo. App. 421, 104 S. W. 120, proofs of loss held waived by statement of adjuster that unless insured would accept specified sum, no adjustment of loss would be made.

Waiver of Conditions on Insurance Policy. See notes, 80 Am. St. Rep. 780; 107 Am. St. Rep. 132; 13 L. R. A. (n. s.) 837, 840, 866.

Cancellation of Insurance Policy. See note, 138 Am. St. Rep. 915.

Arbitration as Condition Precedent to Action on insurance policy. See note, 15 L. R. A. (n. s.) 1059, 1072, 1073.

83 Cal. 264-270, 23 Pac. 369, **YOSEMITE STAGE ETC. CO. v. DUNN.**

To Constitute Gift by Legislature within inhibition of section 31, article IV, Constitution, there must be gratuitous transfer of property of state, voluntarily and without consideration.

Distinguished in *Board of Directors v. Nye*, 8 Cal. App. 537, 97 Pac. 212, legislative appropriations under act of 1897, for support of ex-army nurses and widows held not to be gift.

Consideration of Extrinsic Evidence to show unconstitutionality of statute. See note, 14 L. R. A. 460.

83 Cal. 270-274, 17 Am. St. Rep. 248, 23 Pac. 318, **MOORE v. HOPKINS.**

Plea of Abatement Founded on Pendency of former action for same cause may be avoided by discontinuance of former action after plea is filed.

Approved in *Manufacturers' Bottle Co. v. Taylor-Stites Glass Co.*, 208 Mass. 596, 95 N. E. 105, where claim sued on had been previously pleaded as setoff in former action, but was unavailable because found

to be unliquidated, plea in abatement of former action pending could not be sustained.

Conclusive or Unanswerable Evidence is that which the law does not permit to be contradicted.

Approved in dissenting opinion in *Pierce v. Palmer*, 31 R. I. 475, 77 Atl. 219, majority holding in action by client against attorney to compel repayment of trust fund burden is on client to prove his case "conclusively."

Instruction That Man Who Enters into contract of marriage with improper motives and then unjustifiably breaks it off does woman wrong, for which she is entitled to exemplary damages, is erroneous where there is no evidence tending to show improper motives.

Distinguished in *Lanigan v. Neely*, 4 Cal. App. 764, 89 Pac. 443, in action for breach of promise of marriage plaintiff could plead seduction brought about by reason of promise, and her reliance on promise, in aggravation of damages for breach.

83 Cal. 274-279, 23 Pac. 348, **CARTER v. McQUADE.**

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 378.

83 Cal. 279-289, 23 Pac. 386, **WILHOIT v. TUBBS.**

Limitations Run in Five Years from Date of patent from state against patentee in favor of adverse occupant of land at time patent issued.

Approved in *Smith v. Los Angeles*, 158 Cal. 710, 112 Pac. 311, title by adverse possession acquired in five years from date of sale to state as against purchaser from state.

83 Cal. 296-302, 23 Pac. 419, **ANTHONY v. JILLSON.**

In Action Under Section 2326, United States Revised Statutes, each party must allege and prove all facts essential to his right to patent.

Approved in *Moran v. Bonyng*, 157 Cal. 297, 107 Pac. 314, complaint by intervener held insufficient in not alleging citizenship; *Smith v. Imperial Copper Co.*, 11 Ariz. 197, 89 Pac. 512, complaint held insufficient in description of claim; *Allyn v. Schultz*, 5 Ariz. 159, 48 Pac. 963, complaint held insufficient in not alleging citizenship; *Upton v. Santa Rita*, 14 N. M. 123, 89 Pac. 284, holder of possession of mining claim, like holder of location, must, to secure patent, possess necessary qualification of citizenship.

Failure to Mark Boundaries of mining location is fatal to its validity.

Approved in *Worthen v. Sidway*, 72 Ark. 225, 79 S. W. 781, provision that placer claims shall conform to established surveys where such have been made held not to dispense with necessity of working boundaries on ground.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 813, 857, 864.

83 Cal. 303-318, 23 Pac. 350, **IN RE LUCE.**

Unless Clearly Satisfied of Attorney's Guilt, court should not disbar him.

Approved in dissenting opinion in *In re Humphreys*, 15 Haw. 214, majority holding attorney guilty of unprofessional conduct.

Payment by Insolvent Debtor of Attorneys' Fees in advance out of goods of insolvent, when salable value of goods does not exceed reasonable fee, does not render attorneys liable to charge of fraudulent conspiracy.

Approved in *Farmers & Merchants' Nat. Bank v. Mosher*, 63 Neb. 136, 88 N. W. 554, following rule; *Zent v. Gilson*, 52 Wash. 322, 100 Pac. 741, where persons were arrested for larceny in another state, they could convey their property to attorneys to secure payment for services to be rendered in defending them, and preventing extradition.

Necessity of Bad or Fraudulent Motive to justify disbarment. See note, 18 L. R. A. 402.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 467.

83 Cal. 319-321, 23 Pac. 301, **BUNNEL v. STOCKTON.**

Statement on Motion for New Trial cannot be considered when not served within time limited.

Approved in *Wheeler v. Karnes*, 125 Cal. 53, 57 Pac. 894, following rule; *Desmond v. Faus* (Cal.), 33 Pac. 458, fact that counsel first consented to extension of time in which to serve statement on motion for new trial did authorize court to further extend time thirty days; *Hochnan v. New York Drygoods Co.*, 8 Idaho, 73, 67 798, party may have statement on motion for new trial settled after time has expired by showing absence of laches or excusable neglect.

Effect of Divorce on Homestead Rights. See note, 23 L. R. A. 239.

83 Cal. 322-332, 17 Am. St. Rep. 252, 23 Pac. 379, **IN RE ESTATE OF STEVENS.**

Widow is Entitled to Reasonable Allowance for support, considering all circumstances.

Approved in *Estate of Hessler*, 2 Caf. Prob. 357, 360, widow entitled to allowance although she had separate estate.

Law Providing for Adoption of Children is valid.

Approved in *Sires v. Melvin*, 135 Iowa, 480, 113 N. W. 113, and *Purinton v. Jamrock*, 195 Mass. 200, 80 N. E. 805, both holding laws relating to adoption are valid.

Power of Adoption is Legislative, and act of judge in passing on question is not part of judicial power vested in courts by constitution.

Approved in *Kaiser Land etc. Co. v. Curry*, 155 Cal. 657, 103 Pac. 348, action of Secretary of State in determining what corporations come within description in section 7, act of March 29, 1905, is ministerial and not judicial; *Estate of Renton*, 3 Caf. Prob. 525, adoption of children is institution created by statute, and one who claims to have been adopted must show statute was strictly complied with.

Order Making Family Allowance cannot be changed by court unless different set of facts are made to appear.

Distinguished in *Estate of Overton*, 13 Cal. App. 119, 108 Pac. 1022, when allowance was made "until further order of court," court had power to reduce allowance; *In re Estate of Fletcher*, 83 Neb. 162, 119 N. W. 235, modified order of allowance to widow sustained when no appeal was taken therefrom.

Order Making Allowance to Widow is Final after time to appeal has expired.

Approved in *In re Dougherty's Estate*, 34 Mont. 343, 86 Pac. 40, following rule; *Estate of Fargo*, 3 Cof. Prob. 222, order making family allowance held conclusive when not appealed from.

Parol Evidence is Inadmissible as to whether omission of testator to provide for child was intentional.

Disapproved in *Brown v. Brown*, 71 Neb. 205, 115 Am. St. Rep. 568, 98 N. W. 720, admitting parol evidence to show whether omission was intentional.

Pretermitted Heirs. See note, 115 Am. St. Rep. 589.

83 Cal. 333-343, 23 Pac. 295, **FOX v. STOCKTON COMBINED HARVESTER ETC. WORKS.**

In Action for Damages for Breach of Contract of sale of machine, evidence that other machines of same make are worthless is inadmissible.

Reaffirmed in *Lander v. Sheehan*, 32 Mont. 29, 79 Pac. 408.

In Action for Breach of Contract of sale of goods manufactured by defendant and sold under warranty, question whether representations alleged to have induced purchase were warranties is for jury.

Approved in *Luitweiler etc. Engine Co. v. Ukiah Water etc. Co.*, 16 Cal. App. 206, 116 Pac. 710, holding there was warranty of fitness of pump sold for purpose for which purchased.

Where Return of Machine Warranted to do certain work is delayed at request of manufacturer, he waives right to prompt return by purchaser on discovery of defect.

Reaffirmed in *Luitweiler etc. Engine Co. v. Ukiah Water etc. Co.*, 16 Cal. App. 208, 116 Pac. 711.

83 Cal. 344-361, 21 Pac. 15, 23 Pac. 314, **SMITH v. BISCOAILUZ.**

Guardian may be Authorized to Sell Property to maintain ward.

Approved in *Guardianship of Hayden*, 1 Cal. App. 77, 81 Pac. 668, authorizing guardian of incompetent to sell realty for best interests of estate, and for maintenance of ward.

Decree of Distribution Purporting to Convey undivided interests in property described, and all other property of decedent not discovered, passes title to lands of decedent not included in particular description.

Approved in *Humphry v. Protestant etc. Church*, 154 Cal. 172, 97 Pac. 188, similar decree held not void for uncertainty of description.

83 Cal. 361-367, 23 Pac. 357, **McALLISTER v. HAMLIN.**

Justice of Peace may Fix Compensation of shorthand reporter employed in taking down testimony given before him as committing magistrate, such action being judicial.

Reaffirmed in *Arnett v. State*, 168 Ind. 186, 80 N. E. 155, 8 L. R. A. (n.s.) 1192, upholding act empowering governor to determine salaries of police commissioners as not being improper delegation of legislative power.

No Appeal by Implication can Result from provision of subsequent statute, which is itself invalid.

Approved in *Matter of Clary*, 149 Cal. 737, 87 Pac. 582, and *Ex parte Sohncke*, 148 Cal. 263, 113 Am. St. Rep. 236, 82 Pac. 957, 2 L. R. A. (n.s.) 813, 7 Ann. Cas. 475, both following rule.

83 Cal. 368-373, 23 Pac. 389, BEWICK v. MUIR.

Summons is Sufficient if It States Nature of action in general terms.

Approved in *Stanley v. Rachofsky*, 50 Or. 475, 93 Pac. 355, holding summons sufficient though rate of interest demanded and date of computation was not stated.

Mining Claim, Within Meaning of mechanic's lien law, includes mines and mining ground, whether title thereto is inchoate or perfect.

Approved in *Berentz v. Belmont Oil Min. Co.*, 148 Cal. 582, 113 Am. St. Rep. 308, 84 Pac. 49, work done on oil well held to extend to give lien on eighty acre tract in process of development as oil mine; *Berentz v. Kern King Oil etc. Co.* (Cal. App.), 84 Pac. 47, holding lien for drilling oil well enforceable only against such land as was necessary for convenient use and occupation of well; *Escott v. Crescent Coal & Nav. Co.*, 56 Or. 195, 196, 106 Pac. 454, 455, work done on coal mine held to give mechanic's lien thereon.

Extent of Land to Which Mechanic's Lien will attach. See note, 26 L. R. A. (n. s.) 836.

To Support Judgment for Materialman's Lien, there should be finding that materials furnished were used in work done.

Approved in *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 701, 118 Pac. 107, and *Fuller v. Ryan*, 44 Wash. 387, 87 Pac. 486, both reaffirming rule.

83 Cal. 374-379, 23 Pac. 391, PEOPLE v. CLINE.

Defendant Accused of Grand Larceny who testifies for himself as to innocent possession of property may be cross-examined as to whereabouts of person from whom he claims to have purchased it.

Approved in *People v. Gallagher* (Cal.), 33 Pac. 893, defendant charged with embezzlement, who merely denied advising another to take money from bank for purpose of embezzling it, and denied all knowledge of his intention to do so, could not be cross-examined as to facts occurring after such taking.

Cross-examination of Defendant in Criminal Cases. See note, 15 L. R. A. 669.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 495, 497.

83 Cal. 380-383, 23 Pac. 421, PEOPLE v. BOLING.

Where Defendant Charged With Murder is convicted of manslaughter, erroneous instructions as to malice cannot have been prejudicial.

Approved in *Loudenback v. Territory*, 19 Okl. 202, 91 Pac. 1031, holding error in charge as to murder in first degree harmless when conviction was for manslaughter.

Burden of Proof is on Defendant Accused of homicide to show circumstances of mitigation or excuse, but they need not be proved by preponderance of evidence, and presumption of unlawful intent is rebutted by evidence raising reasonable doubt.

Approved in *Prince v. United States*, 3 Okl. Cr. 706, 109 Pac. 243, approving instruction in regard to burden of proof of circumstances in justification of homicide.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n. s.) 490.

83 Cal. 384-387, 17 Am. St. Rep. 261, 23 Pac. 320, QUAN WO CHUNG v. LAUMEISTER.

Order of Restitution of Premises Made on appeal in unlawful detainer suit cannot be defeated by claim of third person who has entered since defendant was dispossessed under independent title.

Approved in *Lehman-Durr Co. v. Folmar*, 166 Ala. 331, 139 Am. St. Rep. 37, 51 So. 956, decree of restitution made upon reversal of judgment does not necessarily finally determine rights of parties in subject matter restored.

Reversal of Judgments. See note, 96 Am. St. Rep. 136.

83 Cal. 388-392, 23 Pac. 372, EX PARTE ROSENHEIM.

Where Sentence is of Imprisonment and Fine, there can be no further imprisonment imposed for nonpayment of fine.

Cited in *In re Johnson*, 6 Cal. App. 738, 93 Pac. 201, refusing to discharge on habeas corpus prisoner sentenced to both fine and imprisonment in county jail, and imprisonment for nonpayment of fine, when he could not be discharged by reason of sentence of imprisonment alone; dissenting opinion in *Ex parte Karlson*, 160 Cal. 386, 117 Pac. 450, majority holding, where fine is imposed for contempt, court may enforce its payment by imprisonment till paid.

Effect of Excessive Sentence. See note, 45 L. R. A. 151.

Cruel and Unusual Punishments. See note, 35 L. R. A. 568, 570, 571.

Miscellaneous.—Cited in *In re Collins* (Cal.), 23 Pac. 374, companion case.

83 Cal. 393-414, 23 Pac. 303, PEOPLE v. CENTRAL PACIFIC R. R. CO.

Where Corporation is Sued for Taxes, fact of incorporation must be alleged, in order to determine jurisdiction.

Approved in *Fegtly v. Village Blacksmith Min. Co.*, 18 Idaho, 540, 111 Pac. 130, holding fact of incorporation sufficiently alleged as against general demurrer.

Tax Proceedings are in Invitum, and to be valid, loan must be strictly complied with.

Approved in *Commercial Nat. Bk. v. Schlitz*, 6 Cal. App. 182, 91 Pac. 753, holding tax deed invalid for uncertainty in description; *Preston v. Hirsch*, 5 Cal. App. 489, 90 Pac. 967, holding void certificate of tax sale with date of year of assessment left blank; *City of Miami v. Miami Realty etc. Co.*, 57 Fla. 369, 49 So. 56, holding bill to enforce lien for unpaid taxes defective in not alleging year for which taxes were assessed.

When Provisions of Any Title in Codes contravene provisions of any other title, provisions of each title must prevail as to all matters and questions arising out of subject matter of such title.

Approved in *State v. Campbell*, 3 Cal. App. 605, 86 Pac. 841, in action by state to recover moneys coming into hands of superintendent of state asylum, section 433, Political Code, held to control as to duties of controller in bringing action, and section 395, Code of Civil Procedure, as to place of trial.

Whether Act is General or Special is determined by its substance, not by its form.

Approved in *State v. Lawrence*, 79 Kan. 258, 100 Pac. 494, where no general law could affect requirement of Constitution, it was no objection that law was special in form.

Scheme for Taxation of Railroads situated in more than one county prescribed in sections 3665 to 3679, Political Code, is invalid as special legislation.

Overruled in *City of Los Angeles v. Glassell*, 4 Cal. App. 46, 87 Pac. 242, upholding Statutes of 1880, page 136, providing for recovery of taxes.

Distinguished in *Hughes v. Lazard*, 5 Ariz. 6, 43 Pac. 423, upholding law that judgment for delinquent taxes could be entered on service only by publication.

Miscellaneous.—Cited in *People v. Southern Pac. R. Co.* (Cal.), 23 Pac. 310, *People v. San Pablo & T. R. Co.* (Cal.), 23 Pac. 310, *People v. Northern Pac. Ry. Co.* (Cal.), 23 Pac. 310, and *People v. California Pac. R. Co.* (Cal.), 23 Pac. 310, all companion cases.

83 Cal. 415-418, 23 Pac. 392, ESTATE OF COOK.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

Entry of Judgment Nunc Pro Tunc. See note, 20 L. R. A. 149.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 626.

83 Cal. 419-420, 23 Pac. 321, PEOPLE v. BEAVER.

Improper Statements of District Attorney cannot be considered on appeal unless objection thereto was made at time.

Approved in *People v. Owens*, 3 Cal. App. 752, 86 Pac. 981, *People v. Ye Foo*, 4 Cal. App. 743, 89 Pac. 454, and *People v. Amer*, 8 Cal. App. 143, 96 Pac. 404, all following rule.

83 Cal. 420-422, 23 Pac. 383, GOLDTREE v. THOMPSON.

Trustees Under Will cannot Litigate Claims of one heir against another.

Approved in *In re Healy's Estate* (Cal.), 66 Pac. 176, administrator cannot represent either side of contest between legatees, heirs, or devisees.

Trustees Under Will Suing for Construction thereof are not aggrieved parties entitled to appeal from order allowing fees to attorney for guardian ad litem for minor heirs.

Approved in *Wash. County Abstract Co. v. Stewart*, 9 Idaho, 381, 74 Pac. 957, person not party to suit not entitled to writ of review.

83 Cal. 423-428, 23 Pac. 393, IN RE ESTATE OF HILLIARD.

Where Vouchers of Expenses of Executors are required, explanation of nonproduction may be given.

Approved in *Rice v. Tilton*, 14 Wyo. 118, 82 Pac. 581, holding payments by administrator improperly allowed in absence of voucher of any kind.

Liability of Executors or Trustees for compound interest. See note, 29 L. R. A. 634.

83 Cal. 428-432, 23 Pac. 705, ORD v. BARTLETT.

Adverse Title to Mortgaged Premises held by parties claiming by conveyance prior to mortgage is not subject to litigation in suit to foreclose mortgage.

Approved in *Wardlow v. Middleton*, 156 Cal. 586, 105 Pac. 738, *Webb v. Winter* (Cal.), 65 Pac. 1030, *Hoppe v. Hoppe* (Cal.), 36 Pac. 390, *Tinsley v. Atlantic Mines Co.*, 20 Colo. App. 66, 77 Pac. 14, and *Gennes v. Peterson*, 54 Or. 380, 103 Pac. 516, all following rule.

83 Cal. 440-444, 23 Pac. 376, MECHANICS' BUILDING & LOAN ASSN. v. KING.

Mortgage on Homestead Executed by Husband and wife cannot be foreclosed unless claim is presented against estate.

Approved in *Hibernia Sav. etc. Society v. Laidlaw*, 4 Cal. App. 629, 88 Pac. 731, where widow's mortgage on homestead was not foreclosed during life, nor presented as claim against estate, right to foreclose was lost.

83 Cal. 445-446, 23 Pac. 524, ROVEGNO v. HUNT.

When Interlocutory Decree in Partition is entered by consent of parties and sale effected thereunder, tenant in possession cannot appeal from order granting writ of assistance to purchaser.

Overruled in *Gordan v. Graham*, 153 Cal. 299, 95 Pac. 146, in partition suit tenant in common in possession could appeal from order confirming sale.

Mandamus Does not Lie to Compel Judge to fix bond on appeal from order granting writ of assistance to purchaser, who obtained title under decree in partition, when time for appeal from such decree has expired.

Distinguished in *Gordan v. Graham*, 153 Cal. 299, 95 Pac. 146, writ lies to compel judge to fix bond to stay proceedings on writ of assistance on appeal by tenant in possession from order refusing to vacate order for writ of assistance.

83 Cal. 447-450, 23 Pac. 530, BALLERINO v. MASON.

Public Officer is not Liable for Error done in performance of act within his discretion.

Approved in *Garff v. Smith*, 31 Utah, 109, 120 Am. St. Rep. 924, 86 Pac. 774, state sheep inspector not liable for error in inspecting and quarantining sheep.

Personal Liability of Judicial Officers. See note, 137 Am. St. Rep. 50.

83 Cal. 450-451, 23 Pac. 527, MAZKEWITZ v. PIMENTEL.

Specifications of Error Which Merely Attack judgment or conclusions of law are insufficient.

Approved in *Crooks v. Harmon*, 29 Utah, 308, 81 Pac. 96, holding assignment of error that judgment is not supported by evidence raised no question as to sufficiency of evidence to support findings; *Kelly v. Strouse*, 116 Ga. 896, 43 S. E. 290, ground for motion for new trial that verdict is contrary to law is too general; *Hayford v. Wallace* (Cal.), 46 Pac. 302, holding assignment of error that findings do not support judgment could not be considered on appeal from order denying new trial.

83 Cal. 453-457, 23 Pac. 378, PEOPLE ex rel. TRAVERS v. FREESE.

Miscellaneous.—Cited in *People ex rel. Eldridges v. Bulger* (Cal.), 23 Pac. 379, companion case.

83 Cal. 457-460, 23 Pac. 531, COTTRELL v. COTTRELL.

Court is not Required to Impose Costs as terms upon setting aside default.

Approved in *Olson v. Sargent County*, 15 N. D. 148, 107 N. W. 44, setting aside default without terms not abuse of discretion.

Public has Interest in Divorce Suit, and court should afford fullest possible hearing to prevent collusion and fraud.

Approved in *Pringle v. Pringle*, 55 Wash. 97, 104 Pac. 137, vacating divorce decree, and remanding for fuller hearing when fraud was charged.

83 Cal. 460-468, 17 Am. St. Rep. 266, 23 Pac. 395, EX PARTE SPENCER.

Court may Modify Allowance of permanent alimony, having regard to circumstances of parties.

Approved in *Soule v. Soule*, 4 Cal. App. 105, 87 Pac. 208, decree providing for "permanent alimony" held not to preclude modification of amount.

Husband's Prospects as Basis for Alimony. See note, 4 L. R. A. (n. s.) 909.

Remarriage of Wife Does not of Itself avoid previous decree for alimony.

Approved in *Cohen v. Cohen*, 150 Cal. 104, 88 Pac. 270, in absence of showing of inability of second husband to support wife, first husband entitled to have alimony stopped.

Inability to Comply With Order for Payment of alimony is ground for purging party from contempt in nonpayment.

Approved in *State v. District Court*, 37 Mont. 488, 97 Pac. 842, holding party unable to comply with order for payment of money into court not guilty of contempt.

Contempt Proceedings to Enforce Payment of alimony. See note, 137 Am. St. Rep. 883.

Facts Showing Jurisdiction of Contempt proceeding must appear of record.

Approved in *Cline v. Langan*, 31 Nev. 244, 101 Pac. 554, affidavit for contempt proceedings held insufficient; *Lutz v. District Court*, 29 Nev. 153, 86 Pac. 445, affidavit deficient in failing to allege defendant's ability to comply with order for payment of alimony.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 184.

Allowance to Husband from Property Held by Wife in divorce cases. See note, 34 L. R. A. 113.

83 Cal. 473-477, 23 Pac. 534, 8 L. R. A. 48, CASE v. SUN INS. CO.

Condition in Insurance Policy Providing against recovery unless suit is brought within stipulated time is valid.

Approved in *Tebbets v. Fidelity and Casualty Co.*, 155 Cal. 139, 99 Pac. 502, upholding condition requiring suit to be brought in six months as reasonable time.

Limitation of Right to Sue on Fire Policy held not to begin to run until adjusted claim became due, although policy provided time should run from date of loss.

Approved in *Methvin v. Fidelity Mut. Life Assn. (Cal.)*, 58 Pac. 388, where policy was dated July 1st but delivered only on payment

of first quarterly premium, September 3d, policy had not been in force three months when insured died in November, and there was no forfeiture for nonpayment of second quarter, October 1st.

When Contractual Limitation of Time for Suit on insurance policy begins to run. See note, 47 L. R. A. 703.

83 Cal. 491-501, 24 Pac. 157, FRESNO NAT. BANK v. SUPERIOR COURT.

Section 16, Article XII, Constitution, providing where corporation may be sued, is permissive and does not conflict with section 5, article VI, regulating venue of real actions.

Approved in *Bond v. Karma-Ajax Con. Min. Co.*, 15 Cal. App. 474, 115 Pac. 256, holding suit properly brought against corporation on claims for goods and services although not in county of residence, or where contract was to be performed; *Pittman v. Carstenbrook*, 11 Cal. App. 227, 104 Pac. 700, holding plaintiff could bring action for damages against corporation in county of residence, though cause of action arose in another county; *Miller & Lux v. Kern County Land Co. (Cal.)*, 65 Pac. 313, corporation sued in county of residence for injuries to real estate had right to have action tried in county where real estate was situated.

Where Corporation is Sued in Any County provided for in section 16, article XII, Constitution, it cannot demand change of venue as matter of absolute right, but only as in other cases and for other reasons.

Distinguished in *Krogh v. Pacific Gateway etc. Co.*, 11 Cal. App. 240, 104 Pac. 699, corporation sued in transitory action in county other than principal place of business has right to have venue changed to county of its residence.

Locality of Jurisdiction of State Court over foreign corporation. See note, 70 L. R. A. 694, 702.

Administration of Federal Laws in state courts. See note, 48 L. R. A. 35, 37.

Writ of Prohibition. See note, 111 Am. St. Rep. 960.

83 Cal. 507-515, 23 Pac. 700, MONTEREY COUNTY v. CUSHING.

Notice of Intention to Move for New Trial printed in transcript and made part of record by stipulation does not nullify assertion in statement that notice of different character was given.

Approved in *Mendocino County v. Peters*, 2 Cal. App. 27, 82 Pac. 1123, recital in bill of exceptions that notice of intention to move for new trial was seasonably served held to prevail over notice itself, which shows it was served and filed too late.

Private Road Referred to in Section 2692, Political Code, designates merely particular kind of public road, and use is public.

Approved in *Los Angeles County v. Reyes (Cal.)*, 32 Pac. 234, holding legislature could declare such private road to be public, and land therefor could be taken by right of eminent domain.

Action to Condemn Property of Estate is properly brought against personal representative of deceased.

Approved in *McClung v. Cullison*, 15 Okl. 408, 82 Pac. 501, action to foreclose mortgage properly brought against administrator, and heirs concluded by judgment therein.

Uses for Which Power of Eminent Domain cannot be exercised.
See note, 102 Am. St. Rep. 828.

Miscellaneous.—Cited in *Hollister v. State*, 9 Idaho, 16, 71 Pac. 543.

83 Cal. 515-521, 23 Pac. 795, 8 L. R. A. 575, **McDANIEL v. OUM-MINGS.**

Easements in Flow of Surface Water are regulated by common law.

Approved in *Fordham v. Northern Pac. Ry. Co.*, 30 Mont. 432, 104 Am. St. Rep. 729, 76 Pac. 1043, 66 L. R. A. 556, railroad cannot obstruct overflow of stream in natural channel by embankment along its course; *Davis v. Fry*, 14 Okl. 348, 349, 78 Pac. 182, 183, 69 L. R. A. 460, holding pond without natural outlet could not be artificially drained to injury of lower tenement.

Owner of Upper Tract has Easement to have surface water which has been accustomed by natural flow to pass off from his land, over land below, flow over such land, without obstruction.

Approved in *Heier v. Krull*, 160 Cal. 444, 117 Pac. 531, and *Humphreys v. Moulton*, 1 Cal. App. 258, 81 Pac. 1085, both following rule.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 720, 721, 722.

Right of Owner of Lower as Against upper land owner to obstruct surface water in natural channel. See note, 22 L. R. A. (n.s.) 801.

Rights as to Flow of Surface Water. See note, 21 L. R. A. 594, 599.

What is Surface Water. See note, 25 L. R. A. 530.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n.s.) 106.

83 Cal. 521-539, 23 Pac. 695, **JACKSON v. TORRENCE.**

Property Conveyed to Married Woman is her separate property in proportion in which it was paid for with her separate funds.

Reaffirmed in *Heintz v. Brown*, 46 Wash. 389, 123 Am. St. Rep. 937, 90 Pac. 212.

What is Community Property. See notes, 126 Am. St. Rep. 104, 107, 111, 125; 4 Cal. Prob. 46, 49, 53, 67.

Purchase of Property With Community Funds and deed to wife at request of husband raises presumption of gift to her.

Approved in *Killian v. Killian*, 10 Cal. App. 316, 101 Pac. 807, and *Wright v. Wright* (Cal.), 41 Pac. 696, both following rule; *Santa Cruz Rock Pav. Co. v. Lyons* (Cal.), 43 Pac. 602, presumption that property conveyed to married woman becomes her separate estate is not conclusive.

Distinguished in *Nilson v. Sarment*, 153 Cal. 530, 126 Am. St. Rep. 91, 96 Pac. 317, holding where property was bought for home with community funds, deed to wife without intention to make it her separate property did not destroy community character.

Where Husband and Wife Hold Separate undivided interests in property and have jointly agreed to sell it, husband does not convey his separate share when she fails to acknowledge their joint deed.

Approved in *Mullarky v. Young*, 9 Cal. App. 688, 100 Pac. 710, contract for conveyance of realty between two named parties of first and two of second part held incomplete when only one on each part signed; *Tillery v. Land*, 136 N. C. 547, 48 S. E. 828, vendor

will not be compelled to specifically perform contract to sell land where his evident intent was not to sell his own interest alone, but in conjunction with interests of others, and conveyance of latter interests cannot be obtained.

Disapproved in *Melvin v. Woolley*, 103 Minn. 502, 115 N. W. 655, 22 L. R. A. (n. s.) 595, deed of tenant in common to whole of property executed without authority in name of cotenant but repudiated by him held to convey first tenant's interest.

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 378.

Specific Performance of Contracts for conveyance where wife refuses to join. See note, 24 L. R. A. 763.

Refusal of Specific Performance of Valid Contract for other reason than that property is of a particular class. See note, 128 Am. St. Rep. 383, 384.

Specific Performance of Contracts Calling for services of a personal nature. See note, 140 Am. St. Rep. 57, 59.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 112.

83 Cal. 547-553, 17 Am. St. Rep. 272, 23 Pac. 703, 8 L. R. A. 425,
STONE v. HAMMELL.

Surety Paying Note so as to Extinguish debt of principal to original creditor can recover from principal amount so paid.

Approved in *Crystal v. Hutton*, 1 Cal. App. 254, 81 Pac. 1116, comaker designated as surety by payment of note extinguishes its obligation and can recover from principal only upon implied obligation to reimburse him; *Yule v. Bishop* (Cal.), 62 Pac. 70, indorser of corporation note who paid it and took assignment could not maintain action thereon against stockholder; *Sandoval v. United States Fidelity etc. Co.*, 12 Ariz. 357, 100 Pac. 820, surety paying debt of principal could recover from principal only amount actually paid; dissenting opinion in *Burrus v. Cook*, 215 Mo. 509, 117 Mo. App. 406, 93 S. W. 895, majority holding surety of judgment debtor who satisfied judgment could maintain action against cosurety at any time within period within which judgment creditor might have asserted rights against principal.

When Sureties' Cause of Action against principal becomes perfect and enforceable. See note, 134 Am. St. Rep. 557, 562.

83 Cal. 553-557, 23 Pac. 691, **TROPE v. KERNS.**

General Retainer Does not Give Attorney right to compromise rights of client.

Reaffirmed in *Gibson v. Nelson*, 111 Minn. 188, 137 Am. St. Rep. 549, 126 N. W. 733.

Implied Authority of Attorney in conducting litigation. See note, 132 Am. St. Rep. 164, 169.

83 Cal. 558, 23 Pac. 1119, **EX PARTE McCONNELL.**

Prisoner Convicted on Information cannot, on habeas corpus, raise objection that he was not examined by magistrate prior to filing of information.

Reaffirmed in *In re Knudtson*, 10 Idaho, 680, 682, 79 Pac. 642, 643.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 184.

83 Cal. 559-561, 23 Pac. 527, NORTON v. STURLA.

Unlawful Detainer. See note, 120 Am. St. Rep. 36.

83 Cal. 566-571, 23 Pac. 522, SAN JOSE ETC. R. R. CO. v. MAYNE.

Section 1249, Code of Civil Procedure, providing value of property taken and damages under eminent domain proceedings shall be determined as of date of summons, is valid.

Reaffirmed in *Los Angeles v. Gager*, 10 Cal. App. 381, 102 Pac. 19.

Counsel Fees of Defendant are not Part of damages assessable for taking land under eminent domain.

Approved in *McCready v. Rio Grande W. Ry. Co.*, 30 Utah, 7, 83 Pac. 333, holding railroad dismissing condemnation proceeding in good faith not liable for costs of defendant in preparing defense as damages.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 313.

Right to Set Off Benefits Against Damages on condemnation. See note, 9 L. R. A. (n.s.) 829.

Where Special Findings are Conflicting, they neutralize each other.

Approved in *Fishbaugh v. Spunaugle*, 118 Iowa, 343, 92 N. W. 60, mere inconsistency between special findings held not fatal to general verdict.

83 Cal. 583-588, 23 Pac. 794, ESTATE OF MOORE.

Grounds for Removal of Executors and Administrators. See note, 138 Am. St. Rep. 540.

83 Cal. 588-589, 23 Pac. 713, NUNAN v. VALENTINE.

Where Appellant Moves to Dismiss Appeal because judgment has been satisfied, question of satisfaction in fraud of rights of respondents' assignees cannot be tried.

Distinguished in *Cook v. Civil Service Commission*, 160 Cal. 600, 117 Pac. 666, under San Francisco charter, civil service commission cannot set aside eligible list pending appeal from superior court decision ordering list annulled.

83 Cal. 589-613, 23 Pac. 1102, BULWER CONSOLIDATED MINING CO. v. STANDARD CONSOL. MINING CO.

New Matter in Answer on Cross-complaint in quiet title suit not relating to land in dispute is improper and should be stricken out on motion.

Approved in *McFarland v. Matthai*, 7 Cal. App. 600, 95 Pac. 180, cross-complaint in regard to other land than that sued for in ejectment held improper.

In Action to Quiet Title, Where Defendant relies on title in himself, cross-complaint is not necessary.

Reaffirmed in *Bacon v. Rice*, 14 Idaho, 113, 93 Pac. 512.

Purpose of Averring Adverse Claim in quiet title suit is to notify defendant of nature of action and require him to set forth and litigate any adverse claim he may have.

Approved in *Peterson v. Gibbs*, 147 Cal. 5, 81 Pac. 123, 109 Am. St. Rep. 107, plaintiff has right to have adverse claim of defendant defined and determined; *Varni v. Devoto*, 10 Cal. App. 307, 101 Pac. 935, that complaint shows adverse possession of cotenant does not

affect action in partition, in which rights of all parties may be determined; *Dorris v. McManus*, 4 Cal. App. 151, 152, 87 Pac. 289, defendant in quiet title suit must prove adverse claim, and if no proof is offered, judgment must be for plaintiff; *Devine v. City of Los Angeles*, 202 U. S. 333, 26 Sup. Ct. 652, 50 L. Ed. 1046, complaint need not allege nature of estate or interest claimed by defendant.

Absence of Finding That Defendants Asserted claim adverse to plaintiff in quiet title suit is immaterial.

Approved in *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 321, 119 Am. St. Rep. 199, 88 Pac. 364, 8 L. R. A. (n.s.) 682, holding it immaterial, under *McEnerney Act*, whether in response to notice given to all claimants there is or is not any appearance to contest plaintiff's right.

What Special Verdict must Contain. See note, 24 L. R. A. (n.s.) 41.

Miscellaneous.—Miscited in *Notley v. Brown*, 17 Haw. 402.

83 Cal. 613-617, 23 Pac. 1109, **BULWER CONSOLIDATED MIN. CO. v. STANDARD CONSOL. MIN. CO.**

Bias of Judge Against Defendant is not ground for change of venue.

Disapproved in *Day v. Day*, 12 Idaho, 563, 86 Pac. 533, holding Constitution guaranteed right of trial by unprejudiced judge.

83 Cal. 618, 23 Pac. 1084, **LANGAN v. LANGAN.**

Appeal from Order in Divorce Action allowing one hundred and fifty dollars counsel fees dismissed because amount was too small to give jurisdiction.

Cited in *Aronson v. Levison*, 148 Cal. 366, 83 Pac. 155, no appeal lay from order directing payment of two hundred dollars for services to guardian pendente lite of infant party to quiet title suit.

83 Cal. 619-620, 24 Pac. 45, **IN RE ESTATE OF WIARD.**

Appeal from Decree in Distribution of estate is governed by section 1715, Code of Civil Procedure, which limits time for taking to sixty days after entry of decree.

Approved in *Estate of Dunphy*, 158 Cal. 3, 109 Pac. 628, dismissing appeal in guardianship proceeding taken before entry of decree; *Estate of Brewer*, 156 Cal. 90, 103 Pac. 487, dismissing appeal from decree of distribution not taken within sixty days from entry.

Subdivision 3, Section 963, Code of Civil Procedure, enumerates all cases in which appeal may be taken in probate proceedings.

Approved in *In re Seymour*, 15 Cal. App. 290, 114 Pac. 1024, order directing place of interment not appealable; *In re Kelly's Estate*, 31 Mont. 357, 78 Pac. 579, holding under section 1722, Code of Civil Procedure, order refusing to vacate decree of distribution and settlement of final account was not appealable.

83 Cal. 620-621, 24 Pac. 276, **EX PARTE AH SAM.**

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 189, 193.

83 Cal. 621-622, 24 Pac. 162, **SOMERS v. SOMERS.**

Statement on Motion for New Trial may be used in support of appeal from judgment.

Approved in *Steve v. Bonner Ferry etc. Co.*, 13 Idaho, 396, 92 Pac. 366, rule applies whether or not statement was used on motion for new trial.

83 Cal. 623-626, 22 Pac. 928, 23 Pac. 1085, **EUREKA v. ARMSTRONG.**

Instance of Ejectment by City to recover portion of alleged street.

Cited in *San Francisco v. Grote* (Cal.), 47 Pac. 940, city cannot maintain ejectment to recover street dedicated by user without showing title in fee.

Ejectment for Public Easement. See note, 11 L. R. A. (n. s.) 130.

Sale of Land Described as Bounded by specified street, which boundary is where street would be if extended, is offer to dedicate, complete upon acceptance.

Approved in *Watertown v. Troeh*, 25 S. D. 27, 125 N. W. 503, evidence held sufficient to show intent to dedicate strip for public alley.

General Order of City Council Accepting all streets dedicated is sufficient acceptance though street is not named.

Approved in *Los Angeles v. McCollum*, 156 Cal. 151, 103 Pac. 916, 23 L. R. A. (n. s.) 378, holding ordinance accepting in general terms all streets, etc., offered for dedication to be sufficient acceptance of offer to dedicate arising from recording of map.

Discontinuance or Vacation of Highway by acts of authorities. See note, 26 L. R. A. 823.

83 Cal. 626-629, 23 Pac. 1111, **PHELPS v. PRUSCH.**

Contract of Broker Who Undertakes to sell land is that he will find purchaser ready to buy on specified terms and when he produces such purchaser he performs contract.

Approved in *Bacon v. Davis*, 9 Cal. App. 99, 98 Pac. 77, following rule; *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 397, 107 Pac. 623, broker's commission not earned when finding offer of purchaser was not shown; *Levy v. Wolf*, 2 Cal. App. 494, 84 Pac. 315, commission earned when oral offer was procured within life of broker's contract, though sale was consummated after its expiration through another broker; *Hill v. McCoy*, 1 Cal. App. 163, 81 Pac. 1017, commission earned when broker procured purchaser with whom he sought to negotiate sale, which was finally made by owner on terms fixed by him within life of broker's contract; *Bell v. Stedman*, 88 Neb. 627, 130 N. W. 258, broker's right to commission not defeated by refusal of owner's wife to join in deed; *Yoder v. Randol*, 16 Okl. 315, 83 Pac. 539, 3 L. R. A. (n. s.) 576, and *Arnold v. National Bank of Waupaca*, 126 Wis. 365, 105 N. W. 829, 3 L. R. A. (n. s.) 580, both holding broker not deprived of commission by reason of vendor's inability to furnish good title.

When Broker Earns Commission. See notes, 139 Am. St. Rep. 254; 44 L. R. A. 593, 605, 623.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 594, 609, 610, 611.

83 Cal. 629-632, 24 Pac. 836, **CRAWFORD v. INDEPENDENT STOVE-PIPE WORKS.**

Creditor of Partnership is Entitled to Recover against secret partner when discovered.

Reaffirmed in *Kennedy etc. Lumber Co. v. Taylor* (Cal.), 31 Pac. 1123.

83 Cal. 633-635, 23 Pac. 1083, KIRSCH v. KIRSCH.

Where Case is Tried upon Theory Issues are properly joined and no exception is taken, objection cannot be raised on appeal.

Approved in Haines v. Stilwell (Cal.), 40 Pac. 333, fact that allegations in complaint were by recital only could not be objected to for first time on appeal; Ennor v. Raine, 27 Nev. 216, 74 Pac. 3, that facts alleged in answer did not constitute proper counterclaim could not be raised for first time on appeal.

83 Cal. 636-642, 24 Pac. 162, BROWN v. STARK.

Sale of Lots by Reference to Plat showing avenue, which was open to public, precludes vendor setting up claim that avenue was private right of way.

Approved in Los Angeles v. McCollum, 156 Cal. 153, 103 Pac. 916, 23 L. R. A. (n. s.) 378, owner, after recording map, could not give testimony of intent not to dedicate strips delineated thereon as streets.

83 Cal. 643-645, 24 Pac. 152, GIBSON v. SUPERIOR COURT.

Order Setting Aside Default is appealable.

Distinguished in Savage v. Smith, 154 Cal. 325, 97 Pac. 821, such order not appealable when no judgment was entered upon default.

Order Extending Time to Answer more than thirty days is in excess of jurisdiction and may be reviewed on certiorari.

Reaffirmed in Voorman v. Superior Court, 149 Cal. 268, 86 Pac. 695.

83 Cal. 645-648, 23 Pac. 1031, KNEEBONE v. KNEEBONE.

Order for Continuance will not be Disturbed on appeal unless record affirmatively shows court abused its jurisdiction.

Approved in Sheldon v. Landwehr, 159 Cal. 781, 116 Pac. 45, and Abrook v. Ellis, 6 Cal. App. 454, 92 Pac. 397, both refusing to disturb order denying continuance.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 84 CALIFORNIA.

84 Cal. 1-7, 23 Pac. 1027, MYERS v. DAUBENBISS.

Road not Used for Five Years ceases to be highway for any purpose.

Approved in *Sowadzki v. Salt Lake City*, 36 Utah, 140, 104 Pac. 116, restraining public authorities from opening highway which had been abandoned for more than five years.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 454.

Injunctive Relief as to Fences or Gates. See note, 7 L. R. A. (n. s.) 61.

84 Cal. 7-12, 24 Pac. 147, DENNERY v. SUPERIOR COURT.

Miscellaneous.—Cited in *In re Dennerly* (Cal.), 24 Pac. 149, on another appeal.

84 Cal. 12-21, 18 Am. St. Rep. 158, 23 Pac. 1091, SPANGLER v. SAN FRANCISCO.

To Constitute Watercourse It is not Necessary that water shall run in channel of stream all year.

Approved in *Huffner v. Sawday*, 153 Cal. 91, 94 Pac. 426, fact that river is dry during summer and that bed changes often does not deprive owners of land fronting on bed of character of riparian owners.

After Knowledge of Defect, City is Liable for injury to private premises caused by defective sewer.

Reaffirmed in *Cook v. San Francisco* (Cal.), 23 Pac. 1094.

Duty and Liability of Municipality with respect to drainage. See notes, 79 Am. St. Rep. 785; 61 L. R. A. 697.

Counsel Should not Impose Their Work upon court by stipulating that all pertinent evidence in transcript in another cause shall be considered as if embodied in new trial statement in which stipulation is made.

Approved in *Missouri etc. Ry. Co. v. Kidd*, 146 Fed. 500, 77 C. C. A. 13, parties cannot stipulate to postpone time for filing of briefs without court's consent.

84 Cal. 21-23, 23 Pac. 1026, DAVIDSON v. ELLMAKER.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 95.

84 Cal. 27-30, 23 Pac. 1026, LYONS v. ROACH.

Appearance of Attorney Need not be Made part of judgment-roll.

Approved in *Brown v. Caldwell*, 13 Cal. App. 31, 108 Pac. 874, and *Western Lumber etc. Co. v. Merchants' Amusement Co.*, 13 Cal. App. 10, 108 Pac. 894, both following rule.

84 Cal. 31-37, 24 Pac. 33, PEOPLE v. FERRY.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 822.

84 Cal. 41-50, 23 Pac. 1088, SACRY v. LOBREE.

Debtor is Solvent so Long as he has sufficient resources to pay his debts as they become due.

Approved in *McKee v. Title Ins. etc. Co.*, 159 Cal. 217, 113 Pac. 144, that corporation is unable to pay its debts as they become due when bonds are issued to stock subscribers as security for subscriptions does not make issuance of bonds fraudulent as to creditors.

84 Cal. 50-56, 23 Pac. 1029, EX PARTE ACOOK.

Facts Stated in Judgment of conviction for contempt are conclusive.

Approved in dissenting opinion in *Ex parte Duncan*, 42 Tex. Cr. 676, 62 S. W. 764, majority holding judgment in contempt reciting facts on which conviction is based is not conclusive as to such facts, but falsity thereof may be shown.

After Hearing, Conviction for Contempt will not be held void because some charges in affidavits are upon information and belief.

Approved in dissenting opinion in *State v. Newton*, 16 N. D. 166, 112 N. W. 59, majority holding court has no jurisdiction to arrest for constructive contempt where proceedings are based upon affidavits upon information and belief.

84 Cal. 57-60, 24 Pac. 111, HUBERT v. DUNN.

Appropriation of Official Salary may be payable out of any money not otherwise appropriated at time when payments become due.

Approved in *Harrison v. Horton*, 5 Cal. App. 420, 90 Pac. 718, where appropriation for salaries of district attorney's office is insufficient salary of assistant appointed under provisions of city charter may be paid out of general fund.

Appropriation for Official Salary may be made in any language expressing intention to provide for payment thereof as it accrues.

Approved in *State v. Eggers*, 29 Nev. 479, 482, 91 Pac. 822, 16 L. R. A. (n. s.) 630, publicity commission act of 1907 constitutes sufficient appropriation of chairman's salary but is void in so far as it authorizes payment of traveling expenses by state; *Menefee v. Askew*, 25 Okl. 628, 107 Pac. 161, game and fish warden act of 1909 constitutes valid appropriation of salary and traveling expenses of warden and deputies; *State v. King*, 108 Tenn. 279, 67 S. W. 814, general appropriation bills of 1899 and 1901 do not prevent payment of state factory inspector's salary.

Object of Constitutional Provision requiring appropriations to be made is to secure to legislature exclusive power of deciding how public funds shall be used.

Approved in *State v. Brian*, 84 Neb. 33, 120 N. W. 917, appropriation of proceeds of tax for two years is appropriation of whole amount of tax and not of portion collected during biennium.

Requisites of Appropriation for Official Salary or expenses. See note, 16 L. R. A. (n. s.) 634.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 37, 53.

84 Cal. 61-70, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809, **ASHTON v. DASHAWAY ASSOCIATION.**

Association Incorporated for Promoting Cause of temperance cannot divide corporate property or funds among its members.

Approved in *McConnell v. Combination Min. etc. Co.*, 30 Mont. 256, 104 Am. St. Rep. 703, 76 Pac. 200, resolution of directors voting themselves salary and back pay predicated on by-laws passed by them is fraudulent as against stockholders.

Stockholder may Compel Corporation to refund money paid by him for redemption of corporate property which directors wrongfully neglected to redeem.

Approved in *Duquesne Gold Mining Co. v. Glaser*, 46 Colo. 191, 103 Pac. 301, where judgment creditor and stockholder and vice-president agree to permit redemption of property from sale under judgment by other stockholders upon farmer's repudiation of agreement, latter may redeem and recover from corporation amount paid to redeem.

84 Cal. 71-77, 23 Pac. 1032, **COUNTY OF SAN LUIS OBISPO v. GRAVES.**

Subdivision of Constitutional Act in nature of special legislation and not germane to act is unconstitutional.

Approved in *Johnson v. Gunn* (Cal. App.), 84 Pac. 373, holding void amendment of 1901 to subdivision 13, section 184, County Government Act, relating to compensation of justices of peace.

84 Cal. 77-85, 24 Pac. 46, **IN RE STEPHENS.**

Necessity of Bad or Fraudulent Motive to justify disbarment. See note, 18 L. R. A. 401.

84 Cal. 89-95, 23 Pac. 1112, **BERSON v. EWING.**

Word "Debt" Does not Include Demand arising from tort.

Approved in *In re Harper*, 175 Fed. 423, common-law meaning of "debt" does not include claim for damages for false and fraudulent representations.

84 Cal. 100-101, 23 Pac. 1117, **McGEE v. SWEENEY.**

Where Court has Jurisdiction of Person, it has power to decree conveyance by him of property outside of state.

Reaffirmed in *Sullivan v. Kenney*, 148 Iowa, 388, 126 N. W. 359.

Jurisdiction of Equity Over Suits Affecting realty in another state or country. See note, 69 L. R. A. 677, 686, 696.

84 Cal. 104-107, 23 Pac. 1098, **HIMMELMAN v. HENRY.**

Failure to Find upon Issue, finding upon which would invalidate judgment supported by findings made, is not error unless it is shown evidence was submitted in relation to such issue.

Approved in *People v. McCue*, 150 Cal. 200, 88 Pac. 901, *Miller v. Price* (Cal.), 39 Pac. 781, *Bailiff v. Powers* (Cal.), 37 Pac. 509, *Newman v. Maldonado* (Cal.), 30 Pac. 834, and *Downing v. Donegan*, 1 Cal. App. 712, 82 Pac. 1112, all following rule; *Coats v. Coats*, 160 Cal. 680, 118 Pac. 445, where court fails to find upon issue of waiver of alimony, it will be presumed, in absence of contrary showing, that there was no evidence to sustain such finding; *Schoonover v. Birnbaum*, 150 Cal. 737, 89 Pac. 1108, if judgment is supported by findings, want of finding on issue will be presumed, in absence of contrary showing, to be result of absence of evidence in support of such issue; *Holzheier v. Hayes* (Cal.), 52 Pac. 838, where findings show there is evidence upon issue as to which there is no finding, judgment will be reversed; *Reed v. Harshall*, 12 Cal. App. 701, 108 Pac. 721, where court fails to find on counterclaim, it will be presumed that there was no evidence upon that issue and that counterclaim was abandoned; *Rauer's Law etc. Co. v. Leffingwell*, 11 Cal. App. 497, 105 Pac. 428, failure to find upon defense of want of consideration is not error where there is no evidence in relation to such issue; *Gerth v. Gerth*, 7 Cal. App. 738, 95 Pac. 905, judgment will not be reversed for failure to find upon issue if omitted finding would be adverse to complaining party; *Hatton v. Gregg*, 4 Cal. App. 546, 88 Pac. 596, where in action to restrain cutting of trees evidence shows trespasser had been so doing for five years, but pleading fails to set up right to easement, failure to find upon issue as to statute of limitations is not error; *Roberts v. Ball* (Cal.), 38 Pac. 950, failure to find on certain issues and making findings outside of issues is not error where findings on material issues warrant judgment; *Bowers v. Cottrell*, 15 Idaho, 241, 96 Pac. 943, finding that deed was never delivered renders unnecessary finding that conveyance was not made to defraud creditors.

84 Cal. 107-113, 23 Pac. 528, 24 Pac. 381, IN RE GRIFFITH.

If Petition for Revocation of Letters of administration does not show jurisdictional facts do not exist for purpose of application, it will be presumed they do.

Approved in *Del Campo v. Camarillo*, 154 Cal. 654, 98 Pac. 1053, where fact of making of decree of distribution appears, it will be presumed court had jurisdiction to make it; *Del Campo v. Camarillo*, 154 Cal. 655, 98 Pac. 1053, allegation that court has no jurisdiction to make decree of distribution is conclusion of law, contrary to presumption arising from fact of rendition of judgment; *Rice v. Tilton*, 14 Wyo. 112, 182 Pac. 579, order appointing administrator reciting that proof of notice was made, but in fact made without mailing of notice to executor, is voidable only.

Order Appointing Administrator Made upon petition setting forth jurisdictional facts is adjudication of existence of such facts, and is valid until set aside.

Approved in *Dungan v. Superior Court*, 149 Cal. 103, 84 Pac. 769, order appointing administrator alleging existence of property in certain county is determination of that fact, and cannot be set aside on collateral attack; *Soules v. Robinson*, 158 Ind. 101, 92 Am. St. Rep. 301, 62 N. E. 1000, where in action to adjudge one incompetent record does not show appearance of or notice to alleged incompetent, judgment adjudging him incompetent is conclusive until set aside.

Jurisdiction, in so far as It Depends upon residence of deceased, cannot be collaterally attacked.

Distinguished in *Nash v. Sawyer*, 114 Iowa, 745, 87 N. W. 708, where person is appointed administrator in one county and subsequently same person is appointed administrator of same estate in another county, jurisdiction of court making second appointment may be collaterally attacked in action on bond given under first appointment.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 550.

Conclusiveness of Probate as Res Judicata. See note, 21 L. R. A. 685.

Collateral Impeachability of Findings as to jurisdictional facts on which administration is based. See note, 18 L. R. A. 242.

There cannot be Two Valid Administrators at same time.

Approved in *Dungan v. Superior Court*, 149 Cal. 100, 84 Pac. 768, under sections 1371 to 1379 of Code of Civil Procedure, application for letters of administration is made when petition is filed within section.

There is No Provision in Probate Procedure authorizing persons to file petition for revocation of letters of administration granted to others.

Approved in *Dungan v. Superior Court*, 149 Cal. 104, 84 Pac. 770, granting writ of prohibition restraining interference in settlement of estate by court in which application for letters was filed subsequent to filing of application in another court.

Grounds for Removal of Executors and administrators. See note, 138 Am. St. Rep. 549.

Application for Relief Against Default, under section 473 of Code of Civil Procedure, must be by proceeding in cause wherein default is taken.

Approved in *In re Burton*, 5 Cal. Prob. 238, refusing to entertain suit brought in one county to set aside certain stipulations between parties to probate proceeding in another county.

Judgment will be Set Aside only for such fraud as is extrinsic or collateral to matter tried in first suit.

Approved in *Flood v. Templeton*, 152 Cal. 155, 92 Pac. 81, 13 L. R. A. (n. s.) 579, setting aside judgment in foreclosure on ground that mortgagee fraudulently induced mortgagor not to avail herself of setoff; *Cragie v. Roberts*, 6 Cal. App. 315, 92 Pac. 100, where one through decision of land office obtains patent to land, another is not entitled to have former declared trustee for his benefit on ground that decision was procured by perjured testimony; *El Capitan Land etc. Co. v. Lees*, 13 N. M. 415, 86 Pac. 926, refusing to set aside judgment on ground that testimony of witnesses on first trial was false.

Relief from Decrees of Courts having exclusive jurisdiction over estates of decedents, minors and incompetent persons. See notes, 106 Am. St. Rep. 645; 1 Cal. Prob. 269.

Jurisdiction of Estates of Decedents. See note, 117 Am. St. Rep. 124.

Miscellaneous.—Cited in *Estate of Welch*, 3 Cal. Prob. 305.

84 Cal. 114-123, 24 Pac. 277, 12 L. R. A. 117, PEOPLE ex rel ATTORNEY GENERAL v. DASHAWAY ASSN.

When Corporations Exceed Their Powers, state may forfeit their franchises and dissolve them by quo warranto proceedings.

Approved in Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 679, 87 Pac. 31, in condemnation proceedings by railroad, good faith of corporators in forming corporation cannot be inquired into; Attorney General v. New York etc. R. R. Co., 197 Mass. 197, 83 N. E. 410, attorney general in quo warranto against corporation may demand judgment of fine and forfeiture of franchise not conferred by law; State v. Standard Oil Co., 218 Mo. 350, 116 S. W. 1009, where corporation forms combination to control prices, state may forfeit franchises and licenses by proceedings in quo warranto.

Word "Temperance" is Too Vague in its signification to establish public charity when not limited to sense of restraining abuse of intoxicants.

Approved in Hale v. Stimson, 198 Mo. 157, 95 S. W. 891, upholding statute providing that no person while kept at poorhouse or other asylum at public expense, except at soldiers' home, shall be entitled to vote.

Enforcement of General Bequest for Charity or religion. See note, 14 L. R. A. (n. s.) 104.

84 Cal. 124-125, 24 Pac. 814, SAN FRANCISCO v. STRAUT.

City's Title to Beach and water lot property may be extinguished by adverse possession.

Distinguished in Koshland v. Cherry, 13 Cal. App. 443, 110 Pac. 144, accepted public highway cannot, as general rule, be acquired by adjacent owners by adverse holding.

Municipal Ownership of Tide Lands. See note, 64 L. R. A. 338.

84 Cal. 126-131, 24 Pac. 319, BRYAN v. TORMEY.

Judgment will not be Sustained where case proved and found at variance with pleadings.

Approved in Uhrlaub v. McMahon, 15 Idaho, 349, 97 Pac. 785, reversing judgment in action to determine interest in flowing water where court failed to find upon case made by complaint.

Action to Quiet Title will not Lie in favor of holder of equitable title against owner of legal title.

Approved in Buchner v. Malloy, 155 Cal. 255, 100 Pac. 688, following rule; Mitchell v. Moses, 16 Cal. App. 599, 117 Pac. 687, husband may maintain against wife action to quiet title to community property.

Pleadings may be Amended at Trial so as to conform to proofs and findings.

Approved in Drew v. Hicks (Cal.), 35 Pac. 565, where evidence of prescriptive right to maintain nuisance is admitted without objection that it is not within issues made by pleadings, it is error to refuse to allow amendment so as to allege right.

84 Cal. 141-142, 24 Pac. 377, SPAULDING v. WESSON.

Whether or not Board of Supervisors has jurisdiction to order doing of street work is question of law.

Approved in *People v. Lanterman*, 9 Cal. App. 681, 100 Pac. 722, whether or not board of supervisors has authority to allow claim for traveling expenses incurred outside of county is question of law.

Miscellaneous.—Cited in *Spaulding v. Wesson* (Cal.), 45 Pac. 807, on another appeal.

84 Cal. 143-154, 24 Pac. 37, NORRIS v. MOODY.

If Condition Subsequent in Grant becomes impossible of performance by act of God it is void and estate vests.

Approved in *Cabrera v. Payne*, 10 Cal. App. 678, 103 Pac. 177, inability of vendor to furnish good title within stipulated time because of destruction of records entitles vendee to sue for deposit paid pending examination of title before expiration of stipulated time.

84 Cal. 154-158, 23 Pac. 1086, BARBIERI v. RAMELLI.

Separate Action cannot be Brought for recovery of debt for which mortgage has been given.

Approved in *Kinsel v. Ballou*, 151 Cal. 761, 91 Pac. 623, where makers of note give mortgage as security, indorser may be sued on note without prior resort to mortgage; *Crisman v. Lanterman*, 149 Cal. 651, 117 Am. St. Rep. 167, 87 Pac. 90, mortgagee who releases mortgage to grantee of mortgagor without latter's consent cannot hold mortgagor personally liable for debt; *State Sav. Bank v. Albertson*, 39 Mont. 422, 102 Pac. 694, under section 6861 of Revised Codes it is not bar to action on note that security has been given for obligation unless security is in form of mortgage; *Howe v. Sears*, 30 Utah, 348, 84 Pac. 1108, right of action on deficiency judgment accrues at date amount of deficiency is ascertained and not at time decree of foreclosure is made.

84 Cal. 159-163, 23 Pac. 1085, TOGNAZZINI v. MORGANTI.

Where Surveyor Testifies That Boundary Line as fixed by another surveyor is wrong because of overlapping, and location of land appears in exhibits in evidence, refusal to strike out such testimony is not error.

Approved in *Andrews v. Wheeler*, 10 Cal. App. 618, 103 Pac. 149, fact that surveyor states his conclusion in respect to effect of his survey is not ground for reversal.

Location of Boundaries. See note, 129 Am. St. Rep. 996.

84 Cal. 163-165, 24 Pac. 156, IN RE HONG YEN CHANG.

Persons of Mongolian Nativity are not entitled to naturalization under laws of United States.

Approved in *In re Halladjian*, 174 Fed. 844, admitting Armenians to citizenship.

Constitutional Right of Aliens to Engage in lawful occupation. See note, 11 L. R. A. (n. s.) 800.

84 Cal. 168-174, 24 Pac. 167, BUNTING v. SALTZ.

Conveyance of Land on Which Personalty is situated is not sufficient to constitute change of possession of personalty required by statute of frauds.

Approved in *Dorman v. Soto* (Cal.), 36 Pac. 590, following rule; *Sequeira v. Collins*, 153 Cal. 431, 95 Pac. 878, statement of pledgee

that he had possession of bricks and visited premises and gave directions as to burning of same is insufficient to show change of possession of bricks; *Kennedy v. Conroy* (Cal.), 44 Pac. 796, taking lease and possession of land on which stock sold under bill of sale runs is insufficient change of possession where lessor continues to live on premises.

Whether Presumption of Fraud Flowing from retention of chattel by vendor may be overcome. See note, 24 L. R. A. (n. s.) 1139.

84 Cal. 174-176, 24 Pac. 113, BARBIERI v. RAMELLI.

Order Refusing to Dissolve Attachment will not be reversed where evidence is conflicting.

Reaffirmed in *Slosson v. Glosser* (Cal.), 46 Pac. 276.

Proceedings to Dissolve Attachments. See note, 123 Am. St. Rep. 1044.

84 Cal. 193-196, 23 Pac. 1095, MENDENHALL v. PARIS.

Where Monuments Marking Boundary Lines are at intermediate points of line, they are not entirely controlling.

Approved in *Goss v. Golinsky*, 12 Cal. App. 76, 106 Pac. 606, where calls are intermediate and are not shown to be controlling, and confusion would result from attempting to locate land from such calls, resort must be had to distances given as controlling.

84 Cal. 197-201, 23 Pac. 1094, GRANT v. SHEERIN.

Complaint Which Fails to Allege nonpayment of money sought to be recovered states no cause of action.

Approved in *Curtiss v. Bachman* (Cal.), 40 Pac. 802, complaint on injunction bond failing to allege party in injunction suit has not paid damages is insufficient; *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 278, sustaining special demurrer to complaint on insurance policies alleging refusal of payment instead of nonpayment.

Essential Facts may be Defectively Stated, but such defects can only be reached by special demurrer.

Approved in *Burke v. Dittus*, 8 Cal. App. 177, 178, 96 Pac. 331, in absence of special demurrer, complaint in foreclosure of mechanic's lien alleging whole amount due is certain sum is sufficient; *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 311, 90 Pac. 207, upholding sufficiency of complaint in foreclosure alleging that under order executrix assigned note and mortgage to plaintiff, but failing to allege confirmation of sale; *Water Supply Co. v. Sarnow*, 1 Cal. App. 482, 82 Pac. 690, holding cross-complaint alleging execution was levied good as against general demurrer.

84 Cal. 201-207, 23 Pac. 1081, GRANGERS' BUSINESS ASSN. v. CLARK.

Sale or Mortgage of Future Crops. See note, 23 L. R. A. 473.

84 Cal. 214-215, 24 Pac. 929, DOUTHITT v. FINCH.

Defendant in Tort Action may at any time before judgment offer to allow judgment to be taken against him for certain sum.

Approved in *Basler v. Sacramento Gas etc. Co.*, 158 Cal. 521, 111 Pac. 533, plea of tender after suit, under section 997 of Code of Civil Procedure, should not contain explanatory or extenuating matters affecting defense.

84 Cal. 216-219, 24 Pac. 379, CURTISS v. BACHMAN.

Complaint on Injunction Bond must allege nonpayment of money claimed under contract.

Approved in *Van Horn v. Holt*, 30 Mont. 72, 75 Pac. 681, following rule; *Curtiss v. Bachman* (Cal.), 40 Pac. 802, complaint on injunction bond alleging demand for payment of damages only is insufficient.

84 Cal. 221-226, 23 Pac. 1037, THOMAS v. BLACK.

Uncertified Notes of Testimony Taken in presence of court before trial but not signed by witnesses are inadmissible upon trial.

Distinguished in *Carpenter v. Ashley*, 15 Cal. App. 468, 469, 115 Pac. 271, transcript of testimony given at former trial is admissible in subsequent trial where party against whom it is offered admits its correctness.

Stenographer's Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 366.

84 Cal. 226-231, 24 Pac. 383, ABEEL v. CLARK.

Act of 1889 Providing for Vaccination of children attending public schools and for exclusion of unvaccinated children therefrom is constitutional.

Approved in *State Board of Health v. Watsonville School Trustees*, 13 Cal. App. 516, 110 Pac. 138, following rule; *Jacobson v. Commonwealth of Massachusetts*, 197 U. S. 33, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, upholding compulsory vaccination law of Massachusetts; *Auten v. School Board of Little Rock*, 83 Ark. 436, 104 S. W. 131, upholding school board regulation providing that pupils before admission to schools shall be vaccinated; *Commonwealth v. Pear*, 183 Mass. 246, 66 N. E. 721, 67 L. R. A. 935, upholding section 137, chapter 75, of Revised Laws, providing for compulsory vaccination; *Matter of Viemeister*, 179 N. Y. 240, 103 Am. St. Rep. 859, 72 N. E. 99, 70 L. R. A. 796, upholding section 210 of public health law as amended in 1900, excluding children not vaccinated from schools; *State v. Board of Education of Village Barberton*, 76 Ohio St. 303, 81 N. E. 569, upholding section 3986 of Revised Statutes empowering boards of education to enforce regulations to secure vaccination of eligible school children.

Compulsory Vaccination. See notes, 25 L. R. A. 152; 17 L. R. A. (n. s.) 711.

Constitutionality of Statutes Restricting contracts and business. See note, 21 L. R. A. 795.

Title of Act Need not Embrace Abstract of its contents.

Approved in *People v. Bank of San Luis Obispo*, 154 Cal. 202, 97 Pac. 310, upholding act of March 24, 1903, creating board of bank commissioners and prescribing their duties and powers; *State v. State Bank & Trust Co.*, 31 Nev. 468, 103 Pac. 409, upholding act of March 26, 1907, creating board of bank commissioners and providing for appointment of bank examiner.

When Title of Statute Embraces Only One Subject, and what may be included thereunder. See note, 79 Am. St. Rep. 457.

Constitutionality of Code Amendment or revision. See note, 86 Am. St. Rep. 274.

Act Need not Include All Classes of individuals in state; it is sufficient if it operates uniformly upon whole of any single class.

Approved in *City of Los Angeles v. Lankershim*, 160 Cal. 802, 118 Pac. 216, declaring unconstitutional Los Angeles ordinance regulating occupations and imposing license tax thereon; *In re Martin*, 157 Cal. 55, 106 Pac. 237, upholding act of March 10, 1909, regulating hours of employment in underground mines and smelting and reduction works; *Johnson v. Gunn*, 148 Cal. 749, 84 Pac. 666, upholding subdivision 13, section 184 of County Government Act, as amended in 1901, providing method for regulating compensation of justices of peace; *Ex parte Sohneke*, 148 Cal. 267, 113 Am. St. Rep. 236, 82 Pac. 958, 2 L. R. A. (n. s.) 813, declaring void act of March 20, 1905, regulating chattel loans; *In re Finley*, 1 Cal. App. 211, 81 Pac. 1046, upholding section 246 of Penal Code, providing death penalty in cases of assault with deadly weapon by life convicts.

84 Cal. 231-232, 23 Pac. 1112, THORNTON v. HOGE.

When Judge Denies Refusal to Settle bill of exceptions and alleges he has settled it, writ of mandamus will be discharged.

Approved in *State v. Craig*, 15 Wyo. 448, 89 Pac. 587, affidavit in support of bill of exceptions alleging evidence tendered in bill is all of evidence bearing on exceptions and errors is not conclusive on judge requested to sign bill.

Distinguished in *State v. Gibson*, 187 Mo. 552, 86 S. W. 180, mandamus will lie to compel signing of bill of exceptions subsequent to expiration of time allowed for preparation and signing thereof.

84 Cal. 233-239, 24 Pac. 107, CHURCHILL v. LAUER.

Several Owners of Tracts of Land through which stream flows may join as plaintiffs to restrain diversion of water.

Approved in *Frost v. Alturas Water Co.*, 11 Idaho, 299, 81 Pac. 997, following rule; *Toomey v. Knobloch*, 8 Cal. App. 587, 97 Pac. 530, several owners of lots may join in suit for cancellation of warrant of assessment for street work, though lien on each lot is separate.

Miscellaneous.—Cited in *Rait v. Furrow*, 74 Kan. 107, 85 Pac. 936, 6 L. R. A. (n. s.) 157, defining natural watercourse.

84 Cal. 239-244, 24 Pac. 114, WILSON v. WHITE.

If Person is in Existence and Ascertained, conveyance to or by him by fictitious name passes title.

Approved in *Emery v. Kipp*, 154 Cal. 86, 129 Am. St. Rep. 141, 97 Pac. 19, 19 L. R. A. (n. s.) 983, where one takes title to land in any other than true name, she may be sued with reference thereto under assumed name; *Homan v. Wayer*, 9 Cal. App. 128, 98 Pac. 82, right of vendee to rely upon false certificate to acknowledgment to deed to vendor is not defeated because title of vendor stood in assumed name; *Blackman v. Henderson*, 116 Iowa, 580, 87 N. W. 656, 56 L. R. A. 902, mortgage executed by land owner in name of fictitious person, to whom owner made fictitious conveyance, is valid as between mortgagor and mortgagee; *Chapman v. Tyson*, 39 Wash. 529, 81 Pac. 1068, where father purchases lands for himself in his son's name, conveyance thereof made under assumed name passes title; *City Bank of Portage v. Plank*, 141 Wis. 658, 135 Am. St. Rep. 62, 124 N. W. 1001, where testator is named grantee in deed to protect on record claims against estate by using decedent's name to designate executor in official capacity, intention will be effectuated by enforcing deed in favor of executor.

Conveyances to Persons not in Being. See note, 84 Am. St. Rep. 238.

Use of Fictitious Name as Affecting Validity of instrument. See note, 39 L. R. A. 424.

84 Cal. 244-249, 24 Cal. 118, **HART v. MEAD.**

Change of Possession on Sale of property by parent to child. See note, 81 Am. St. Rep. 27.

84 Cal. 249-256, 24 Pac. 149, **CALANCHINI v. BRANSTETTER.**

Oral Contract for Purchase of Land will be specifically enforced where vendee, with consent of vendor, has taken possession thereof and has made valuable improvements thereon.

Approved in *Meridian Oil Co. v. Dunham*, 5 Cal. App. 369, 90 Pac. 469, following rule; *Davis v. Judson*, 159 Cal. 132, 113 Pac. 152, holding evidence insufficient to show purchaser, under oral contract to convey, took actual possession; *Brown v. Sebastopol*, 153 Cal. 709, 96 Pac. 365, 19 L. R. A. (n. s.) 178, part or full payment of purchase price and delivery of possession to vendee takes oral contract of sale of land out of statute of frauds; *Barton v. Dunlap*, 8 Idaho, 92, 66 Pac. 836, where purchaser under oral contract places valuable improvements upon land he may force subsequent grantee of vendor to convey land to him.

Contract for Sale of Land at option of vendee only upon election and notice may be specifically performed.

Approved in *Smith v. Baugham*, 156 Cal. 363, 104 Pac. 691, election to accept option within time limited is sufficient to overcome objection to enforcement of contract of sale on ground of want of mutuality.

Specific Performance of Options. See note, 118 Am. St. Rep. 595.

Right to Specific Performance of Option as affected by lack of mutuality. See note, 6 L. R. A. (n. s.) 404.

Rights Conferred by a "Refusal" or "Option." See note, 21 L. R. A. 131.

Taking Possession of Realty as Part Performance to satisfy statute of frauds. See note, 3 L. R. A. (n. s.) 795.

Possession as Ground for Specific Performance or parol gift of or contract to convey realty. See note, 8 L. R. A. (n. s.) 872.

84 Cal. 263-271, 18 Am. St. Rep. 172, 24 Pac. 154, **NORTON v. WHITE-HEAD.**

Moneys Due or to Become Due under contract may be assigned without consent of other contracting party.

Approved in *Hipwell v. Nat. Surety Co. of N. Y. City*, 130 Iowa, 669, 105 N. W. 322, order of contractor directing sum of money to be paid to third party on completion of building does not violate conditions forbidding its assignment.

Provision in Power of Attorney that it is irrevocable tends to prove power is coupled with interest.

Approved in *Cox v. Hughes*, 10 Cal. App. 559, 102 Pac. 958, power of attorney in terms irrevocable authorizing party to assign earnings from future employment is revocable.

Distinguished in *Brown v. Skotland*, 12 N. D. 451, 97 N. W. 545, power of attorney authorizing mortgagee's agent to execute note and mortgage on failure of principal to do so terminates upon death of principal.

84 Cal. 272-275, 24 Pac. 116, HAWES v. OLARK.

Where Jury is Orally Waived in consideration of transfer of case to another court, party is estopped to avoid burden of trial without jury.

Approved in *Continental Bldg. etc. Assn. v. Woolf*, 12 Cal. App. 729, 108 Pac. 730, where parties agree to judgment by stipulation, they are estopped to repudiate provisions of stipulation.

Where Findings Support Judgment, failure to find on issues will not justify reversal unless it is shown evidence was submitted in relation thereto.

Reaffirmed in *Schoonover v. Birnbaum*, 150 Cal. 737, 89 Pac. 1109.

84 Cal. 276-279, 24 Pac. 379, PEOPLE v. CHOY AH SING.

Reason or Character of Flight of accused must be determined by jury.

Approved in *People v. Gee Gong*, 15 Cal. App. 33, 114 Pac. 79, whether or not accused fled is question for jury.

84 Cal. 281-291, 18 Am. St. Rep. 179, 24 Pac. 42, LA RUE v. GROEZINGER.

Contract by Which A Agrees to Sell and B to buy all of crop of certain standard which A may raise on certain land is assignable by A.

Approved in *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 568, 86 Pac. 822, upholding assignment of commissions to become due under contract with person who advanced money to charterer of vessels and was to collect commissions and account to charterer; *Mueller v. Northwestern University*, 195 Ill. 252, 88 Am. St. Rep. 194, 63 N. E. 116, holding void as to owner assignment by contractor of moneys to become due under building contract which were paid to contractor, and claimed from owner by assignee; *Lakeview Land Co. v. San Antonio Traction Co.*, 95 Tex. 257, 66 S. W. 768, holding assignable contract by which street railroad company obligated itself to construct and operate street railway; *Hunter Tract Imp. Co. v. Stone*, 58 Wash. 664, 109 Pac. 113, holding assignable contract for purchase of land wherein it was stipulated words "vendor" and "vendee" should include also their assigns.

Distinguished in *Wilkes v. Sievers*, 8 Cal. App. 662, 97 Pac. 678, holding void assignment of unearned salary of public officer; *Royal v. Dennison (Cal.)*, 38 Pac. 40, holding one to whom person had agreed to convey land was entitled to deed from such person and could not be compelled to accept deed from stranger to contract; *Barringer v. Bes Line Const. Co.*, 23 Okl. 136, 99 Pac. 777, 21 L. R. A. (n. s.) 597, holding void attempted assignment of time certificate stipulated on face to be nontransferable; *Swarts v. Narragansett Elec. Lighting Co.*, 26 R. I. 391, 59 Atl. 78, holding nonassignable contract for installation of electrical apparatus providing construction of circuits should be done under supervision of contractor.

Power of Parties to Restrict assignability of contract. See note, 88 Am. St. Rep. 203.

Validity of Stipulation Against Assignment in contract for payment of money. See note, 21 L. R. A. (n. s.) 598.

Miscellaneous.—Cited in *Larue v. Groezinger (Cal.)*, 24 Pac. 45, companion case.

84 Cal. 295-299, 24 Pac. 171, SCRIVNER v. DIETZ.

If There is Intervening Encumbrance, acquirement of title by prior mortgagee will not operate as merger.

Approved in Glenn v. Rudd, 68 S. C. 105, 102 Am. St. Rep. 657, 46 S. E. 556, upholding parol agreement that conveyance by mortgagor to mortgagee shall not constitute merger or satisfaction of mortgage.

Mistake, Fraud, or Undue Influence as ground for relief from voluntary trust. See note, 19 L. R. A. 768.

84 Cal. 299-303, 24 Pac. 160, KNOTT v. PEDEN.

In New Trial Statement, Only Specifications of insufficiency of evidence to support findings which show wherein evidence is insufficient will be regarded.

Approved in Porter v. Counts, 6 Cal. App. 551, 92 Pac. 655, holding specifications of insufficiency of evidence to support findings were sufficient.

Where There is No Evidence to Support particular finding, specification to that effect in new trial statement is sufficient.

Approved in Gillies v. Clarke Fork Coal Min. Co., 32 Mont. 327, 80 Pac. 373, following rule.

Assessment of Mortgagor's Interest in land must show on face that value of mortgage interest is deducted from value of land.

Reaffirmed in Henne v. Los Angeles County (Cal.), 59 Pac. 782.

Assessment of Land Which Does not Show road district in which situated is defective.

Distinguished in Baird v. Monroe, 150 Cal. 575, 89 Pac. 358, holding road district sufficiently designated in assessment.

84 Cal. 304-310, 24 Pac. 34, EX PARTE KEENEY.

Person Subjected to Punishment for violation of unconstitutional municipal ordinance will be released on habeas corpus.

Approved in In re McMonies, 75 Neb. 704, 106 N. W. 456, In re McCoy, 10 Cal. App. 125, 101 Pac. 423, and In re Desanta, 8 Cal. App. 302, 96 Pac. 1030, all following rule.

84 Cal. 311-315, 24 Pac. 284, SCAMMON v. WELLS, FARGO & CO.

Carrier has Right to Assume That Consignee is owner of goods consigned, and to settle with him therefor, when goods are lost, in absence of notice of consignor's ownership.

Approved in Schlichting v. Chicago R. I. & P. Ry. Co., 121 Iowa, 504, 96 N. W. 960, holding carrier justified in refusing to deliver to consignee when consignor had instructed it not to deliver until bills of lading were presented; Nashville etc. Ry. Co. v. Grayson Co. Nat. Bank, 100 Tex. 22, 93 S. W. 433, holding carrier could deliver goods to consignee without requiring production of bill of lading, which contained no stipulation to that effect; Bonds-Foster Lum. Co. v. Northern Pac. R. Co., 53 Wash. 305, 101 Pac. 878, holding delivery of goods to carrier vested title in consignee in absence of any provision to contrary in bill of lading.

Effect of Shipper's Misrepresentation as to character, quantity, or value, on right to recover for loss. See note, 23 L. R. A. (n. s.) 750.

84 Cal. 316-322, 18 Am. St. Rep. 187, 24 Pac. 280, OLEARY v. FOLGER.

Where Contract is Determined by Mutual Failure of both parties to perform, money paid by vendee may be recovered though paid as forfeit, less damages caused to vendor.

Approved in *Phelps v. Brown* (Cal.), 27 Pac. 421, reaffirming rule; *Law Credit Co. v. Tibbitts*, 160 Cal. 629, 117 Pac. 773, holding in absence of agreement as to terms of rescission of contract to purchase land for purchaser's default, he could recover amounts paid less damages to vendor; *Christy v. Arnold*, 4 Ariz. 270, 36 Pac. 920, holding contract for purchase of land rescinded by seller and purchaser entitled to recover amount paid thereon; *Maffet v. Oregon etc. R. R. Co.*, 46 Or. 454, 80 Pac. 493, holding contract for purchase of land of which time was essence was rescinded by acts of parties and vendee could recover amounts paid thereunder; *Weitzel v. Leyson*, 23 S. D. 378, 121 N. W. 873, holding where contract for sale of land was abandoned by both parties for two years, purchaser could recover payments made thereon.

Criticised in *Freeman v. Griswold* (Cal.), 34 Pac. 328, 329, holding covenant in agreement to convey land freeing seller from duty to convey on purchaser's default and forfeiting vendee's right thereto, time being essence of contract, authorized seller on such default to avoid contract at his option.

Forfeitures are not Favored and will not be enforced if couched in ambiguous terms.

Approved in *McCaskill v. Union Naval Stores Co.*, 59 Fla. 574, 52 So. 962, following rule; *Liskey v. Snyder*, 56 W. Va. 622, 49 S. E. 520, holding time not of essence of contract.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 44.

Miscellaneous.—Cited in *Cleary v. Folger* (Cal.), 33 Pac. 877, on another appeal.

84 Cal. 327-408, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627, HAVEMEYER v. SUPERIOR COURT.

Unless Other Persons are Appointed by court, directors or managers of corporation at time of dissolution are trustees of creditors and stockholders, and have power to settle its affairs under section 400, Civil Code.

Approved in *Crossman v. Vivienda Water Co.*, 150 Cal. 580, 89 Pac. 337, following rule; *In re Balfour & Garrette*, 14 Cal. App. 271, 111 Pac. 620, holding remedy afforded creditors by section 400, Civil Code, is merely cumulative, and not conflicting with remedy by opposition to voluntary dissolution.

Court cannot Take Property from Party in possession without hearing and compel him to prove title in order to regain it.

Approved in *Modern Loan Co. v. Police Court*, 12 Cal. App. 587, 108 Pac. 58, holding void provisions of sections 1408 and 1409, authorizing magistrate in ex parte proceeding to determine title to property taken from third party without hearing.

Effect of Failure to Serve Real Parties in interest with petition and writ of prohibition will not abate proceedings, but, at most, requires postponement of hearing until they could be served.

Approved in *Canadian Bank of Com. v. Wood*, 13 Idaho, 801, 93 Pac. 259, applying rule to certiorari.

When Court has Exceeded Jurisdiction in appointing receiver or in directing him to take property from stranger, prohibition lies to prevent resulting injury.

Approved in *First Nat. Bank v. Superior Court*, 12 Cal. App. 345, 107 Pac. 327, holding prohibition was writ of right when inseparable and continuing injury resulted from unauthorized appointment of receiver; *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 102, 89 Pac. 869, holding void ex parte appointment of receiver; *State v. Graves*, 66 Neb. 23, 92 N. W. 146, holding judge of district court could, if ordinary remedy was inadequate, be compelled by mandamus to vacate injunction granted without jurisdiction or authority; *Cronan v. District Court*, 15 Idaho, 205, 96 Pac. 774, holding prohibition lies to prevent appointment of receiver to manage private corporation for purpose of giving it time to raise money to pay debts.

Prohibition Lies to Arrest Proceedings of inferior tribunal when in excess of jurisdiction and no plain, speedy and adequate remedy at law.

Approved in *Keefe v. District Court of Carbon Co.*, 16 Wyo. 394, 94 Pac. 462, holding where change of venue had been taken in murder case, prohibition lay to prevent court of county from which case had been removed from proceeding with trial on second information charging same offense; dissenting opinion in *Hamberger v. Police Court*, 12 Cal. App. 156, 107 Pac. 614, majority holding writ did not lie to restrain police court from trying civil action.

Distinguished in *McAneny v. Superior Court*, 150 Cal. 10, 11, 87 Pac. 1022, holding writ did not lie to prevent enforcement of order appealed from pending stay of proceedings on appeal; *Board of Home Missions v. Maughn*, 35 Utah, 525, 101 Pac. 585, holding prohibition did not lie against garnishment proceeding used to gain information in another action pending.

When a Writ of Prohibition will Lie. See note, 85 Am. St. Rep. 207.

Writ of Prohibition. See note, 111 Am. St. Rep. 935, 949, 953, 955, 962, 965, 966, 977, 978.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 36, 46, 54, 58, 75, 81, 107, 108, 109.

When Proceedings Sought to be Prohibited have already been disposed of by court, prohibition will not lie.

Approved in *Primm v. Superior Court*, 3 Cal. App. 210, 84 Pac. 787, holding writ lay to prevent continuance of attachment lien on real property by court order after judgment in favor of defendant; *People v. District Court*, 33 Colo. 305, 80 Pac. 912, holding prohibition lay to prevent further illegal action where unauthorized act of lower court had been performed, but something remained to be done to give it full effect.

It is not Essential to Jurisdiction of appellate court to issue prohibition that preliminary objection to jurisdiction of lower court be presented in that court.

Approved in *Dole v. Gear*, 14 Haw. 568, *State v. Williams*, 221 Mo. 247, 120 S. W. 745, and *State v. Bright*, 224 Mo. 526, 135 Am.

St. Rep. 552, 123 S. W. 1060, all following rule; *State v. Eby*, 170 Mo. 521, 71 S. W. 60, writ issued to prevent trying of certain cases though issue as to jurisdiction was not raised in lower court.

Writ of Prohibition will not Issue until objection to its want of jurisdiction has been made in or overruled by lower court.

Approved in *Boca etc. R. R. Co. v. Superior Court*, 150 Cal. 158, 88 Pac. 720, refusing writ to restrain proceedings on suit, motion to dismiss which was pending; *Board of Education of Black Fork v. Holt*, 51 W. Va. 436, 41 S. E. 337, holding writ of prohibition did not lie to preliminary injunction until application had been made to judge issuing it to dissolve same; *Jennings v. Bennett*, 56 W. Va. 148, 49 S. E. 24, holding where personal decree for money was made on nonresidents by publication only, they must first move to vacate decree and quash execution before asking prohibition against execution.

Functions of Receiver Appointed Before Judgment are not suspended during appeal.

Approved in *Nail v. Superior Court*, 11 Cal. App. 30, 103 Pac. 903, holding as ancillary attachment proceeding in justice's court continued in effect after appeal on questions of law and fact to superior court.

Rights of Receiver to Take Property in possession of stranger. See note, 82 Am. St. Rep. 125.

When and at Whose Instance Receiver of corporation may be appointed. See note, 118 Am. St. Rep. 199.

Power to Appoint Receivers of Corporations where no other relief asked. See note, 20 L. R. A. 211.

Effect of Dissolution of Corporation. See note, 135 Am. St. Rep. 246.

Acts and Proceedings of Dissolved Corporations. See note, 134 Am. St. Rep. 313.

Reversion of Property of Corporation or society to the grantor. See note, 140 Am. St. Rep. 414.

Miscellaneous.—Cited in *War Eagle Con. Min. Co. v. Dickie*, 14 Idaho, 543, 94 Pac. 1036, as to disposition of property of dissolved corporations; *Cahill v. Colgan* (Cal.), 31 Pac. 615, referring historically to principal case.

84 Cal. 409-419, 24 Pac. 164, **MITCHELL v. CLINE.**

Contract Between Several Persons that they shall locate for joint benefit placer claims in excess of twenty acres for each is void.

Approved in *Nome & Sinook Co. v. Snyder*, 187 Fed. 388, and *Cook v. Klonos*, 164 Fed. 538, 90 C. C. A. 403, both following rule.

Cotenancy in Mines. See note, 91 Am. St. Rep. 887.

Whether Placer Claim can be Partitioned among tenants in common is question of fact for court.

Cited in *Musick Consolidated Oil Co. v. Chandler*, 158 Cal. 13, 109 Pac. 615, and *Manley v. Boone*, 159 Fed. 637, 87 C. C. A. 197, both arguendo.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 818, 851.

84 Cal. 420-424, 24 Pac. 316, **SILVA v. CAMPBELL.**

"Expiration of Term" of Lease refers to expiration of terms specified in lease by lapse of time.

Approved in *Pringle v. Wilson*, 156 Cal. 318, 104 Pac. 318, 24 L. R. A. (n. s.) 1090, following rule; *Walther v. Anderson*, 52 Tex. Civ. App. 366, 114 S. W. 418, holding lease to certain date with covenant authorizing re-entry without notice or demand in case of breach of any covenant was letting until date stated unless sooner terminated by landlord for violation of conditions.

Acceptance of Rent in Arrear After Notice of forfeiture and termination of lease for nonpayment of rent is not waiver of forfeiture unless rent accepted became due after breach.

Approved in *Mageon v. Alkire*, 41 Colo. 343, 92 Pac. 722, following rule; *German-American Sav. Bank v. Gollmer*, 155 Cal. 691, 102 Pac. 935, 24 L. R. A. (n. s.) 1066, holding condition in lease against assignment not waived by acceptance of rent accruing thereafter without knowledge of assignment.

Unlawful Detainer. See note, 120 Am. St. Rep. 51.

84 Cal. 424-433, 23 Pac. 1100, SHARON v. SHARON.

Alimony and Counsel Fees cannot be Allowed where no marriage in fact existed.

Distinguished in *Day v. Day*, 12 Idaho, 570, 86 Pac. 535, ordering alimony and counsel fees in divorce suit.

Judgment Annuling Marriage in Circuit Court given in action commenced before action for divorce in superior court is binding on all parties and other courts.

Approved in *In re Burton*, 5 Cal. Prob. 238, holding final orders in probate court of one county conclusive upon all persons and all other courts; *Equitable Land Co. v. Allen*, 84 Neb. 516, 121 N. W. 601, holding judgment of foreclosure in suit brought by holder of second lien who has redeemed from first lien after foreclosure by holder of first and third liens concludes all parties when holder of first and third liens is joined.

Right to Contest Validity of Divorce Decree after death of one or both parties. See note, 57 L. R. A. 605.

84 Cal. 435-440, 24 Pac. 288, ALBION RIVER R. R. CO. v. HESSER.

Entry on Property for Construction of Railroad before commencement of condemnation proceedings does not defeat right to begin such proceedings.

Approved in *Blackwell, Enid etc. Ry. Co. v. Bebout*, 19 Okl. 72, 91 Pac. 881, following rule.

Nature of Railroad as Realty or Personalty. See note, 66 L. R. A. 48.

Value of Improvements Made by One taking property by eminent domain as element of damages. See note, 16 L. R. A. 807.

84 Cal. 449-456, 24 Pac. 143, PEOPLE v. SANSOME.

Instruction That "in Order to Convict, circumstantial evidence should be such as to produce nearly same degree of certainty as that which arises from direct testimony," criticised.

Cited in *People v. Taggart*, 1 Cal. App. 425, 82 Pac. 397, disapproving instruction as to weight of circumstantial evidence.

84 Cal. 456-468, 22 Pac. 658, 24 Pac. 48, HARRIGAN v. MOWRY.

Action to Quiet Title will not Lie in favor of owner of equitable title for whom defendant holds legal title in trust.

Approved in *Buchner v. Malloy*, 155 Cal. 255, 100 Pac. 688, following rule; *Robinson v. Muir*, 151 Cal. 124, 90 Pac. 524, holding owner of equitable title could not quiet title as against holder of legal title; *Spotswood v. Spotswood*, 4 Cal. App. 713, 89 Pac. 362, holding in action to quiet title brought by holder of equitable title, trust in his favor could not be declared against defendant who held legal title; *Mitchell v. Moses*, 16 Cal. App. 599, 117 Pac. 687, *arguendo*.

Disapproved in *Coleman v. Jaggars*, 12 Idaho, 129, 118 Am. St. Rep. 207, 85 Pac. 895, holding owner of equitable title could maintain suit to quiet title against holder of legal title.

Miscellaneous.—Cited in *Lockwood v. Meade*, 71 Kan. 741, 81 Pac. 497, to point that decree quieting plaintiffs' title does not have effect of transferring to him, as against stranger to suit, title theretofore held by defendant.

84 Cal. 468-475, 24 Pac. 298, PEOPLE v. HAMBERG.

Offense Punishable by Imprisonment in County Jail not exceeding one year, and by fine which may exceed one thousand dollars, is not within jurisdiction of police court.

Approved in *People v. Palermo Land & Water Co.*, 4 Cal. App. 720, 89 Pac. 725, holding justice's court had jurisdiction of offense of violating ordinance punishable by fine of two hundred dollars or less and imprisonment of one hundred days or less; *Moore v. Orr*, 30 Nev. 465, 98 Pac. 400, holding district court did not have original jurisdiction of misdemeanor carrying fine of two hundred dollars and three months' jail sentence.

Plea of Once in Jeopardy must be Found upon by jury when offered, as well as plea of not guilty.

Approved in *State v. Creechley*, 27 Utah, 145, 75 Pac. 385, holding when both pleas were entered it was error to enter judgment on verdict of guilty alone.

Void Portion of Judgment Imposing imprisonment for nonpayment of fine may be stricken out on appeal.

Reaffirmed in *People v. Kerr*, 15 Cal. App. 276, 114 Pac. 585.

Distinguished in *In re Johnson*, 6 Cal. App. 737, 93 Pac. 200, upholding judgment imposing imprisonment in lieu of fine until paid.

Competency of Prosecuting Attorney as witness. See note, 55 L. R. A. 234.

84 Cal. 476-480, 24 Pac. 109, MARTIN v. PORTER.

In Action of Claim and Delivery by Assignee against his insolvent, denial of ownership and possession raises material issues, and judgment on pleadings is improper.

Approved in *Casci v. Ozalli*, 158 Cal. 283, 110 Pac. 933, holding judgment on pleadings improperly granted when defendant denied he was owner or possessor or claimed any interest in mining claim.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 744.

84 Cal. 480-483, 24 Pac. 32, PEOPLE v. McLEAN.

Testimony Corroborating Accomplice is Sufficient if it tends to connect defendant with offense.

Approved in *People v. Bunkers*, 2 Cal. App. 205, 84 Pac. 368, *People v. Spadoni*, 11 Cal. App. 218, 104 Pac. 588, and *People v.*

Garwood, 11 Cal. App. 668, 106 Pac. 114, all holding sufficient corroboration of accomplice testimony; People v. Sciaroni, 4 Cal. App. 699, 89 Pac. 134, holding insufficient corroboration of accomplice testimony.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 170.

Remarks to Counsel in Ruling on Evidence are not addressed to jury, and are not improper though court states certain facts which in its opinion evidence tends to show.

Approved in People v. Ruef, 14 Cal. App. 599, 114 Pac. 63, holding remarks of court to counsel in ruling on evidence were not prejudicial to defendant.

Failure of Court to Charge on Any Point usually proceeds from inadvertence, and law casts upon parties duty of calling court's attention to matter by formal request for instruction in relation thereto.

Approved in People v. Loomer, 13 Cal. App. 660, 110 Pac. 468, upholding instruction in language of code when no elaboration of principle was requested.

84 Cal. 484-486, 24 Pac. 283, **PEOPLE v. SAMARIO.**

Motion to Strike Out Evidence Admitted without objection may be denied, though it would have been excluded on proper objection.

Approved in People v. Petruzo, 13 Cal. App. 575, 110 Pac. 326, following rule; Estate of Loucks, 160 Cal. 559, 117 Pac. 676, refusing to strike out evidence admitted without objection; Poindexter & Or. etc. Co. v. Oregon Short Line R. R. Co., 33 Mont. 341, 83 Pac. 888, holding evidence admitted without objection, where witness was cross-examined could not be stricken out on motion.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 655, 656; 56 L. R. A. 407, 451.

Effect of Failure to Give Accused Opportunity to plead. See note, 13 L. R. A. (n. s.) 814.

84 Cal. 486-489, 24 Pac. 119, **HOME OF INEBRIATES v. KAPLAN.**

Appeal Taken Before Judgment is entered of record is premature and must be dismissed.

Reaffirmed in Pedley v. Werdin (Cal.), 99 Pac. 975.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 627.

84 Cal. 489-499, 24 Pac. 269, **O'CALLAGHAN v. BODE.**

Objection to Proper Questions Calling for competent testimony, upon ground they are irrelevant, does not raise objection that part of answer is nonresponsive, and only remedy is motion to strike out nonresponsive matter.

Approved in Short v. Frink, 151 Cal. 88, 90 Pac. 202, holding party could not afterward complain of objectionable evidence when no objection thereto was made when offered.

Damages for Wrongful Death held not excessive.

Approved in Christensen v. Floriston Pulp etc. Co., 29 Nev. 575, 92 Pac. 218, holding ten thousand dollars damages for wrongful death of man thirty years old earning three dollars per day was excessive.

Measure of Recovery for Death caused by negligence. See note, 17 L. R. A. 80.

Appellant Who Objects to Sufficiency of evidence to prove appointment of guardian ad litem must show error affirmatively when it does not appear of record.

Approved in *Boyer v. Pac. Mutual Life Ins. Co.*, 1 Cal. App. 56, 81 Pac. 672, holding appellant bound to show error affirmatively in admission of judgment-roll of another action.

Liability of Occupant of Building for injury by article falling or thrown from window. See note, 14 L. R. A. (n. s.) 427.

84 Cal. 505-510, 24 Pac. 286, JUDSON v. LYFORD.

Deed in Fraud of Creditors is Absolutely Void as against them, and execution sale of debtor's interest carries legal title.

Approved in *Bekins v. Dieterle*, 5 Cal. App. 694, 91 Pac. 175, *Rountree v. Marshall*, 6 Ariz. 417, 59 Pac. 110, and *Wood v. Fisk*, 45 Or. 279, 77 Pac. 129, all following rule.

Effect on Legal Title of Conveyance of land in fraud of creditors. See note, 67 L. R. A. 868.

Where There is Proper Specification of insufficiency of evidence to justify decision, presumption is that statement contains all material evidence in relation to it.

Approved in *Couson v. Wilson*, 2 Cal. App. 184, 83 Pac. 264, holding finding not sustained by presumption of other evidence not set forth in bill of exceptions.

Priority as to Proceeds of Creditors' Bills. See note, 17 L. R. A. 345.

84 Cal. 511-514, 24 Pac. 381, FALLON v. BRITTAN.

Clerical Error in Description of Property running throughout whole record may be corrected at any time.

Approved in *Erickson v. Stockton etc. R. R. Co.*, 148 Cal. 207, 82 Pac. 961, holding trial court could correct error in computation appearing on face of record in findings without vacating judgment.

84 Cal. 515-528, 18 Am. St. Rep. 248, 24 Pac. 303, MUNRO v. PACIFIC COAST DREDGING ETC. CO.

No Degree of Care and Skill will Excuse Injury to others caused by voluntary explosion of blast in thickly settled part of city.

Approved in *Fitz Simons etc. Co. v. Braun*, 199 Ill. 395, 65 N. E. 251, 59 L. R. A. 421, following rule; *Wells v. Knight*, 32 R. I. 438, 80 Atl. 19, holding that, irrespective of question of negligence, for one, by blasting on his land, to throw stone, hitting traveler on highway, was trespass; *Hoffman v. Walsh*, 117 Mo. App. 283, 93 S. W. 854, holding person blasting rock on his own land liable for injury to premises of another caused by throwing rock thereon, regardless of negligence in conducting blasting; *Blackford v. Heman Const. Co.*, 132 Mo. App. 162, 112 S. W. 290, enjoining use of explosives in quarry in city; *Hickey v. McCabe*, 30 R. I. 349, 75 Atl. 405, holding skill and care did not excuse liability for damage to adjacent land caused by concussions due to blasting of railroad tunnel.

Liability for Injuries Caused by Blasting. See notes, 104 Am. St. Rep. 729; 109 Am. St. Rep. 183.

Liability for Injury by Servant to Third Person in use of dangerous agency. See note, 10 L. R. A. (n. s.) 381.

In Action for Wrongful Death caused by explosion, evidence of effect of explosion on adjacent buildings is admissible.

Approved in *Linforth v. San Francisco Gas & Electric Co.*, 156 Cal. 64, 103 Pac. 323, in action for damages sustained by explosion of escaped gas in building, evidence of damage to adjacent buildings was admissible.

Title of Lord Campbell's Act is an act for compensating families of persons killed.

Cited in *Gregorg v. Southern Pac. Co.*, 157 Fed. 115, *arguendo*.

Mental Suffering of Relative of Deceased is not element of damages for wrongful death, under section 377, Code of Civil Procedure.

Approved in *Simoneau v. Pacific Electric Ry.*, 159 Cal. 505, 115 Pac. 325, following rule; *Beaulieu v. Great Northern Ry. Co.*, 103 Minn. 49, 114 N. W. 354, 19 L. R. A. (n. s.) 564, holding damages not recoverable for mental anguish caused by failure of carrier to deliver corpse.

Distinguished in *Melone v. Sierra Ry. Co.*, 151 Cal. 116, 91 Pac. 523, holding mental suffering of person injured was element of damages in action for his injury.

Mental Suffering of Parent as Element of damages in action for death of child. See note, 2 L. R. A. (n. s.) 899.

In Action for Wrongful Death, Damages are confined to pecuniary loss by kindred, and their loss of comfort, society, support, and protection of deceased.

Approved in *Hale v. San Bernardino etc. Traction Co.*, 156 Cal. 716, 106 Pac. 85, *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 710, 87 Pac. 378, and *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 535, 129 Am. St. Rep. 659, 100 Pac. 974, all following rule; *Christensen v. Floriston Pulp etc. Co.*, 29 Nev. 570, 571, 92 Pac. 217, holding damages for wrongful death were compensatory only, and not punitive; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 521, 99 Pac. 93, holding welfare, comfort, and happiness of parents were elements entering into pecuniary damage for loss of child.

Measure of Recovery for Death caused by negligence. See note, 17 L. R. A. 72, 73, 77.

Action Given by Statute for Wrongful Death is new action, and not transfer to representative of right of action which deceased person would have had had he survived injury.

Approved in *Northern Pacific Ry. Co. v. Adams*, 116 Fed. 328, 54 C. C. A. 196, following rule; *Strode v. St. Louis Transit Co.*, 197 Mo. 632, 95 S. W. 856, holding settlement for injury by deceased during lifetime barred action for wrongful death thereafter.

Damages Recovered by Administrator for Death of decedent, caused by negligence, are for benefit of heirs, and do not constitute any part of estate of deceased.

Reaffirmed in *Jones v. Leonardt*, 10 Cal. App. 286, 101 Pac. 812.

Administration of Estates. See note, 131 Am. St. Rep. 995.

Several Actions for Wrongful Death. See note, 34 L. R. A. 789, 795.

Duty and Liability of Land Owners to adjoining proprietors. See note, 123 Am. St. Rep. 582.

84 Cal. 528-535, 24 Pac. 292, **CLIFFORD v. ALLMAN**.

Measure of Recovery for Death caused by negligence. See note, 17 L. R. A. 71.

Notary's Power to Punish for Contempt. See note, 36 L. R. A. 822.

84 Cal. 535-537, 24 Pac. 284, DUTERTRE v. SUPERIOR COURT.

Filing of Undertaking and Filing and service of notice of appeal from justice's court may be done at any time within thirty days from judgment, and order in which they are done is immaterial.

Approved in *State v. Brown*, 30 Nev. 499, 98 Pac. 872, holding immaterial order of serving and filing notice of appeal.

Disapproved in *State v. District Court*, 34 Mont. 119, 115 Am. St. Rep. 522, 85 Pac. 873, holding filing of notice of appeal must precede or be contemporaneous with service on adverse party.

84 Cal. 539-541, 24 Pac. 107, NAGLE v. McMURRAY.

Personal Liability to Pay Assessment for local improvement. See note, 35 L. R. A. 61.

84 Cal. 541-544, 24 Pac. 307, CHRISTY v. SPRING VALLEY WATER-WORKS.

New Adverse Title Acquired by Defendant pending action of partition before decree is conclusively adjudged by decree which fixes rights of parties as of its date.

Reaffirmed in *Phillips v. Winter* (Cal.), 37 Pac. 156.

84 Cal. 544-547, 22 Pac. 676, 24 Pac. 110, FALK v. STROTHER.

Appeal Lies from Decision of Auditor in refusing to allow claim against county to board of supervisors, whose decision is conclusive.

Approved in *State v. District Court*, 90 Minn. 464, 97 N. W. 135, upholding charter provision for appeal to district court from order of city council refusing to allow claim against city.

84 Cal. 554-560, 24 Pac. 169, BEAMER v. FREEMAN.

Unrecorded Mortgage is Void as Against Attachment levied without notice of mortgage.

Approved in *McFadden v. Blocker*, 2 Ind. Ter. 285, 48 S. W. 1051, 58 L. R. A. 876, following rule.

Right to Attach Property in Hands of assignee for creditors. See note, 26 L. R. A. 596.

Miscellaneous.—Cited in *Yond v. German Sav. & Loan Soc.*, 3 Cal. App. 710, 86 Pac. 992, discussing right of redemption.

84 Cal. 560-566, 24 Pac. 145, VACA VALLEY ETC. R. R. CO. v. MANSFIELD.

Error in Denying Nonsuit is Cured when defendant by his testimony supplies proof necessary to support cause.

Approved in *Lowe v. San Francisco etc. Ry. Co.*, 154 Cal. 576, 98 Pac. 679, and *Bowley v. Mangrum & Otter*, 3 Cal. App. 232, 84 Pac. 997, both following rule.

84 Cal. 567-570, 24 Pac. 106, PEOPLE v. HARROLD.

Indictment Charging Forgery of Assignment of letters patent and alleging defendant offered instrument for record does not charge second offense under section 115, Penal Code, such instrument not being entitled to be recorded.

Distinguished in *People v. Driggs*, 12 Cal. App. 242, 108 Pac. 63, holding information charging forgery of lease by offering same for record charged but one offense under section 115, Penal Code; *Flohr v. Territory*, 14 Okl. 484, 78 Pac. 568, holding indictment charging

grand larceny and alleging property was taken by fraud and stealth was not insufficient as charging two offenses; *State v. Klugherz*, 91 Minn. 408, 98 N. W. 100, holding making of forged written instrument and uttering it at same time by same person constituted but one offense; *State v. Adams*, 41 Wash. 554, 83 Pac. 1108, holding information alleging "defendant did forcibly and against her will ravish female child under age of eighteen years" charged but one offense.

84 Cal. 570-572, 24 Pac. 120, DENNIS v. UNION MUT. LIFE INS. CO.

Provision in Insurance Policy avoiding risk if insured commit suicide upheld.

Approved in *Kunse v. Knights of Modern Maccabees*, 45 Ind. App. 34, 90 N. E. 90, following rule.

Self-destruction as Defense to Life Insurance. See note, 84 Am. St. Rep. 540, 541.

Insanity as Affecting Suicide Condition in insurance policy. See note, 35 L. R. A. 262.

Duty of Insured to Negative Death or accident from excepted cause. See note, 4 L. R. A. (n. s.) 636.

84 Cal. 573-583, 24 Pac. 313, PEOPLE v. CLARK.

Expert Testimony is Admissible to Show greatest distance at which clothing could be powder-marked by rifle used by defendant when distance between decedent and accused is material question.

Approved in dissenting opinion in *Scott v. Homesteaders*, 149 Iowa, 557, 129 N. W. 315, majority holding such evidence admissible though experiments were not performed under exactly same conditions.

Distinguished in *People v. Solani*, 6 Cal. App. 109, 110, 91 Pac. 657, holding inadmissible evidence of experiments with pistol where evidence was conflicting as to relation between deceased and defendant when fatal shot was fired.

Modifications of Instructions Requested by either party must be shown on appeal by indorsement of judge thereon by bill of exceptions.

Reaffirmed in *People v. Schultz*, 14 Cal. App. 110, 111 Pac. 273.

Objections That Certain Instructions, considered separately, do not contain proper limitations required by facts, are obviated if all instructions read together fairly state law applicable.

Approved in *People v. Wah Hing*, 15 Cal. App. 199, 114 Pac. 418, holding instruction as to adherence to opinion of guilt not cured by instruction as to reasonable doubt and presumption of innocence; *People v. Cain*, 7 Cal. App. 168, 93 Pac. 1039, holding instructions read together sufficiently stated law.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 681.

84 Cal. 584, 24 Pac. 308, EX PARTE WALPOLE.

Petition for Habeas Corpus on Ground prisoner was committed without probable cause must set forth evidence taken at examination.

Reaffirmed in *Ex parte Lapique* (Cal.), 72 Pac. 996.

84 Cal. 585-590, 24 Pac. 308, 598, VAN BIBBER v. HILTON.

In Action to Restrain Diversion of Water from riparian proprietor, cross-complaint setting out defendant's right to use water as riparian proprietor and prior appropriator is proper pleading.

Approved in *Ames Realty Co. v. Big Indian Min. Co.*, 146 Fed. 177, in action to establish rights in waters of stream against other separate appropriators, court could entertain separate cross-bills by any or all defendants setting up priority of respective rights.

Riparian Proprietor is Entitled to reasonable use of water from stream.

Approved in *Turner v. James Canal Co.*, 155 Cal. 95, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, holding common-law right to undiminished flow limited by right to reasonable use by riparian proprietors.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 738.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 677.

84 Cal. 592-598, 24 Pac. 310, MURPHY v. SUPERIOR COURT.

Writ of Prohibition Does not Lie where inferior court has jurisdiction of subject matter and there is remedy by appeal.

Approved in *Hamberger v. Police Court*, 12 Cal. App. 154, 155, 106 Pac. 895, holding writ did not lie to prevent police court from hearing civil action; *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 246, 91 Pac. 1017, holding writ did not lie to restrain condemnation proceeding of which court had jurisdiction because court reserved question of necessity of taking particular piece until after special verdict determining value of whole tract per acre; *Hubbard v. Justice's Court*, 5 Cal. App. 91, 89 Pac. 865, writ did not lie to prevent trial of action in justice's court where summons had not been served and returned within three years from commencement of action; *Johnston v. Superior Court*, 4 Cal. App. 92, 87 Pac. 212, writ did not lie to prevent determination of contest between rival applicants for letters of administration of decedent's estate, over which court had jurisdiction, in which questions of heirship were involved; *State v. Morse*, 27 Utah, 340, 75 Pac. 741, refusing writ to restrain criminal proceedings asked on ground complaint and evidence were not submitted to county attorney before warrant issued.

Writ of Prohibition. See note, 111 Am. St. Rep. 959, 960.

Necessity of Bond by Guardian to make acts valid. See note, 33 L. R. A. 760.

84 Cal. 598-606, 24 Pac. 384, PEOPLE v. THOMPSON.

Where Examining Magistrate Makes Defective commitment, information filed thereon is without authority and should be set aside.

Approved in *Ex parte Fowler*, 5 Cal. App. 553, 90 Pac. 959, setting aside information upon commitment which held accused for offense different from that charged in information.

Magistrate may upon Return of Papers from superior court correct defective commitment.

Approved in *Ex parte Fowler*, 5 Cal. App. 556, 557, 90 Pac. 961, holding superior court had power on setting aside information, because not charging offense for which prisoner was committed, to direct magistrate to correct irregularity in order of commitment, and new information to be filed; *People v. Kilvington (Cal.)*, 36 Pac. 14, hold-

ing court could permit correction of technical error for which information had been set aside and allow filing of new information.

Confession Induced by Advice of Sheriff that it would be better to make full disclosure is inadmissible.

Approved in *People v. Loper*, 159 Cal. 17, 112 Pac. 724, reversing judgment of conviction for admission of confession induced by threats and coercion; *People v. Siemsen*, 153 Cal. 394, 95 Pac. 866, holding confession voluntary and admissible; *State v. Alexander*, 109 La. 560, 33 So. 601, holding confession not voluntary.

Distinguished in *People v. Warren*, 12 Cal. App. 732, 108 Pac. 726, holding confession admitted was voluntary.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 851.

Section 1222, Penal Code, Requiring Court to admonish jury on separation should be strictly complied with.

Approved in *People v. Maughs*, 149 Cal. 265, 86 Pac. 192, holding statutory admonition should be shown by record on appeal; *People v. McKeehan*, 11 Cal. App. 447, 105 Pac. 274, holding failure to admonish jury did not amount to reversible error; *State v. Johnson*, 24 S. D. 603, 124 N. W. 852, and *People v. Ye Foo*, 4 Cal. App. 738, 89 Pac. 452, both holding where record merely failed to show admonition of jury, court would be presumed to have done its duty.

84 Cal. 607-611, 22 Pac. 1143, 24 Pac. 311, **PEOPLE v. HARRISON.**

Judgment not Void on Face cannot be collaterally attacked.

Approved in *Tuffree v. Stearns Ranchos Co. (Cal.)*, 54 Pac. 827, following rule; *Boyer v. Pac. Mutual Life Ins. Co.*, 1 Cal. App. 56, 81 Pac. 672, holding defects in affidavit and order for publication of summons, which were wrongly attached to judgment-roll could not be considered in passing on validity of judgment; *Estate of Welch*, 3 Cof. Prob. 305, holding probate judgments could only be vacated as other judgments.

Relief from Judgments Rendered on Publication of process. See note, 16 L. R. A. 361.

Miscellaneous.—Cited in *People v. Hemme (Cal.)*, 24 Pac. 313, and *People v. Brady (Cal.)*, 24 Pac. 313, both companion cases.

84 Cal. 611-615, 22 Pac. 1142, 24 Pac. 313, **PEOPLE v. BLAKE.**

Party Who has Only Filed Application to purchase state lands has acquired no right which he can transfer to another.

Approved in *Polk v. Sleeper*, 158 Cal. 634, 112 Pac. 181, holding death of applicant to purchase state land, whose application had not been approved, pending contest of right to purchase abated action.

Miscellaneous.—Cited in *People v. Hemme (Cal.)*, 22 Pac. 1143, companion case.

84 Cal. 634-639, 24 Pac. 295, **PEOPLE v. HIBERNIA SAVINGS ETC. SOCIETY.**

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 454.

84 Cal. 639-642, 24 Pac. 298, **IPSWITCH v. FERNANDEZ.**

New Trial for Disqualification of Juror. See note, 18 L. R. A. 475.

84 Cal. 642-645, 24 Pac. 296, **SAYERS v. SUPERIOR COURT.**

Certiorari cannot be Employed to Prevent threatened excess of jurisdiction.

Approved in *St. Paul etc. Ry. Co. v. Blakemore*, 17 N. D. 73, 114 N. W. 732, holding certiorari did not lie to review appealable order.

Miscellaneous.—Cited in *Estate of Wittmeier*, 118 Cal. 256, 50 Pac. 393, to point that obedience of executor or administrator to decree of distribution may be enforced by contempt proceedings.

84 Cal. 646-650, 24 Pac. 597, **MAYER v. SALAZAR.**

Positive Assertion in Manner not warranted by information of person making it of that which is not true, though he believes it true, is fraud.

Approved in *Howe v. Martin*, 23 Okl. 568, 138 Am. St. Rep. 840, 102 Pac. 130, following rule.

84 Cal. 651-655, 24 Pac. 290, **PEOPLE v. TILEY.**

Evidence to Show Oredibility or bias of witness. See note, 82 Am. St. Rep. 43.

84 Cal. 655-656, 24 Pac. 598, **EX PARTE ARMSTRONG.**

Adoption of Present Constitution and General Legislation thereunder has not repealed, by implication, provision of prior special charters of municipalities relating to justices of peace.

Distinguished in *People v. Wilmington*, 151 Cal. 652, 91 Pac. 525, holding Constitution of 1879 did not prevent legislature from passing special act repealing act for incorporation of particular town under which no organization had been effected.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 177.

Decision Against Constitutional Right as a nullity subject to collateral attack. See note, 39 L. R. A. 456.

NOTES

ON THE

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85 Cal. 1-11, 21 Pac. 431, 24 Pac. 382, EVERSDON v. MAYHEW.

Decision of Court upon Former Appeal becomes law of case.

Approved in Crooker v. Pac. Lounge etc. Co., 34 Wash. 198, 75 Pac. 634, decision that nonsuit was improperly granted is conclusive on subsequent appeal as to issue of contributory negligence, presented on practically the same evidence.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 333.

Objection of Variance Between Pleadings and proof must be raised in trial court.

Approved in California etc. Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 700, 118 Pac. 106, reaffirming rule.

Fact That Deed is Made to grantee under assumed name does not affect his rights.

Reaffirmed in Homan v. Wayer, 9 Cal. App. 128, 98 Pac. 82.

85 Cal. 11-36, 20 Am. St. Rep. 197, 24 Pac. 707, 9 L. R. A. 376, LOAIZA v. SUPERIOR COURT.

It will be Presumed, Prima Facie, that law of Mexico as to validity and rescission of contracts is same as law of this state.

Approved in Cuba R. Co. v. Crosby, 170 Fed. 376, 95 C. C. A. 539, applying presumption to law of Mexico as to recovery for personal injuries.

Proof of Foreign Laws and Their Effect. See note, 113 Am. St. Rep. 880.

It is Essential to Validity of Contract that consent be freely given.

Approved in Van Valkenburgh v. Oldham, 12 Cal. App. 574, 108 Pac. 43, but holding that facts showed such consent.

Misrepresentation of Value of Property knowingly made entitles purchaser to rescission.

Distinguished in Craig v. Wade, 159 Cal. 173, 112 Pac. 891, report in circular to stockholders that corporation owned thirty-one oil wells, worth fifteen hundred dollars each, held to be statement of opinion.

Expression of Opinion as Fraud. See note, 35 L. R. A. 430.

Court has Jurisdiction, upon Service by publication, to order return of so much of the consideration, fraudulently procured, for property in Mexico as remains within this state.

Approved in *Morgan v. Mutual etc. Ins. Co.*, 16 Cal. App. 93, 116 Pac. 389, service by publication confers jurisdiction in action by personal representative of assignee of life policy against nonresident beneficiaries; *Tutt v. Davis*, 13 Cal. App. 719, 110 Pac. 692, in suit for specific performance of contract to convey realty, defendant may be summoned by publication; *Epperly v. Ferguson*, 118 Iowa, 49, 91 N. W. 816, suit for specific performance may be brought by vendor in court having jurisdiction of property; *Gassert v. Strong*, 38 Mont. 34, 98 Pac. 501, court has jurisdiction to enforce trust in realty, though trustee is absent from state; *Knapp v. Golden Cross*, 121 Tenn. 228, 118 S. W. 394, court has jurisdiction, upon service by publication on nonresident beneficiary association, to prevent illegal merger of latter with Tennessee beneficiary association.

Distinguished in *Silver Camp Min. Co. v. Dickert*, 31 Mont. 500, 78 Pac. 971, 67 L. R. A. 940, service of summons by publication on nonresident defendant cannot be had in action for specific performance of contract to convey realty.

Jurisdiction of Equity Over Suits affecting realty in another state or country. See note, 69 L. R. A. 694.

Admissibility of Communications to Persons serving in judicial capacity. See note, 67 L. R. A. 945.

How Case Determined When Proper Foreign Law not proved. See note, 67 L. R. A. 43.

Foreign Judgments. See note, 94 Am. St. Rep. 552.

85 Cal. 39-49, 22 Pac. 969, 24 Pac. 631, **PEOPLE v. LEVINE.**

Admission of Evidence of Experiment is entirely within discrimination of court.

Approved in *People v. Solani*, 6 Cal. App. 109, 91 Pac. 657, rejecting evidence of experiments to determine powder marks made by revolver fired at various distances, conditions not being proved to resemble those of case at bar; *Spires v. State*, 50 Fla. 125, 39 So. 182, rejecting evidence of experiment to determine whether person could be recognized by light from flash of gun; *State v. Nowells*, 135 Iowa, 59, 109 N. W. 1018, admitting evidence of experiments to show effect produced upon piece of decedent's shirt by shots fired from defendant's revolver; *State v. McKowen*, 126 La. 1086, 53 So. 356, fact that accused, when asked to spell certain word in order to connect him with authorship of incriminating letter, declined to do so, may be considered; *Corbin v. United States*, 181 Fed. 302, admitting evidence of experiments to show that whisky seized was not product of particular distillery.

Distinguished in *Hooker v. State*, 98 Md. 160, 56 Atl. 394, where evidence did not show that arson was committed by leaving lighted candle under counter, evidence of experiment to show light given by candle in that position held inadmissible.

Experiments in Presence of Jury. See note, 15 L. R. A. 223.

Burden and Measure of Proof of Alibi. See note, 41 L. R. A. 540.

85 Cal. 49-50, 24 Pac. 747, **STROUSE v. POLICE COURT.**

Prohibition will not lie to restrain police court from proceeding with trial, where petitioner has plain, speedy and adequate remedy by appeal.

Approved in *Hamberger v. Police Court*, 12 Cal. App. 154, 155, 106 Pac. 895, prohibition will not lie in superior court to restrain police

court from trying action to recover price of goods sold; *Hubbard v. Justice's Court*, 5 Cal. App. 91, 92, 89 Pac. 865, refusing to restrain justice court from proceeding with trial where summons not served until after expiration of three years; *State v. Morse*, 27 Utah, 339, 75 Pac. 740, refusing to restrain criminal proceedings on ground that procedure leading up to issuance of warrant was erroneous.

Disapproved in dissenting opinion in *Hamberger v. Police Court*, 12 Cal. App. 160, 107 Pac. 616, majority holding that prohibition will not lie in superior court to restrain police court from trying action to recover price of goods sold.

Writ of Prohibition. See note, 111 Am. St. Rep. 952.

85 Cal. 50-55, 24 Pac. 607, PAGE v. LOS ANGELES COUNTY.

Miscellaneous.—Cited in *Bosworth v. Shuck*, 118 Ky. 462, 81 S. W. 241, mandamus will not lie to compel treasurer to pay warrant drawn against specified fund which has been exhausted; *State v. Scales*, 21 Okl. 694, 97 Pac. 588, freeholders could not pass ordinance to provide for election of city officers at same time charter was voted upon.

85 Cal. 63-71, 24 Pac. 723, FRANKLIN v. SOUTHERN CALIFORNIA MOTOR ROAD CO.

Contributory Negligence is Ordinarily Question for jury.

Approved in *Braly v. Fresno City Ry. Co.*, 9 Cal. App. 431, 99 Pac. 407, that passenger did not use best judgment in resisting assault by conductor of street-car not, of itself, contributory negligence.

Carrier must Use Special Care where there are no facilities for receiving or discharging passengers.

Approved in *McGovern v. Interurban Ry. Co.*, 136 Iowa, 20, 125 Am. St. Rep. 215, 111 N. W. 414, 13 L. R. A. (n. s.) 476, passenger on interurban car stopping at highway crossings does not assume risk of alighting at more dangerous place than usual.

Presumption of Exercise of Care. See note, 116 Am. St. Rep. 112.

85 Cal. 71-76, 24 Pac. 594, DEMARTIN v. DEMARTIN.

Where Party Having Burden of Proof on issue offers no evidence, he is not prejudiced by failure of court to find thereon.

Reaffirmed in *Frantz v. Harper* (Cal.), 62 Pac. 603.

Duty of Probate Court to Set Apart Homestead. See note, 1 Cof. Prob. 219, 556.

85 Cal. 80-86, 24 Pac. 648, KERCKHOFF-OUZNER MILL ETC. CO. v. OLMSTEAD.

Cessation of Labor upon Unfinished building for thirty days is equivalent to completion, under mechanic's lien law.

Distinguished in *Robison v. Mitchel*, 159 Cal. 590, 114 Pac. 988, under statutory amendment, owner who proceeds with work must give required notice of cessation from labor.

85 Cal. 86-89, 24 Pac. 635, PEOPLE v. AYHENS.

A Prosecution for Misdemeanor is Barred if information is not filed in superior court within one year.

Distinguished in *Rouse v. State*, 44 Fla. 154, 32 So. 785, semble, that proceeding before committing magistrate by affidavit and warrant would be commencement of prosecution within statute of limitations.

Defendant may Demur to information where it appears upon its face that prosecution is barred by statute of limitations.

Reaffirmed in *State v. Clemens*, 40 Mont. 571, 107 Pac. 898.

Miscellaneous.—Cited in *Ex parte Blake*, 155 Cal. 587, 102 Pac. 270, section 801, Penal Code, does not apply to misdemeanors originally triable in police or justice's court; *People v. Gray*, 137 Cal. 268, 70 Pac. 20, seduction is misdemeanor where judgment is one of fine or imprisonment in county jail; *In re O'Shea*, 11 Cal. App. 574, 105 Pac. 778, poolselling is felony or misdemeanor according to mode of punishment.

85 Cal. 90-98, 24 Pac. 733, McPHERSON v. WESTON.

It is Within Discretion of Court to permit amendment of answer during trial.

Approved in *Cooke v. Cain*, 35 Wash. 362, 77 Pac. 684, amendment of answer after plaintiff had rested not ground for reversal where plaintiff did not ask for continuance on ground of surprise.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 757, 768.

85 Cal. 98-102, 24 Pac. 634, IN RE ESCHRICH.

Refusal of Court to Hear Evidence is not ground for reversal where there is no formal offer to prove or any question asked and not allowed.

Reaffirmed in *People v. Casselman*, 10 Cal. App. 238, 101 Pac. 695.

Liability of Executors or Trustees for compound interest. See note, 29 L. R. A. 635.

85 Cal. 108-109, 24 Pac. 659, COHN v. COHN.

Divorce for Insanity. See note, 34 L. R. A. 164.

85 Cal. 110-115, 20 Am. St. Rep. 213, 24 Pac. 613, BURKS v. DAVIES.

Vendor of Option to Purchase must be ready at all times to convey good title.

Approved in *Cabrera v. Payne*, 10 Cal. App. 678, 103 Pac. 177, where vendors had ninety days within which to perfect title, cause of action immediately accrued where destruction of records made performance impossible; *Primm v. Wise*, 126 Iowa, 534, 102 N. W. 429, where vendor in contract to sell realty at given date had only option to purchase a month later, vendee could rescind; *Weitzel v. Laysoh*, 23 S. D. 376, 121 N. W. 872, after time allowed vendors to procure title to lands, right to rescind would be same as if they had contracted claiming to be owners; *Walsh v. Colvin*, 53 Wash. 315, 101 Pac. 1088, where purchase price is tendered at proper time, vendee does not have reasonable time to deliver deed, if he has no title; *Sutthoff v. Maruca*, 57 Wash. 105, 106 Pac. 633, where vendor cannot convey good title at time stipulated, vendee may rescind without tendering unpaid purchase money.

Distinguished in *Backman v. Park*, 157 Cal. 612, 137 Am. St. Rep. 153, 108 Pac. 688, where vendor agreed to convey property within given time and did so, it is immaterial that she did not have title at time contract was made.

Vendor of Real Estate, though not absolute owner, may be given reasonable time within which to procure title.

Approved in *Farnum v. Clarke*, 148 Cal. 618, 84 Pac. 170, specific performance may be granted as to land selected in lieu of land within forest reservation; *Royal v. Dennison* (Cal.), 38 Pac. 41, in contract for exchange of land, one who is unable to convey cannot object to tender of conveyance by other on condition that price fixed in contract be paid; *Day v. Mountin*, 137 Fed. 762, 763, 70 C. C. A. 190, vendor may specifically enforce contract for sale of land though he did not have title, where fact was known to parties and he acquired title before time for performance; *Provident Loan & Trust Co. v. McIntosh*, 68 Kan. 462, 75 Pac. 501, one having interest in land and control of title may contract to convey it by warranty deed; *Donovan v. Hananer*, 32 Utah, 326, 90 Pac. 572, fact that vendor did not have good title to all of mining claims at time of agreement or when first installment due, would not justify vendee in refusing to pay latter.

85 Cal. 116-118, 24 Pac. 644, BUELL v. EMERICH.

Application to Set Aside Judgment is directed to sound legal discretion of trial court.

Approved in *Mitchell v. California etc. S. S. Co.*, 156 Cal. 579, 105 Pac. 592, default excused by illness and stress of business on part of counsel, together with mistake of law by his clerk; *Haynes v. Backman* (Cal.), 31 Pac. 746, setting aside foreclosure sale where failure of mortgagee to bid had resulted in inadequate price; *Pittock v. Buck*, 15 Idaho, 52, 96 Pac. 213, where petitioner for intervention relied upon statements of court as to time during which no further proceedings would be taken.

85 Cal. 119-122, 24 Pac. 633, ESTATE OF BELL.

Remedy of Landlord upon Abandonment of Premises. See note, 13 L. R. A. (n. s.) 402.

85 Cal. 122-130, 24 Pac. 642, KELLY v. MATLOCK.

Conversion of Pledged Property by Invalid Sale. See note, 43 L. R. A. 746, 759.

Assignee of Mortgage as Collateral Security, who forecloses and purchases property, as trustee for assignor. See note, 7 L. R. A. (n. s.) 1097.

Authority of Pledgee to Compromise Obligations held as collateral. See note, 28 L. R. A. (n. s.) 981.

85 Cal. 131-133, 24 Pac. 658, BARNARD v. LLOYD.

Allegation That Contract was Made will be construed to mean that it was in writing where the law requires it to be so.

Reaffirmed in *Morrow v. Norton* (Cal.), 38 Pac. 953.

Creation and Conveyance of Easements Appurtenant. See note, 136 Am. St. Rep. 697.

Grants of Easements by Implication. See note, 122 Am. St. Rep. 209.

Easements Created by Severance of Tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 352.

Appurtenances. See note, 81 Am. St. Rep. 767, 769.

85 Cal. 137-142, 24 Pac. 638, WALKERLY v. BACON.

Equity will Enforce Trust Against Executor of deceased trustee.

Approved in *Austin v. Wilcoxson*, 149 Cal. 27, 84 Pac. 418, but holding that complaint did not allege trust.

One Who Files Allowance of Part of claim against estate is not estopped to sue for portion disallowed.

Reaffirmed in *Haub v. Leggett*, 160 Cal. 495, 117 Pac. 558.

85 Cal. 142-147, 24 Pac. 659, PENDLETON v. CLINE.

Damages from Loss of Business opportunity caused by failure to make abstract of title in time are too remote.

Approved in *Pacific Club v. Commercial etc. Co.*, 12 Cal. App. 509, 107 Pac. 731, loss not caused directly or indirectly by earthquake which broke water mains and prevented extinguishing of fire.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 55.

Firm Name Disclosing Surnames only of partners is not "fictitious name."

Approved in *Wilson v. Yegen Bros.*, 38 Mont. 510, 100 Pac. 615, *Patterson Furniture Co. v. Byers*, 17 Okl. 636, 638, 89 Pac. 1115, 1116, *Walker v. Stemmell*, 15 N. D. 488, 107 N. W. 1083, and *Bovee v. De Jong*, 22 S. D. 164, 116 N. W. 83, all reaffirming rule.

85 Cal. 148-151, 24 Pac. 612, PRIET v. DE LA MONTANGA.

Actions for Which Sureties on Official Bonds are liable. See note, 91 Am. St. Rep. 557.

85 Cal. 151-154, 24 Pac. 641, IN RE ARGUELLO.

Failure to State in Petition for sale of real property whether same was separate or community is remedied by statement in order directing sale.

Distinguished in *Estate of Cook*, 137 Cal. 189, 69 Pac. 970, on direct attack upon sufficiency of petition for sale of real estate, order will not supply defects in petition.

Statute of Limitations Does not Run, pending administration, against claim which has been allowed.

Approved in *In re Tuohy's Estate*, 33 Mont. 247, 83 Pac. 491, reaffirming rule; *Shively v. Harris*, 5 Cal. App. 515, 90 Pac. 971, where judgment has been recovered against administrators, limitations do not run against it pending administration.

85 Cal. 155-170, 24 Pac. 738, SPOTTS v. HANLEY.

Specifications must State Particulars in which evidence is insufficient to justify decision.

Approved in *Love v. Anchor Raisin Vineyard Co. (Cal.)*, 45 Pac. 1046, specifications as to what evidence shows or does not show are insufficient.

The Purpose of Specifications of insufficiency is to direct attention of court and counsel to particulars relied upon by moving party.

Approved in dissenting opinion in *Smith Table Co. v. Madsen*, 30 Utah, 317, 84 Pac. 892, majority holding specification of errors need not be made and settled in bill of exceptions.

Failure to Find upon Material Issue may be considered upon assignment that decision is against law.

Reaffirmed in *Brown v. Macey*, 13 Idaho, 455, 90 Pac. 341, and *Dillon Implement Co. v. Cleaveland*, 32 Utah, 4, 88 Pac. 671.

Title Vests in Heir, Subject Only to right of administrator to dispose of land to pay debts.

Approved in *Hume v. Laurel Hill Cemetery*, 142 Fed. 562, heir may bring action against third person, regardless of whether estate has been settled.

85 Cal. 174-176, 24 Pac. 722, PEOPLE v. STEWART.

Upon Trial for Assault With Intent to commit rape upon girl less than fourteen years old, evidence of lewd conduct with other girls is inadmissible.

Reaffirmed in *State v. Williams*, 36 Utah, 281, 103 Pac. 253.

Distinguished in *People v. Smith*, 13 Cal. App. 630, 110 Pac. 334, such evidence admissible where it may have referred to prosecutrix.

85 Cal. 177-190, 24 Pac. 729, MORE v. CALKINS.

Sale Under Trust Deed for More than amount due may be enjoined.

Approved in *Curtin v. Krohn*, 4 Cal. App. 134, 135, 136, 87 Pac. 244, 245, where trustee refuses to execute trust, beneficiaries may sue to have respective rights of parties adjusted and property sold; *Ekeberg v. Mackay*, 114 Minn. 504, 131 N. W. 789, substantial overstatement of mortgage debt in notice of sale is ground for injunction.

Contract of One Non Compos Mentis is not void where he was not "entirely without understanding."

Approved in *Ripperdan v. Weldy*, 149 Cal. 673, 87 Pac. 279, finding that grantor "fully understood the transaction" involves inference that he was not "entirely without understanding"; *Maionchi v. Nicholini*, 1 Cal. App. 693, 694, 695, 696, 82 Pac. 1053, 1054, complaint asking rescission on ground that plaintiff was of unsound mind cannot be amended to allege that he was entirely without understanding; *Ratiff v. Baltzers*, 13 Idaho, 159, 89 Pac. 73, insane person held to have been competent to make contract sued upon.

Validity of Deed of Insane Person. See note, 19 L. R. A. 491.

Person of Unsound Mind cannot rescind contract unless he restores or offers to restore consideration received.

Approved in *Coburn v. Raymond*, 76 Conn. 489, 100 Am. St. Rep. 1000, 57 Atl. 117, incompetent, suing to avoid conveyance made to person acting in good faith, must first return consideration.

Miscellaneous.—Cited in *Younger v. Moore*, 155 Cal. 772, 103 Pac. 224, instrument held to be valid trust deed rather than mortgage; *Baldwin v. Hart*, 136 Cal. 230, 68 Pac. 701, to point that where simple contract is made for purely money consideration, no greater judgment can be recovered than amount actually paid, with stipulated interest.

85 Cal. 191-196, 24 Pac. 729, ARZAGA v. VILLALBA.

Damages may be Recovered for time and money spent in pursuit of property.

Approved in *Lothrop v. Golden (Cal.)*, 57 Pac. 397, and *Cain v. Cody (Cal.)*, 29 Pac. 779, both reaffirming rule.

85 Cal. 196-203, 24 Pac. 735, WEYSE v. CRAWFORD.

All Proceedings for Assessment of property and collection of taxes are in invitum and must be stricti juris.

Approved in *Guptill v. Kelsey*, 6 Cal. App. 43, 91 Pac. 412, applying rule to tax levied by sanitary district.

Goods Stored in Warehouse are not subject to arbitrary assessment to warehouseman.

Approved in *State v. Northern Pac. Ry. Co.*, 95 Minn. 47, 103 N. W. 733, foreign railway company, upon which no demand has been made for listing of credits, may deduct its indebtedness from such credits.

Distinguished in *Title Guaranty etc. Co. v. Los Angeles*, 3 Cal. App. 620, 86 Pac. 845, money received by title company from purchaser of real estate and deposited in banks pending search of title is properly assessable to company.

85 Cal. 205-208, 24 Pac. 715, **SCHNEIDER v. BROWN.**

Since Verdict of Jury in Equity Case is merely advisory, error in instructions is immaterial.

Approved in *Grand Central Min. Co. v. Mammoth Min. Co.*, 29 Utah, 572, 83 Pac. 676, reaffirming rule.

Injunction Against Trespass on Realty. See note, 99 Am. St. Rep. 743.

85 Cal. 208-214, 24 Pac. 747, **EX PARTE CHRISTENSEN.**

A Municipal Ordinance is a Law of the state within section 435, Penal Code.

Approved in *In re Miller*, 13 Cal. App. 566, 110 Pac. 139, *Ex parte Sweetman*, 5 Cal. App. 579, 90 Pac. 1070, and *Ex parte Bagshaw*, 152 Cal. 703, 93 Pac. 865, all reaffirming rule; *County of Plumas v. Wheeler*, 149 Cal. 768, 87 Pac. 913, applying rule to county ordinance imposing license tax upon sheep grazing.

If Invalid Part of Law or Ordinance is distinctly separable from the remainder, the latter may stand.

Approved in *In re Hallawell*, 8 Cal. App. 565, 97 Pac. 321, part of act regulating sale of poisons, which gives state board of pharmacy power to establish rules in matter, is separable from remainder.

Governing Power may Altogether Prohibit liquor traffic, or impose such conditions thereon as it pleases.

Approved in *Ex parte Fedderwitz (Cal.)*, 62 Pac. 940, 941, upholding ordinance prohibiting sale or giving away of spirituous liquors except on physician's prescription; *Ex parte Holmquist (Cal.)*, 27 Pac. 1100, upholding ordinance making issuance of liquor license dependent upon permission of police commission and approval of adjacent property owners; *Ritz v. Lightston*, 10 Cal. App. 689, 103 Pac. 364, upholding ordinance providing that bar license, in certain parts of city, should be granted only to hotels; *Denton v. Vann*, 8 Cal. App. 681, 97 Pac. 676, 677, upholding county ordinance forbidding sale of liquor in all precincts outside of incorporated cities, except when voters decide otherwise; *In re Hallawell*, 8 Cal. App. 565, 97 Pac. 321, upholding statute forbidding sale of opium or its compounds save on prescription; *Ex parte Murphy*, 8 Cal. App. 446, 97 Pac. 201, sustaining ordinance forbidding maintenance of billiard or pool tables for public use; *Davis v. Board of Education*, 7 Cal. App. 575, 95 Pac. 172, upholding ordinance forbidding issuance of saloon license when majority of voters in precinct, living within one mile of proposed saloon, protest; *Ex parte Mogensen*, 5 Cal. App. 597, 90 Pac. 1064, upholding town ordinance prohibiting liquor traffic; *Reed v. Collins*, 5 Cal. App. 499, 90 Pac. 975, upholding ordinance

leaving issuance of liquor license to discretion of board of supervisors; *In re Kidd*, 5 Cal. 160, 89 Pac. 987, upholding ordinance forbidding sale of liquor except by hotel-keepers as part of regular meal; *State v. Calloway*, 11 Idaho, 736, 114 Am. St. Rep. 285, 84 Pac. 32, 4 L. R. A. (n.s.) 109, sustaining ordinance closing saloons between midnight and 6 A. M. and on Sundays; *Boomershine v. Uline*, 159 Ind. 502, 65 N. E. 514, upholding statute prohibiting issuance of liquor license where remonstrance is signed by majority of voters in township; *Baton Rouge v. Butler*, 118 La. 76, 42 So. 651, upholding city ordinance requiring applicant for liquor license to procure written assent of majority of property owners in immediate vicinity; *New Orleans v. Macheca*, 112 La. 562, 36 So. 591, upholding charter provision that liquor license shall not be granted save on petition of majority of householders or property owners within three hundred feet of proposed location; *People v. Case*, 153 Mich. 101, 116 N. W. 560, 18 L. R. A. (n.s.) 657, upholding ordinance forbidding persons licensed to sell liquor to permit females to resort to their places of business; *Burke v. Collins*, 18 S. D. 194, 99 N. W. 1113, upholding statute empowering county commissioners to refuse bond for liquor license of applicant known to be unfit person; *Grainger v. Douglas Park Jockey Club*, 148 Fed. 530, 532, 542, 78 C. C. A. 199, upholding statute creating state racing commission and regulating racing of running horses.

Power of Municipality to Regulate Dealing in intoxicating liquors. See note, 114 Am. St. Rep. 298, 299, 301, 302, 304.

Power of Municipality to Punish Acts already covered by statute. See notes, 110 Am. St. Rep. 151; 17 L. R. A. (n.s.) 62.

Test of Validity of Municipal Ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 41.

Power to Make Particular Use of Property conditional upon consent. See notes, 8 L. R. A. (n.s.) 979; 9 L. R. A. (n.s.) 661.

85 Cal. 219-230, 20 Am. St. Rep. 217, 24 Pac. 645, **ALTA LAND ETC. CO. v. HANCOCK.**

As Far as Title to Real Property is Concerned, prescription and limitation are convertible terms.

Approved in *Wutchumna Water Co. v. Ragle*, 148 Cal. 764, 84 Pac. 165, reaffirming rule.

Right of Riparian Proprietor is appurtenance which may be extinguished by prescription.

Approved in *Northern Light etc. Co. v. Stacher*, 13 Cal. App. 423, 109 Pac. 901, riparian rights may be condemned for purpose of generating electricity to furnish power and light.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 712, 717, 718, 719, 722, 728, 730.

To be Adverse, Right to Water must be asserted with knowledge and acquiescence of prior claimant, be uninterrupted, and have so invaded his rights as to give him ground of action.

Approved in *Richard v. Hupp* (Cal.), 37 Pac. 921, where flume was built as adjunct of quartz-mill, evidence that mill was no longer operated is admissible to show abandonment of prescriptive easement; *Alper v. Tormey*, 7 Cal. App. 10, 93 Pac. 403, after parol sale of right of way for spur track, grantee thereof held adversely to grantor; *Jobling v. Tuttle*, 75 Kan. 364, 89 Pac. 704, use of

mineral springs which did not deprive owner of his rights held not to be adverse; *Talbott v. Butte City Water Co.*, 29 Mont. 26, 73 Pac. 1113, no use of water is adverse unless it deprives prior appropriator of it when he has actual need of it; *Anderson v. Bassman*, 140 Fed. 26, so long as use of water by defendants did not deprive plaintiffs of amount to which they were entitled, statute of limitations did not run.

Necessity of Color of Title, not Expressly Made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1185.

Use of Water by Trespasser confers no rights.

Approved in *Prentice v. McKay*, 38 Mont. 118, 98 Pac. 1083, one cannot go upon private property of another to make appropriation of water, except by condemnation proceedings; *Seawerd v. Pac. Livestock Co.*, 49 Or. 161, 88 Pac. 965, semble, that trespasser who diverts water for irrigation makes it appurtenant to land benefited; *Avery v. Johnson*, 59 Wash. 334, 109 Pac. 1029, no right of appropriation in waters can be acquired by one illegally occupying land in Indian reservation.

All Land Bordering on Streams, held by same title, is riparian.

Approved in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 331, 88 Pac. 980, 11 L. R. A. (n. s.) 1062, where riparian owner conveys part of land not contiguous to stream, he thereby cuts it off from participation in use of stream, unless conveyance declares to the contrary; *Hercules Water Co. v. Fernandez*, 5 Cal. App. 735, 91 Pac. 404, measurement of damages in eminent domain by running foot is improper.

What is Riparian Land. See note, 11 L. R. A. (n. s.) 1065.

Rights of Riparian Owners. See note, 87 Am. St. Rep. 647.

Abandonment or Loss of Rights of Prior Appropriators of water. See note, 30 L. R. A. 267.

Liability of Water Companies. See note, 81 Am. St. Rep. 494, 495.

85 Cal. 231-237, 24 Pac. 629, **PEOPLE v. ADAMS.**

Homicide by Official Action or by Officers of justice. See note, 67 L. R. A. 297, 298, 304, 306, 308.

85 Cal. 238-251, 24 Pac. 718, **PEOPLE v. GUNN.**

Where Constitutional Provision is Mandatory, mode is measure of power.

Approved in *State v. Scales*, 21 Okl. 693, 97 Pac. 587, board of freeholders had no right to pass ordinance providing for election of officers at same time charter was voted upon.

85 Cal. 251-270, 24 Pac. 649, 858, 9 L. R. A. 487, **WALDEON v. WALDEON.**

Extreme Cruelty is Such Conduct as produces bodily harm or ill-health or apprehension thereof.

Approved in *Ring v. Ring*, 118 Ga. 194, 44 S. E. 866, 62 L. R. A. 878, habitual and intemperate use of morphine is not such "cruel treatment" as will constitute ground for divorce; *Bartlett v. Bartlett*, 13 Haw. 710, false and malicious charges of adultery may amount to extreme cruelty.

Making Charges of Adultery as ground for divorce. See note, 18 L. R. A. (n. s.) 307.

85 Cal. 270-274, 24 Pac. 713, SCHEERER v. OUDDY.

Actual Possession by Lessee under unrecorded lease is sufficient to put purchaser on inquiry.

Approved in *Austin v. Pulschen* (Cal.), 39 Pac. 800, possession of unpaid vendor is sufficient to put mortgagor on inquiry as to vendor's lien.

Effect of Possession of Real Property, as notice. See notes, 104 Am. St. Rep. 348; 13 L. R. A. (n. s.) 54, 56, 57, 58, 97.

85 Cal. 274-276, 20 Am. St. Rep. 226, 24 Pac. 737, 9 L. R. A. 482, EX PARTE KUBACK.

Ordinance Forbidding Employment of Chinese on municipal work, or any person more than eight hours a day, is invalid.

Approved in *Cleveland v. Clements Bros. Construction Co.*, 67 Ohio St. 222, 93 Am. St. Rep. 670, 65 N. E. 891, 59 L. R. A. 775, statute limiting hours of labor of persons employed upon public work is void.

Distinguished in *State v. Muller*, 48 Or. 253, 120 Am. St. Rep. 805, 85 Pac. 856, upholding law restricting labor of females employed in factories to ten hours a day.

Disapproved in *Keefe v. People*, 37 Colo. 321, 87 Pac. 792, 8 L. R. A. (n. s.) 131, upholding statute restricting hours of labor on works of public improvement.

Limitation of Hours of Labor on public work. See note, 8 L. R. A. (n. s.) 134.

Statutory Limitation of Hours of Labor. See notes, 65 L. R. A. 51; 19 L. R. A. 142.

Police Power to Protect Health of Employees. See note, 32 L. R. A. 854.

85 Cal. 280-291, 24 Pac. 743, TOLMAN v. SMITH.

Superior Court of County does not lose jurisdiction from creation of another county within its boundaries.

Distinguished in *Pope v. State*, 124 Ga. 808, 110 Am. St. Rep. 197, 53 S. E. 387, criminal case which arose within limits of new county cannot be tried in court of original county where timely objection is made.

Where There is No Evidence as to law of another state, it will be presumed that it is the same as law of this state.

Approved in *Allen v. Allen* (Cal.), 27 Pac. 32, applying rule to statute of limitations.

Prior to Act of 1889, the Presumption was that property acquired by either spouse by purchase during marriage was community property.

Reaffirmed in *Estate of Schade*, 4 Cof. Prob. 442.

Distinguished in *Nilson v. Sarment*, 153 Cal. 527, 532, 126 Am. St. Rep. 91, 96 Pac. 316, 318, under amendment of 1889, presumption is, as to property thereafter acquired, that conveyance to married woman vests title in her as her separate property.

Where One Mortgage is Substituted for another, equity will keep the first alive when interest of justice requires it.

Approved in *Collins v. Davis*, 132 N. C. 113, 43 S. E. 582, enforcing original mortgage where new mortgage was invalid as to third parties because of failure to record deed; dissenting opinion in

Stuart v. Hauser, 9 Idaho, 79, 72 Pac. 728, majority holding that finding, on conflicting evidence, that deed absolute on its face was not intended as mortgage, will not be disturbed.

85 Cal. 291-300, 24 Pac. 661, ORCUTT v. PACIFIC COAST RY. CO.

Fact That Cattle Injured by Railroad Train were at large contrary to law was not contributory negligence.

Approved in *France v. Salt Lake & O. Ry. Co.*, 31 Utah, 306, 88 Pac. 21, allowing recovery where cow killed was not at large by willful act of owner.

One has Right to Assume that required statutory signals will be given by railroad train before reaching crossing.

Approved in *Scott v. San Bernardino Valley etc. Co.*, 152 Cal. 611, 93 Pac. 679, applying rule in action arising from collision between street-car and buggy; dissenting opinion in *Hutson v. Southern California Ry. Co.*, 150 Cal. 707, 89 Pac. 1096, majority holding that person approaching railroad crossing is not entitled to assume that persons operating train will not be negligent.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 339, 342, 366.

Miscellaneous.—Cited in *Vance v. Atchison etc. Ry. Co.*, 9 Cal. App. 23, 98 Pac. 42, road intended for use in connection with lime-kiln is road at which crossing locomotive whistle must be blown under Civil Code, section 486.

85 Cal. 300-304, 24 Pac. 654, PEOPLE v. LEE FOOK.

If Doubt Arises as to Sanity of accused at trial, court must submit issue to a jury.

Approved in *Marshall v. Territory*, 2 Okl. Cr. 145, 101 Pac. 142, inquiry to be submitted to jury is whether accused is mentally competent to make rational defense.

Evidence of Sanity of Accused before and after commission of offense charged is admissible.

Approved in *People v. Willard*, 150 Cal. 550, 89 Pac. 127, admitting defendant's petition for habeas corpus and his testimony on hearing thereof; *People v. Kirby*, 15 Cal. App. 271, 114 Pac. 797, evidence of defendant's insanity at time of trial is admissible as tending to show prior insanity.

Insanity at Time of Trial is no defense.

Reaffirmed in *People v. Kirby*, 15 Cal. App. 271, 114 Pac. 797.

Insanity After Commission of Criminal Act. See note, 38 L. R. A. 582, 584.

85 Cal. 309-313, 24 Pac. 742, EX PARTE KEIL.

Prisoner's Right to Discharge on Habeas Corpus after commitment and before trial. See note, 100 Am. St. Rep. 35.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 197.

Miscellaneous.—Cited in *Ex parte Miller* (Cal.), 24 Pac. 743.

85 Cal. 313-321, 24 Pac. 663, ADAIR v. WHITE; S. C., 34 Pac. 338.

In Determining Boundaries of Patent, courses and distances must yield to natural objects or monuments.

Approved in *Hatcher v. Richmond & Ches. Bay Ry. Co.*, 109 Va. 363, 63 S. E. 1001, but holding inconsistency between monuments and courses and distances not shown.

Location of Boundaries. See note, 129 Am. St. Rep. 997.

85 Cal. 322-328, 24 Pac. 636, **McLAUGHLIN v. CLAUSEN.**

Escrows. See note, 130 Am. St. Rep. 958.

85 Cal. 329-332, 20 Am. St. Rep. 228, 24 Pac. 610, 9 L. R. A. 431, **METZ v. CALIFORNIA SOUTHERN R. R. CO.**

Liability for Loss of Baggage. See note, 99 Am. St. Rep. 350.

Interurban Railroad as Controlled by General Law in regard to operation of railroads as carriers of passengers. See note, 67 L. R. A. 646.

85 Cal. 333-343, 24 Pac. 603, **PEOPLE v. TOAL.**

Inferior Courts cannot be Established by municipal charter.

Approved in *Fleming v. Hance*, 153 Cal. 164, 94 Pac. 621, provision in charter establishing police court not validated by subsequent amendment to constitution; *Graham v. Fresno*, 151 Cal. 469, 91 Pac. 148, section 103, Code of Civil Procedure, requiring city of fourth class to furnish city justice of the peace with suitable office does not apply where city charter provides for police court; *In re Baxter*, 3 Cal. App. 718, 86 Pac. 999, city officer designated as "recorder" held to be "police judge" within meaning of constitutional provision.

Distinguished in *People v. Sands* (Cal.), 35 Pac. 332, city charter may provide for filling vacancies in office of city justice of the peace.

De Facto Officers and Offices under unconstitutional statutes. See note, 21 L. R. A. 143.

De Jure Office as Condition of de facto officer. See note, 15 L. R. A. (n. s.) 94.

85 Cal. 343-349, 24 Pac. 716, **PEOPLE v. BAGLEY.**

Special Charter Adopted Pursuant to section 8, article XI, Constitution, supersedes charter framed under general act of March 13, 1883.

Approved in *In re Pfahler*, 150 Cal. 89, 88 Pac. 278, 11 L. R. A. (n. s.) 1092, "initiative" provision of Los Angeles charter not invalid because inconsistent with section 4354 et seq., Political Code.

85 Cal. 350-361, 24 Pac. 666, **PEOPLE v. MURRAY.**

Order Excusing Jurors from Further Duty is within discretion of court.

Reaffirmed in *In re Schmidt*, 13 Haw. 333.

Witness for Defendant may be Impeached by proof of statements showing friendly feeling toward defendant and intention to suppress facts that would injure him.

Approved in *People v. Mack*, 14 Cal. App. 15, 110 Pac. 968, evidence that witness for defendant attempted to dissuade prosecutrix from testifying is admissible.

Defendant is Entitled to Show, on motion for new trial, that jury was improperly influenced by newspaper article.

Approved in *United States v. Marrin*, 159 Fed. 772, but refusing new trial where defendant did not ask for withdrawal of juror.

85 Cal. 362-365, 24 Pac. 657, EX PARTE WALPOLE.

Error of Committing Magistrate, which can be reviewed upon appeal, is not ground for habeas corpus.

Approved in *Borello v. Superior Court*, 8 Cal. App. 218, 96 Pac. 406, denying prohibition to review ruling of court that defendant had waived right to challenge grand jury; *Ex parte Fowler*, 5 Cal. App. 554, 556, 90 Pac. 960, 961, validity of information based on recommitment cannot be considered on habeas corpus.

One Accused of Capital Offense cannot be admitted to bail where proof of his guilt is evident or presumption great.

Disapproved in *In re Thomas*, 20 Okl. 172, 1 Okl. Cr. 19, 93 Pac. 982, bail should be denied one accused of capital offense unless he succeeds in raising reasonable doubt of his guilt.

85 Cal. 365-368, 24 Pac. 725, PHELAN v. DE MARTIN.

Mortgagor may Convey to Mortgagee where sale is fair and for adequate price.

Approved in *Freese v. Mutual Life Ins. Co.*, 11 Cal. App. 395, 105 Pac. 264, upholding contract by which insurer, lending money on policy, might apply cash surrender value in payment of loan.

85 Cal. 369-374, 24 Pac. 772, PEOPLE v. COMMON COUNCIL.

Right of Relator in Mandamus to Attack constitutionality of statute relied upon. See note, 16 L. R. A. (n. s.) 267.

Miscellaneous.—Cited in *People v. Wilmington*, 151 Cal. 652, 91 Pac. 525, since act of February 20, 1872, incorporating town of Wilmington, was not acted upon, legislature might pass new act of incorporation; *People v. Town of Ontario*, 148 Cal. 627, 84 Pac. 206, act of March 19, 1889, as to annexation of territory to incorporated towns and cities is valid.

85 Cal. 374-375, 24 Pac. 706, PEOPLE v. HANNON.

Recent Possession of Stolen Property is evidence of guilt, but is not alone sufficient to support conviction.

Approved in *State v. Brady*, 121 Iowa, 567, 97 N. W. 64, recent possession of stolen goods is not evidence of burglary, unless jury finds that burglary and larceny were committed at same time by same person.

Possession of Stolen Property as evidence of guilt. See notes, 101 Am. St. Rep. 483, 524; 12 L. R. A. (n. s.) 214.

85 Cal. 376-378, 24 Pac. 806, CURTISS v. STARR & CO.

Granting New Trial for Insufficiency of evidence is within discretion of trial court.

Approved in *Colon v. Tosetti*, 14 Cal. App. 694, 113 Pac. 365, and *Scrivani v. Dondero* (Cal.), 44 Pac. 1066, both reaffirming rule.

Written Instructions to Agent may be changed by parol.

Distinguished in *Womble v. Wilbur*, 3 Cal. App. 547, 86 Pac. 921, where escrow was evidenced by written agreement signed by both parties, parol evidence was inadmissible to add further conditions thereto.

85 Cal. 385-390, 24 Pac. 803, MOULTON v. KNAPP.

Contract will not be Specifically Enforced where plaintiff has adequate and speedy remedy at law.

Approved in *Sherwood v. Wallin*, 1 Cal. App. 534, 82 Pac. 567, but holding that contract for controlling interest in shares of mining company should be specifically enforced.

Injunctions Against Judgment for Matters subsequent to rendition. See note, 30 L. R. A. 563.

Injunctions Against Judgments Entered on confessions. See note, 30 L. R. A. 242.

85 Cal. 390-401, 20 Am. St. Rep. 232, 24 Pac. 790, HUSE v. DEN.

Power of Sale will not be Implied merely from direction to pay debts.

Approved in *Chandler v. Thompson*, 62 N. J. Eq. 726, 48 Atl. 585, power of sale will not arise by implication unless implication is clear from terms of entire will.

Purchasers from Executors, With Notice of their want of power to sell, are not entitled to subrogation.

Approved in dissenting opinion in *Thomas v. Provident Life etc. Co.*, 138 Fed. 371, 70 C. C. A. 488, majority holding estate bound to repay money received from mortgage made by executors without authority.

Sale by an Executor Without an Order of court. See note, 79 Am. St. Rep. 855.

What are Betterments, and allowance therefor. See note, 81 Am. St. Rep. 180.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324.

Right of Subrogation. See note, 99 Am. St. Rep. 530.

Miscellaneous.—Cited in *Huse v. Den* (Cal.), 24 Pac. 791, appeal from judgment in same case; *United States Fidelity etc. Co. v. Ridgley*, 70 Neb. 628, 97 N. W. 838, fidelity bond held not binding because not signed by employee.

85 Cal. 402-407, 24 Pac. 891, GILLESPIE v. LAKE.

Failure to Find is not Ground for reversal, where finding must necessarily have been adverse.

Approved in *Aydelotte v. Billing*, 8 Cal. App. 676, 97 Pac. 699, re-affirming rule.

85 Cal. 418-421, 20 Am. St. Rep. 237, 24 Pac. 890, GRANT v. EDE.

Letter from Owner to Agent stating that "We will sell" certain real property at specified price does not authorize agent to execute contract of sale, but simply binds owner to pay commission.

Approved in *White v. Bank of Hanford*, 148 Cal. 553, 83 Pac. 698, contract held to be mere option to purchase; *Sanchez v. Yorba*, 8 Cal. App. 494, 97 Pac. 206, and *Kennedy v. Merickel*, 8 Cal. App. 380, 97 Pac. 82, both holding memorandum evidencing employment of real estate broker need not be contract; *Jones v. Howard*, 234 Ill. 409, 84 N. E. 1042, authority to brokers to sell real estate does not empower them to execute binding contract of sale; *Brown v. Gilpin*, 75 Kan. 784, 90 Pac. 271, correspondence held not to show that owner gave

agent power to make conveyance of real estate; *Chick v. Bridges*, 56 Or. 5, 107 Pac. 480, letter from owner to agent promising latter certain commission if he made sale of land does not authorize agent to execute contract of sale; *Shillinglaw v. Sims*, 86 S. C. 80, 67 S. E. 907, broker's contract authorizing him to effect sale of property does not empower him to bind principal by contract of sale; *Lichty v. Daggett*, 23 S. D. 390, 121 N. W. 866, letter from owner to brokers stating price of land and asking to hear from them does not authorize them to execute contract of sale; *Robertson v. Allen*, 184 Fed. 380, real estate brokers have no power to bind owners by contract to convey.

Distinguished in *Bacon v. Davis*, 9 Cal. App. 92, 99, 98 Pac. 74, 77, authority "to sell for me in my name and receipt for deposit thereon" empowers broker to contract for sale.

Disapproved in *Hawaiian Agricultural Co. v. Norris*, 12 Haw. 239, authority to agent to sell real estate gives power to make binding contract to convey.

Escrows. See note, 130 Am. St. Rep. 962.

85 Cal. 421-431, 24 Pac. 1006, PEOPLE v. NELSON.

On Trial for Robbery of One Man, evidence of robbery of another at same time is admissible as part of the *res gestae*.

Approved in *State v. Howard*, 30 Mont. 524, 77 Pac. 53, admitting, on trial for robbery of mail clerk, evidence of attempted robbery of safe on train.

Evidence of Other Crimes in Criminal Cases. See note, 62 L. R. A. 318.

Objection to Testimony as Hearsay and incompetent cannot be taken for first time by motion to strike out.

Reaffirmed in *People v. Petruzo*, 13 Cal. App. 575, 110 Pac. 326.

General Objection to Admission of evidence is insufficient.

Approved in *People v. Walker*, 15 Cal. App. 406, 114 Pac. 1011, reaffirming rule.

If Defense of Alibi Raises reasonable doubt, jury should acquit.

Reaffirmed in *Schultz v. Territory*, 5 Ariz. 241, 52 Pac. 352.

Burden and Measure of Proof of Alibi. See note, 41 L. R. A. 537.

Circumstantial Evidence. See note, 97 Am. St. Rep. 795.

Admissibility in Criminal Trial of Testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 876.

85 Cal. 432-434, 24 Pac. 857, PEOPLE v. TURNER.

Information Signed by De Facto Assistant district attorney is valid.

Approved in *Harrison v. Horton*, 5 Cal. App. 417, 90 Pac. 717, additional district attorney authorized by supervisors is entitled to compensation, although there is no specific appropriation therefor.

Jurisdiction to Punish Crimes Committed by or against Indians. See note, 21 L. R. A. 173.

85 Cal. 434-436, 24 Pac. 810, PEOPLE v. ALSEMI.

Ambiguous Instruction is not Ground for reversal, if, when read in connection with other instructions, it would not mislead.

Approved in *Hayden v. Consolidated Min. etc. Co.*, 3 Cal. App. 139, 84 Pac. 423, instructions considered as a whole held not erroneous.

85 Cal. 436-447, 25 Pac. 22, ROACH v. CARAFFA.

Personal Representative of One Deceased Partner may bring suit for accounting against personal representative of another without first presenting claim against estate.

Approved in *Franklin v. Trickey*, 9 Ariz. 285, 80 Pac. 353, reaffirming rule; *Reiter v. Rothschild* (Cal.), 33 Pac. 851, claim need not be presented for money deposited as security for lease; *Kline v. Ginery*, 25 S. D. 19, 124 N. W. 959, claim for rescission of sale of stallion need not be presented.

Trust in Personal Property may be established by parol.

Approved in *Harris Banking Co. v. Miller*, 190 Mo. 665, 89 S. W. 636, 1 L. R. A. (n. s.) 790, applying rule to certificate of deposit.

Statute of Limitations will not run against beneficiary until he has notice of repudiation of trust.

Approved in *Mountain Waterworks v. Holme*, 49 Colo. 440, 113 Pac. 510, before limitation or laches can affect right of stockholder to accounting for dividends, he must have notice that corporation claims stock adversely.

Distinguished in *Norton v. Bassett*, 154 Cal. 418, 129 Am. St. Rep. 162, 97 Pac. 897, rule inapplicable to involuntary or constructive trustee.

85 Cal. 448-488, 23 Pac. 267, 24 Pac. 818, UNITED LAND ASSOCIATION v. KNIGHT.

Tide Lands Belonged to Mexican Government, and were no part of pueblo lands of San Francisco.

Reversed in *Knight v. United Land Association*, 142 U. S. 163, 12 Sup. Ct. 258, 35 L. ed. 974, patent of United States to pueblo lands is conclusive evidence of city's title under Mexican laws.

Municipal Ownership of Tide Lands. See note, 64 L. R. A. 336.

85 Cal. 488-508, 24 Pac. 930, WARD v. WATERMAN.

Attaching Creditor Only Reaches Interest of debtor at time of levy.

Approved in *National Bank etc. v. Western Pac. Ry. Co.*, 157 Cal. 576, 108 Pac. 677, bona fide purchaser of corporate stock will prevail against attaching creditor, though transfer unregistered.

Declaration of Trust may be Reformed by adding provision omitted by mistake from agreement as written.

Approved in *House v. McMullen*, 9 Cal. App. 671, 100 Pac. 347, written contract for sale of realty could be reformed by substituting word "exchange" for "sell" and inserting more particular description of property.

Appellate Court will not Set Aside judgment reforming written instrument, based on conflicting evidence.

Reaffirmed in *Monterey County v. Seegleken* (Cal.), 36 Pac. 516.

Mortgage is Barred When Statute of limitations has run against debt which it secures.

Approved in *Sanford v. Bergin*, 156 Cal. 51, 103 Pac. 336, where debt is acknowledged after it is barred, mortgage is not revived.

Who may Plead Statute of Limitations. See note, 104 Am. St. Rep. 753.

Miscellaneous.—Cited in *Messer v. Hibernia Sav. etc. Society*, 149 Cal. 126, 84 Pac. 837, to point that contract may be revised and specifically enforced in same action.

85 Cal. 509-514, 26 Pac. 245, **PEOPLE v. PERKINS.**

Statute Should be so Construed as to give effect to every part, if possible.

Approved in *Edwards v. Sweigert*, 15 Cal. App. 507, 115 Pac. 258, fireman's pension, limited "to cease at his death," cuts off widow's claim to pension.

Commission or Certificate of Election constitutes official notice of election or appointment.

Approved in *Wilson v. Fisher*, 148 Cal. 16, 82 Pac. 422, "commission" held to include "certificate of election."

Vacancy in Office by Failure to File Bond within time prescribed. See note, 16 L. R. A. 140.

85 Cal. 515-518, 24 Pac. 892, **PEOPLE v. MORINO.**

To Constitute Larceny, Felonious Intent must exist at time of taking.

Reaffirmed in *State v. Riggs*, 8 Idaho, 642, 70 Pac. 951.

Information Should be Dismissed where case has been postponed in violation of section 1382, Penal Code.

Approved in *Matter of Ford*, 160 Cal. 344, 116 Pac. 761, mandamus lies to relieve indicted person under such circumstances; *State v. Dewey*, 73 Kan. 740, 88 Pac. 881, provisions of similar statute held to be imperative; *State v. Caruthers*, 1 Okl. Cr. 445, 98 Pac. 480, mandamus will lie to enforce dismissal of criminal action where speedy trial has been denied; *Dudley v. State*, 55 W. Va. 475, 47 S. E. 285, 287, indictment for felony retired from trial docket cannot be afterward restored on motion of state.

Distinguished in *State v. Fleming*, 20 N. D. 111, 126 N. W. 567, action will not be dismissed for failure to file information at term of court when defendant could not be tried.

Right to Speedy Trial. See note, 85 Am. St. Rep. 196, 198, 199, 202, 203.

Delay of Prosecution as Ground for Discharge. See note, 56 L. R. A. 513.

85 Cal. 518-521, 24 Pac. 839, **CHATFIELD v. WILLIAMS.**

In Contract for Sale of Realty, it is duty of vendor, upon tender of balance due, to deliver deed of conveyance.

Approved in *Kerr v. Moore*, 6 Cal. App. 308, 92 Pac. 108, tender held sufficient.

Distinguished in *Thomas v. Pacific Beach Co. (Cal.)*, 44 Pac. 476, where contract provides that deed shall be executed upon demand, statute of limitations does not begin to run until demand has been made.

Where Vendor of Realty Refuses to convey upon tender of balance of purchase price, vendee may treat contract as at an end and recover money paid.

Approved in *Carter v. Fox*, 11 Cal. App. 72, 103 Pac. 912, applying rule where vendor was unable to procure certificate of title.

85 Cal. 522-532, 20 Pac. 239, 24 Pac. 837, **HAMMOND v. WALLACE.**

The First Requisite of Rescission is prompt action.

Approved in *Spoonheim v. Spoonheim*, 14 N. D. 389, 104 N. W. 848, unexplained delay of nearly seven years before commencing action

to set aside deed is unreasonable, especially where value of land has materially increased; *McDonald v. Markesan Canning Co.*, 142 Wis. 259, 125 N. W. 447, one who repudiated his obligation to subscribe for stock held not entitled thereto when corporation proved successful.

Mere Inadequacy of Price is not in itself sufficient to warrant court in setting aside sale.

Reaffirmed in *Barry v. St. Joseph's Hospital* (Cal.), 48 Pac. 69.

Offer to Return Consideration is Condition Precedent to maintenance of action to rescind.

Distinguished in *St. Louis & S. F. R. Co. v. Richards*, 23 Okl. 279, 102 Pac. 101, 23 L. R. A. (n. s.) 1032, offer is unnecessary when it is reasonably certain that it will be refused.

85 Cal. 533-535, 24 Pac. 926, BARKER v. FREEMAN.

Miscellaneous.—Cited in *Stoner v. Freeman* (Cal.), 24 Pac. 927, *Etzenhouser v. Freeman* (Cal.), 24 Pac. 927, and *Wilson v. Freeman* (Cal.), 24 Pac. 927, all decided on authority of cited case.

85 Cal. 535-538, 24 Pac. 787, BOAS v. FARRINGTON.

Where Vendor Contracted to Furnish Abstract showing good title, vendee may rescind where abstract failed to show such title, though title in fact was good.

Approved in *Fagan v. Hook*, 134 Iowa, 386, 105 N. W. 157, title by adverse possession which could not be shown on abstract, insufficient; *Howe v. Coates*, 97 Minn. 395, 114 Am. St. Rep. 723, 107 N. W. 401, 4 L. R. A. (n. s.) 1170, vendee not compelled to rely upon admittedly incomplete abstract, but might search record; *Crosby v. Wynkoop*, 56 Wash. 477, 106 Pac. 176, abstract not sufficient which showed deed from heirs with nothing but ex parte affidavit to prove that they were heirs.

85 Cal. 538-541, 24 Pac. 1070, PAULSEN v. SCHULTZ.

What Constitutes an Account Stated. See note, 27 L. R. A. 821.

85 Cal. 542-545, 24 Pac. 781, HEWLETT v. PILCHER.

Instructions to Advisory Jury in equity case will not be reviewed.

Reaffirmed in *Apland v. Pott*, 16 S. D. 197, 92 N. W. 23.

85 Cal. 545-549, 20 Am. St. Rep. 245, 26 Pac. 244, OHM v. SUPERIOR COURT.

To Entitle Creditor to Sue to set aside deed of intestate as void as to creditors, his claim must have been allowed or be evidenced by a judgment.

Approved in *Lyden v. Spohn-Patrick Co.*, 155 Cal. 183, 100 Pac. 238, fact that action for money has been commenced does not entitle plaintiff to sue to set aside conveyance by defendant; *Folsom v. Peru Plow & Implement Co.*, 69 Neb. 319, 111 Am. St. Rep. 537, 95 N. W. 636, chattel mortgage held void only as to those creditors of estate whose claims had been allowed prior to its recordation.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 96.

Statute of Limitations Does not Bar action to set aside conveyance by intestate until three years after his claim is established.

Approved in *Ziska v. Ziska*, 20 Okl. 641, 642, 95 Pac. 256, 257, 23 L. R. A. (n. s.) 1, creditor's bill might be brought within two years after execution returned unsatisfied.

Creditor may Sue to Set Aside Conveyance by decedent or court may direct personal representative to bring such action.

Distinguished in *Beswick v. Dorris*, 174 Fed. 507, one creditor wishing to sue in behalf of all should permit court to decide whether action should be brought by representative of estate.

Relief from Fraudulent Conveyance after death of grantor. See note, 135 Am. St. Rep. 337, 339.

85 Cal. 557-558, 24 Pac. 788, **McLEAR v. HAPGOOD.**

Party Claiming to be Surprised must move for continuance at earliest practicable movement.

Approved in *Josephson v. Sigfusson*, 13 N. D. 318, 100 N. W. 704, where party learns during trial that witness will be unable to attend through sickness, he should move for continuance.

85 Cal. 559-568, 24 Pac. 811, **PRESTON v. KNAPP.**

Objection That Claim was not Presented to executrix is waived where not made in lower court.

Distinguished in *Burke v. Maguire*, 154 Cal. 464, 98 Pac. 24, fact that objection was not mentioned in opinion of court on sustaining demurrer does not show that point was not raised.

85 Cal. 568-574, 24 Pac. 888, **PEOPLE v. CHRISTENSEN.**

What Constitutes Reasonable Doubt in criminal cases. See note, 17 L. R. A. 705.

85 Cal. 574-580, 24 Pac. 782, **GOLDMAN v. ROGERS.**

Where It Appears from Record That Court adopted findings of jury in equity case, it is not necessary that word "adopt" should have been used.

Approved in *Hoyt v. Hart*, 149 Cal. 729, 87 Pac. 572, where court in equity case adopts verdict of jury, further finding is unnecessary.

85 Cal. 598-600, 24 Pac. 784, **WILSON v. MORTON.**

Contract to Examine and Advise as to purchase of lands is not within statute of frauds.

Approved in *Schmidt v. Berseker*, 14 N. D. 590, 116 Am. St. Rep. 706, 105 N. W. 1103, 5 L. R. A. (n. s.) 123, contract to bid in land at public sale provided for by federal laws in name of principal is not within statute of frauds.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 236.

Necessity That Authority of Agent to purchase or sell realty be written to enable him to recover compensation. See note, 9 L. R. A. (n. s.) 936.

85 Cal. 600-603, 24 Pac. 995, **LOWREY v. HOGUE.**

Affidavit of Bias and Prejudice Does not Oust Jurisdiction of justice's court in criminal case, but for any abuse of discretion in passing thereon defendant has speedy and adequate remedy by appeal.

Approved in *Miles v. Justice's Court*, 13 Cal. App. 455, 110 Pac. 350, reaffirming rule; *Garrison v. Territory*, 13 Okl. 707, 76 Pac. 187, where

affidavits reasonably established fact that accused could not have fair and impartial trial, change of venue should have been granted.

Effect of Excessive Sentence. See note, 45 L. R. A. 154.

85 Cal. 603-608, 20 Pac. 248, 25 Pac. 256, EX PARTE BARRY.

Where Demurrer to Complaint has Been Sustained and time for amendment has not expired, case is still pending.

Reaffirmed in *Ex parte Joutsen*, 154 Cal. 543, 98 Pac. 392.

For Libel Concerning Judge to be contempt of court, it must relate to pending cause.

Approved in *Fellman v. Mercantile Fire & Marine Ins. Co.*, 116 La. 729, 41 So. 51, and *Ex parte Green*, 46 Tex. Cr. 580, 108 Am. St. Rep. 1035, 81 S. W. 725, 66 L. R. A. 727, both reaffirming rule.

Contempt of Court by Newspaper Publications. See note, 83 Am. St. Rep. 537.

Statement With Respect to Ended Cause as contempt. See note, 68 L. R. A. 257, 262.

85 Cal. 610-614, 24 Pac. 779, ROSENBERG v. FORD.

Mortgage upon Homestead cannot be Enforced unless claim therefor has been duly presented to administrator.

Distinguished in *Bank of Woodland v. Stephens*, 144 Cal. 663, 79 Pac. 380, mortgage on homestead exceeding five thousand dollars in value need not be presented in order to enforce it against excess.

Where Mortgage on Homestead was invalidated by failure to present claim against estate of deceased husband, renewal of mortgage by widow under mistake of law is not binding.

Distinguished in *Lyon v. Robertson* (Cal.), 59 Pac. 990, widow liable on note given in renewal of notes to which deceased husband was party, though given under misapprehension as to her liability for his debts.

85 Cal. 614-619, 24 Pac. 778, BIGELOW v. LOS ANGELES.

Facts That Work is of a Public Nature and that defendant is able to respond in damages are to be considered in determining right to injunction.

Approved in *Flood v. Goldstein Co.*, 158 Cal. 249, 110 Pac. 917, refusing temporary injunction to restore possession of room to tenant who had already been dispossessed and building practically destroyed; *Williams v. Los Angeles Ry. Co.*, 150 Cal. 597, 89 Pac. 332, refusing to enjoin erection of switch tower on street in front of plaintiff's lot.

85 Cal. 619-622, 24 Pac. 1071, HUTCHINSON v. McNALLY.

Homestead from Separate Property of Decedent can be set apart to widow only for limited time.

Approved in *Zanone v. Sprague*, 16 Cal. App. 339, 116 Pac. 991, where homestead has been selected from separate property of husband, homestead interest vests in him upon divorce, unless court decrees otherwise; *Estate of Hayes*, 1 Cof. Prob. 553, where application is made by minor child, for homestead out of community property, widow having died and other children having attained majority, court must set aside homestead to applicant absolutely.

85 Cal. 632-633, 24 Pac. 807, **EX PARTE REILLY**.

De Facto Officers and Offices under unconstitutional statutes. See note, 21 L. R. A. 142.

85 Cal. 633-639, 24 Pac. 791, **COLUSA COUNTY v. HUDSON**.

Defendant in Eminent Domain Proceedings is entitled to compensation for his private road.

Approved in *Ranck v. Cedar Rapids*, 134 Iowa, 566, 111 N. W. 1029, value of livery-stable and undertaking-rooms may be considered.

85 Cal. 639-648, 24 Pac. 843, **WOODS v. VARNUM**.

Proceeding for Summary Removal of Public Officer need not be in form of criminal action.

Approved in *Skeen v. Craig*, 31 Utah, 26, 86 Pac. 488, holding proceeding for summary removal of public officer to be civil in its nature.

Legislature may Provide for Removal of Officer for misdemeanor without trial by jury.

Approved in *State v. Henderson*, 145 Iowa, 664, 124 N. W. 770, reaffirming rule; *Hewel v. Hogin*, 3 Cal. App. 255, 84 Pac. 1005, 1007, trial by jury of issues raised in mandamus proceeding is not absolute right; *State v. Richardson*, 16 N. D. 4, 109 N. W. 1027, accusation for summary removal of county commissioners for "charging and collecting" illegal fees need not be presented by grand jury.

Right to Remove Officers Summarily. See note, 15 L. R. A. 99.

Accusation Against Tax Collector for Failure to perform official duties held sufficient.

Approved in *State v. Richardson*, 16 N. D. 7, 109 N. W. 1029, upholding accusation for illegal "charges and collections" made by county commissioners.

Miscellaneous.—Cited in *State v. Crumbaugh*, 26 Tex. Civ. App. 526, 63 S. W. 927, public office is not property, and may be abolished during term of incumbent.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 86 CALIFORNIA.

86 Cal. 1-22, 26 Pac. 523, LAST CHANCE WATER DITCH CO. v. HEILBRON.

To Maintain Prescriptive Right to flowing water, there must have been diversion and use of water to knowledge and acquiescence of riparian owners such as to occasion damage and give them right of action.

Approved in *Anderson v. Bassman*, 140 Fed. 26, following rule; *Morris v. Bean*, 146 Fed. 434, holding facts do not show such adverse use of water as will justify application of statute of limitations.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 730.

86 Cal. 22-27, 24 Pac. 814, KERCKHOFF-CUZNER MILL ETC. CO. v. CUMMINGS.

Miscellaneous.—Cited in *Hawkins v. Morehead* (Cal.), 34 Pac. 223,

86 Cal. 27-30, 24 Pac. 807, PEOPLE v. WATERMAN.

Judge Elected to Office Newly Created under section 9, article VI, of Constitution holds office for six years, regardless of time of expiration of term of other judges.

Distinguished in *State v. Burkhead*, 187 Mo. 42, 85 S. W. 908, upholding legislative act providing for filling of judgeship vacancy by election for term of less than six years.

86 Cal. 31-36, 24 Pac. 802, PEOPLE v. MURRAY.

Instruction That Prisoner's Testimony is not entitled to same consideration as that of persons not charged with crime is not erroneous.

Approved in *People v. Ryan*, 152 Cal. 368, 92 Pac. 855, reaffirming rule; *State v. Bartlett*, 50 Or. 444, 126 Am. St. Rep. 751, 93 Pac. 244, holding similar instruction in extortion case erroneous as implying it was incumbent on jury to consider prisoner's testimony as false.

86 Cal. 37-58, 24 Pac. 771, DAVIES v. LOS ANGELES.

Under Section 6, Article XI of Constitution, all charters adopted under Constitution are controllable by general laws.

Approved in *Postal Tel. Cable Co. v. Los Angeles*, 160 Cal. 131, 116 Pac. 567, Los Angeles charter of 1889 does not impair right of telegraph corporations under section 536 of Civil Code to construct lines over public highways; *Ex parte Helm*, 143 Cal. 556, 77 Pac. 454, town incorporated prior to adoption of Constitution is not subject to control of general laws in municipal affairs.

Vrooman Act of 1889 is General Law within meaning of Constitution.

Approved in *Clute v. Turner*, 157 Cal. 77, 81, 106 Pac. 242, 244, upholding Vrooman Act of 1889.

Miscellaneous.—Cited in *City of Austin v. Nalle*, 102 Tex. 538, 120 S. W. 996, holding assessment of property for cost of street work is not exercise of power of eminent domain.

86 Cal. 70-72, 26 Pac. 528, IN RE VINICH.

Allegations in Affidavit Made upon Information and belief do not constitute proof sufficient to warrant issuance of order of arrest.

Approved in *State v. M'Gahey*, 12 N. D. 547, 97 N. W. 869, affidavit made upon information and belief not sufficient to warrant issuance of search-warrant.

86 Cal. 72-73, 24 Pac. 846, IN RE MOORE.

Special Administrator may be Appointed to act during suspension of administrator pending appeal from order of removal.

Approved in *Estate of Chadbourne*, 14 Cal. App. 485, 112 Pac. 474, and *Davenport v. Davenport*, 68 N. J. Eq. 612, 60 Atl. 379, both following rule.

Distinguished in *More v. Miller* (Cal.), 53 Pac. 1079, holding judgment cannot be rendered against administrator as such after removal from office.

86 Cal. 74-78, 24 Pac. 845, McCracken v. SUPERIOR COURT.

Under Section 978, Code of Civil Procedure, failure of sureties on bond on appeal from justice's court to qualify within five days after notice of exception to their sufficiency renders appeal ineffectual.

Approved in *Crowley Launch etc. Co. v. Superior Court*, 10 Cal. App. 344, 345, 346, 101 Pac. 936, *Lane v. Superior Court*, 5 Cal. App. 764, 91 Pac. 406, and *Hoffman v. Lewis*, 31 Utah, 191, 87 Pac. 171, all following rule; *Stimpson etc. Scale Co. v. Superior Ct.*, 12 Cal. App. 540, 107 Pac. 1016, failure to file undertaking renders appeal from justice's court ineffectual; *Minton v. Ozias*, 115 Iowa, 150, 88 N. W. 337, appeal bond on appeal from justice's court which is signed by appellant only is not sufficient to give district court jurisdiction.

Undertaking on Appeal from Justice's Court must be filed within thirty days from rendition of judgment.

Approved in *Swem v. Monroe*, 148 Cal. 743, 83 Pac. 1075, undertaking to stay proceedings cannot be taken in lieu of undertaking for costs on appeal from justice court; *Regan v. Superior Court*, 14 Cal. App. 574, 114 Pac. 73, holding rule not changed by section 978a, Code of Civil Procedure; *W. P. Jeffries Co. v. Superior Court*, 13 Cal. App. 198, 109 Pac. 148, under section 978a, Code of Civil Procedure, notice of filing of undertaking is not necessary to give superior court jurisdiction.

Time Within Which Jurisdictional Prerequisites must be completed cannot be extended by court.

Approved in *Jenkins v. Carroll*, 42 Mont. 313, 112 Pac. 1069, parties cannot confer jurisdiction by waiving filing of notice and undertaking.

86 Cal. 78-90, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483, **ALPERS v. HUNT.**

Sufficiency of Complaint cannot be Considered upon appeal from order granting new trial.

Approved in *Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 795, 96 Pac. 575, following rule.

On Appeal from Order Granting New Trial, sufficiency of complaint may be considered where new trial was granted for error in denying nonsuit asked on ground of insufficiency of complaint.

Approved in *Ayotte v. Nadeau*, 32 Mont. 509, 81 Pac. 147, where objection is made to introduction of any evidence on ground of insufficiency of complaint, sufficiency of complaint is reviewable on appeal from order denying new trial.

Contract Whereby Layman Agrees to procure client for attorney in consideration of receiving part of latter's remuneration is void.

Approved in *Langdon v. Conlin*, 67 Neb. 247, 108 Am. St. Rep. 643, 93 N. W. 390, 60 L. R. A. 429, following rule; *Holland v. Sheehan*, 108 Minn. 366, 122 N. W. 3, 23 L. R. A. (n.s.) 510, applying rule where layman in consideration of division of fees received agreed to bring to attorney persons having causes of action for personal injuries.

Distinguished in *State Electro-Medical Inst. v. Platner*, 74 Neb. 27, 103 N. W. 1081, holding corporation may recover in its corporate name for services of licensed physicians furnished under contract; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 289, 119 Am. St. Rep. 1003, 98 S. W. 184, 9 L. R. A. (n.s.) 282, holding attorney may rightfully solicit business for firm of attorneys.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 183.

When Attorney's Contract of Employment is void as against public policy because procured by solicitation. See note, 119 Am. St. Rep. 1040.

86 Cal. 93-106, 23 Pac. 207, 24 Pac. 801, **GOLDTREE v. McALISTER.**

Upon Collateral Attack, Order Admitting foreign will to probate will not be declared void for erroneous finding as to authentication or residence.

Approved in *Dunsmuir v. Coffey*, 148 Cal. 141, 82 Pac. 684, order admitting will to probate, although erroneous, is not rendered void by reason of incorrect determination of domicile of deceased; *Estate of Clark*, 148 Cal. 115, 116, 119, 120, 121, 126, 113 Am. St. Rep. 197, 82 Pac. 763, 764, 765, 767, 1 L. R. A. (n.s.) 996, 7 Ann. Cas. 306, on application for probate of foreign will, proof of foreign probate and question of testator's residence are open to contest.

Distinguished in *Estate of Dunsmuir*, 2 Cal. Prob. 62, 64, statutes relating to probate of foreign will have no reference to will executed in state wherein testator resided at time of his death.

Probate of Foreign Wills. See note, 113 Am. St. Rep. 206, 207, 210.

Mortgage is not Foreclosed Until Mortgagor's Right of redemption is cut off.

Approved in North Dakota etc. Cattle Co. v. Serumgard, 17 N. D. 485, 138 Am. St. Rep. 717, 117 N. W. 461, holder of mortgage given after sale under prior mortgage and before expiration of redemption period is redemptioner.

86 Cal. 107-110, 24 Pac. 834, SCHAUFELLE v. DOYLE.

Right of Access and Egress to Land Abutting on street is property which cannot be taken without compensation.

Approved in Danielson v. Sykes, 157 Cal. 689, 109 Pac. 88, enjoining obstruction of private alley lying opposite plaintiff's lot on opposite side of street; Sievers v. Root, 10 Cal. App. 340, 101 Pac. 926, abutting owner who has not been compensated for damages from change of grade of street may enjoin improvement; McLean v. Llewellyn Iron Works, 2 Cal. App. 348, 83 Pac. 1084, 1085, owner of property abutting on street may enjoin nuisance maintained on opposite side of street; Coats v. Atchison etc. Ry. Co., 1 Cal. App. 443, 82 Pac. 641, railroad company maintaining embankment in front of abutting property is liable as for nuisance.

86 Cal. 110-114, 24 Pac. 862, JOHNSON v. VANCE.

Necessity of Jury to Compute Damages on default judgment. See note, 20 L. R. A. (n. s.) 7.

86 Cal. 114-118, 24 Pac. 867, DALEY v. RUSS.

Under Pleading Alleging Performance, proof of excuse for non-performance will not entitle one to recover.

Approved in Estate of Warner, 158 Cal. 445, 111 Pac. 353, proof of waiver of performance of agreement to support and educate child does not justify finding of performance thereof; Los Angeles Gas etc. Co. v. Amalgamated Oil Co., 156 Cal. 778, 106 Pac. 57, in action for breach of contract to deliver oil, plaintiff must allege and prove performance or excuse for nonperformance; Seebach v. Kuhn, 9 Cal. App. 490, 99 Pac. 725, under pleading alleging performance of building contract party cannot recover by showing readiness to perform and prevention by independent contractors; Aronson v. Frankfort etc. Ins. Co., 9 Cal. App. 479, 99 Pac. 540, under pleading alleging giving of notice proof of waiver of notice is inadmissible.

Motion for Nonsuit must Specify Grounds upon which it is made.

Reaffirmed in De Leonis v. Hammel, 1 Cal. App. 396, 82 Pac. 352.

Where Defects cannot be Corrected failure to specify grounds for motion for nonsuit is immaterial.

Approved in Smalley v. Rio Grande Western Ry. Co., 34 Utah, 445, 98 Pac. 318, failure to specify grounds in motion for directed verdict does not justify reversal where it appears case was taken from jury for insufficiency of evidence and defects upon which ruling was based cannot be corrected.

Amendment to Pleading will be Allowed when it is in furtherance of justice.

Approved in Rudd v. Byrnes, 156 Cal. 638, 105 Pac. 958, 26 L. R. A. (n. s.) 134, refusal of leave to amend to plead statute of limitations is not abuse of discretion where it appears counsel overlooked amendment reducing time for commencement of action.

86 Cal. 119-122, 21 Am. St. Rep. 26, 24 Pac. 852, **SANDERS v. RUSSELL**.

On Death of One of Spouses, community property dedicated as homestead vests in survivor.

Approved in *Saddlemire v. Stockton Savings etc. Soc.*, 144 Cal. 653, 79 Pac. 382, where wife survives, heirs cannot maintain action to quiet title to property selected by husband and wife as homestead; *Estate of Clavo*, 6 Cal. App. 777, 93 Pac. 295, surviving spouse holds homestead property exempt from forced sale; *Hibernia Sav. etc. Soc. v. Laidlaw*, 4 Cal. App. 629, 88 Pac. 731, homestead vesting in wife on death of husband retains its homestead character.

Judgment Creditor of Owner of Homestead declared upon community property to acquire lien upon property must present judgment to administratrix.

Approved in *Hibernia Sav. etc. Soc. v. Laidlaw*, 4 Cal. App. 628, 88 Pac. 731, claim secured by mortgage on homestead property must be presented against estate.

Though Value of Homestead Exceeds Statutory amount, docketing of judgment and levying of execution thereon creates no lien.

Reaffirmed in *Boggs v. Dunn*, 160 Cal. 286, 287, 116 Pac. 744, 745.

86 Cal. 122-127, 24 Pac. 859, **LANDREGAN v. PEPPIN**.

Under Political Code, Section 3628, no mistake in name of owner of realty renders assessment thereof invalid.

Approved in *Hertzler v. Freeman*, 12 N. D. 191, 96 N. W. 296, assessment of realty in name of another than owner does not render tax void.

Tax Deed Conveys No Title where it appears therefrom that notice required by section 3785 of Political Code incorrectly stated amount land was sold for.

Approved in *Elickinger v. Cornwell*, 22 S. D. 387, 117 N. W. 1041, tax certificate conveys no title where last publication of notice provided for in section 15, chapter 51, page 58, of Session Laws, is less than ninety days before date on which certificate becomes absolute.

First and Last Days in Computation of Time. See note, 49 L. R. A. 238.

86 Cal. 128-132, 24 Pac. 863, **JOHNSON v. VANCE**.

Allegation in Complaint in Ejectment that plaintiff is owner of premises is sufficient averment of plaintiff's title.

Approved in *Casci v. Ozalli*, 158 Cal. 283, 110 Pac. 933, where allegations of ownership and possession in suit to quiet title to mining claim are denied, judgment on pleadings cannot be given; *Corea v. Higuera*, 153 Cal. 455, 95 Pac. 884, 17 L. R. A. (n. s.) 1018, finding that party is owner of right of way across land and that it is appurtenant to his land is statement of ultimate facts; *Merryman v. Kirby*, 13 Cal. App. 346, 109 Pac. 636, holding complaint in ejectment sufficiently alleged ownership of property; *Travelers' Ins. Co. v. Hallaner*, 131 Wis. 374, 111 N. W. 528, allegation that plaintiff "was obliged to and did pay upon said judgment" is sufficient allegation of affirmance of judgment.

Failure to Find upon Immaterial Issue will not justify reversal of judgment.

Approved in *Bradley v. Parker* (Cal.), 34 Pac. 235, where finding on one of issues is determinative of case, failure to find on plea of statute of limitations is not error.

86 Cal. 134-141, 24 Pac. 853, ROTH v. INSLEY.

After Mother's Death Homestead Declared by son, as head of family, during her lifetime is not subject to execution because he has ceased to be head of family.

Approved in *Zanone v. Sprague*, 16 Cal. App. 346, 116 Pac. 994, where husband files homestead on his separate property, divorced wife retains no interest therein unless assigned to her under subdivision 4, section 146, of Civil Code; *Robinson v. Dougherty*, 118 Cal. 301, 50 Pac. 650, after wife's death, leaving husband childless, homestead declared by him as head of family upon community property during her lifetime is exempt.

Sale Under Execution of Homestead which is exempt is cloud upon title.

Approved in *Beardsley v. Hill*, 85 Ark. 8, 106 S. W. 1170, refusing to quiet title to plaintiff's lands where it appeared defendant claimed under tax deed void on face.

Homestead Declared by Party not Head of family upon property not exceeding one thousand dollars in value is exempt from execution.

Approved in *Hohn v. Pauly*, 11 Cal. App. 728, 106 Pac. 267, homestead declared by widow as required by statute on her own property which does not exceed one thousand dollars in value is exempt.

Continuance of Family as Condition of continuance of homestead where a condition of inception. See note, 16 L. R. A. (n. s.) 112.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 101.

86 Cal. 142-144, 24 Pac. 851, HARTIGAN v. SOUTHERN PACIFIC CO.

Under Section 377 of Code of Civil Procedure, action for damages for injuries resulting in death can be brought by heirs or personal representatives.

Approved in *Gregory v. Southern Pac. Co.*, 157 Fed. 115, action based on section 377 of Code of Civil Procedure of California brought in another state is governed as to limitation by law of forum.

Several Actions for Wrongful Death. See note, 34 L. R. A. 792.

Power to Compromise Action for Death. See note, 21 L. R. A. 158.

Measure of Recovery for Death caused by negligence. See note, 17 L. R. A. 73, 74.

86 Cal. 151-154, 24 Pac. 850, IN RE LAHIFF.

Separate Property of Deceased can be Set Aside as probate homestead for limited time only.

Approved in *Estate of Leahy*, 3 Cal. Prob. 369, property obtained by pledge of deceased husband's separate property cannot be set aside as homestead to widow and minor child absolutely; *Estate of Hayes*, 1 Cal. Prob. 553, on death of parents, community property can be set aside as homestead to minor child absolutely.

Heirs, Devisees and Legatees Take Their Interests subject to all contingencies of administration.

Approved in *Matter of Silliman*, 159 Cal. 161, 112 Pac. 891, surviving husband is entitled to homestead for limited time out wife's separate property devised to her sister notwithstanding will makes provision for him; *Estate of Bump*, 162 Cal. 277, 92 Pac. 644, upholding order made without notice providing for allowance out of decedent's estate for support of widow; *Estate of Bump*, 152 Cal. 278, 92 Pac. 644, husband cannot by provisions of his will deprive widow of her right to family allowance.

Equitable Conversion. See note, 1 Cof. Prob. 427.

86 Cal. 171-176, 24 Pac. 1061, BLANKENBURG v. JORDAN.

Commissions of Executors. See note, 1 Cof. Prob. 214.

86 Cal. 179-184, 24 Pac. 943, IN RE WELCH.

Administrator Should not be Removed except for good and sufficient cause.

Approved in *In re Chadbourne*, 15 Cal. App. 372, 114 Pac. 1015, failure of executor to publish notice to creditors within statutory period is not ground for removal where it appears he was not intentionally neglectful; *Estate of Graber*, 2 Cof. Prob. 352, executor will not be removed for failure to file inventory within statutory time where delay is result of counsel's negligence.

Grounds for Removal of Executors and administrators. See note, 138 Am. St. Rep. 547, 548.

86 Cal. 184-189, 24 Pac. 1005, JAMES v. YAEGER.

Where One of Comakers of Non-negotiable Note who is surety pays note and takes it up, note is extinguished.

Approved in *Crystal v. Hutton*, 1 Cal. App. 254, 256, 81 Pac. 1116, where surety pays note, he can maintain action against maker on implied contract of indemnity only, notwithstanding note was assigned to him; *Yule v. Bishop (Cal.)*, 62 Pac. 70, indorser of corporation's note who paid same and took assignment thereof cannot enforce statutory liability of stockholders for such debt.

Distinguished in *Enscoe v. Fletcher*, 1 Cal. App. 663, 82 Pac. 1076, notes payable to father and executed by son as comaker are not extinguished by transfer to son on distribution of father's estate.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 761, 778.

86 Cal. 189-191, 25 Pac. 916, PARKS v. DUNLAP.

Voluntary Dismissal of Action Without Circumstances showing dismissal was intended as final disposition of dispute is not bar to another action.

Approved in *Carr v. Howell*, 154 Cal. 384, 97 Pac. 890, dismissal of action by federal court while demurrer is undecided is not bar to subsequent action in any court; *Hubbard v. Superior Court*, 9 Cal. App. 171, 98 Pac. 396, dismissal under section 581 of Code of Civil Procedure is without prejudice to new action unless it operates as retraxit; *Lemon v. Sigourney Sav. Bank*, 131 Iowa, 86, 108 N. W. 107, voluntary dismissal of one of two counts in petition in intervention does not constitute binding adjudication; *Benbow v. The James Johns*, 56 Or. 562, 108 Pac. 637, in action against vessel owner and contractor to recover for work and materials, party can take non-

suit as to vessel and owner and judgment against contractor and afterward enforce lien against vessel.

86 Cal. 192-197, 24 Pac. 1025, **GRIFFITHS v. GALINDO**.

Question of Dedication of Street is one of intention to be determined by acts of owner.

Approved in *Smith v. Glenn* (Cal.), 62 Pac. 183, holding there was no dedication of certain strip of land for use as highway.

86 Cal. 197-202, 24 Pac. 1000, **CAMPBELL v. WEST**.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 441, 445.

86 Cal. 203-209, 24 Pac. 1009, **TATUM v. THOMPSON**.

In Absence of Statute Lessor is not Bound to keep premises in condition fit for occupation for which they were demised.

Approved in *Tucker v. Bennett*, 15 Okl. 191, 81 Pac. 424, in absence of agreement, landlord is not bound to put premises in condition fit for occupation of printing business or repair subsequent dilapidations.

Where It is Agreed Rent shall not be Charged while premises are untenable, surrender of premises is not condition precedent to tenant's release from liability for rent.

Distinguished in *Snook etc. Furniture Co. v. Steiner*, 117 Ga. 375, 43 S. E. 778, if premises are destroyed and lessor notifies tenant he elects not to rebuild, tenant is relieved from paying rent and is no longer entitled to possession.

86 Cal. 210-211, 24 Pac. 996, **FAEKLER v. WRIGHT**.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 442.

86 Cal. 211-212, 24 Pac. 1063, **FLASHNER v. WALDRON**.

Order Granting Nonsuit cannot be Reviewed on appeal if no exception was taken to ruling.

Reaffirmed in *Nelmes v. Wilson* (Cal.), 34 Pac. 341.

86 Cal. 212-216, 24 Pac. 1030, 33 Pac. 400, **WHITE v. WHITE**.

Order Denying Alimony for Counsel Fees is appealable.

Approved in *Stewart v. Stewart*, 156 Cal. 654, 105 Pac. 956, order denying application for costs in divorce suit is appealable.

Distinguished in *Bordeaux v. Bordeaux*, 32 Mont. 161, 162, 80 Pac. 6, order denying alimony pendente lite is not appealable.

Wife must Show Necessity for Award of alimony pendente lite.

Approved in *Stewart v. Stewart*, 156 Cal. 655, 105 Pac. 957, wife is bound to show necessity for award of alimony for costs incurred in summoning witnesses.

86 Cal. 225-232, 24 Pac. 998, **PEOPLE v. TARM POL**.

Instruction That Accused may Establish facts essential to his defense by preponderance of evidence is not erroneous when limited by instruction relating to consideration of all testimony.

Approved in *Prince v. United States*, 3 Okl. Cr. 705, 109 Pac. 243, following rule; *Schultz v. Territory*, 5 Ariz. 241, 52 Pac. 352, if evidence which does not fully prove alibi raises doubt as to prisoner's guilt, jury should acquit.

Burden and Measure of Proof of Alibi. See note, 41 L. R. A. 533.

Separation of Jury While Viewing Place of commission of crime cannot be considered on appeal unless objected to when opportunity was offered.

Approved in *People v. White*, 5 Cal. App. 341, 90 Pac. 477, failure to object to jury taking view of place of commission of offense in absence of judge is waiver of right to have judge present.

Effect of Separation of Jury. See notes, 103 Am. St. Rep. 170; 24 L. R. A. (n. s.) 784.

86 Cal. 236-238, 21 Am. St. Rep. 30, 24 Pac. 989, **PARKER v. LARSEN.**

One Permitting Water to Percolate Through Ditch and saturate neighbor's land, to his injury, may be enjoined from continuing injury.

Approved in *Paolini v. Fresno Canal etc. Co.*, 9 Cal. App. 8, 97 Pac. 1133, one negligently permitting water to escape from irrigation ditch onto another's land is liable for resulting injury.

Liability for Escape of Dangerous Substance stored on premises. See note, 15 L. R. A. (n. s.) 541.

86 Cal. 238-241, 24 Pac. 988, **PEOPLE v. SMITH.**

Entering of Premises With Intent to commit larceny is burglary.

Approved in *People v. King*, 4 Cal. App. 218, 87 Pac. 402, holding section 459 of Penal Code applies to dwelling.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 499.

86 Cal. 241-245, 24 Pac. 1013, **SILVA v. SERPA.**

Admissions Made After Execution of Mortgage are not admissible to prove it was executed to defraud creditors.

Approved in *First Nat. Bank of Enid v. Yoeman*, 17 Okl. 618, 90 Pac. 414, admissions and statements of mortgagor made at time of and after execution of chattel mortgage are not admissible to impeach it.

86 Cal. 246-248, 24 Pac. 1027, **SAN FRANCISCO ETC. R. R. CO. v. TAYLOR.**

Owner is not Entitled to Value of improvements placed upon land by condemnor before commencement of condemnation proceedings.

Approved in *Aldridge v. Board of Education*, 15 Okl. 357, 82 Pac. 829, following rule; *Blackwell, Enid etc. Ry. Co. v. Bevout*, 19 Okl. 72, 91 Pac. 881, after railroad has entered upon lands of private owner and appropriated right of way, either party may institute condemnation proceedings to determine their rights.

Right to Compensation for Improvements made by taker before condemnation without owner's consent. See note, 5 L. R. A. (n. s.) 923.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 296.

Value of Improvements Made by One taking property by eminent domain as element of damage. See note, 16 L. R. A. 805.

Nature of Railroad as Realty or Personalty. See note, 66 L. R. A. 48.

86 Cal. 260-264, 24 Pac. 1003, McCORMICK v. ORIENT INS. CO.

If Insurer has Defense to Claim, and insured upon request of insurer and at considerable expense produces books and property which escaped damage, there is no waiver of such defense or estoppel with respect thereto.

Approved in McCormick v. Union Ins. Co. (Cal.), 24 Pac. 1005, and McCormick v. Springfield Ins. Co. (Cal.), 24 Pac. 1005, both following rule; Goorberg v. Western Assurance Co., 150 Cal. 519, 119 Am. St. Rep. 246, 89 Pac. 133, 10 L. R. A. (n. s.) 876, where insurer denies liability, retention of premium after loss is not waiver of defense that policy is void for misrepresentation as to insurer's title; Webster v. State Mut. Fire Ins. Co., 81 Vt. 80, 69 Atl. 320, if with knowledge insurer elects not to take advantage of forfeiture, he is bound as by election to treat contract as if no cause of forfeiture had occurred.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 835.

86 Cal. 265-274, 24 Pac. 1028, IN RE WHITCOMB.

Precatory Words and Trusts. See notes, 106 Am. St. Rep. 512, 516, 518, 528; 2 Cof. Prob. 294, 298, 299, 310, 312.

86 Cal. 279-286, 24 Pac. 1032, SOUTHERN PACIFIC CO. v. BURR.

Congress may Withdraw Public Lands from sale, though in possession of pre-emptors, if it has not been paid for, and grant it to others.

Approved in Oregon etc. R. R. Co. v. Quigley, 10 Idaho, 781, 80 Pac. 403, following rule.

Grant of Right of Way is Conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to such use.

Approved in Oregon etc. R. R. Co. v. Quigley, 10 Idaho, 784, 80 Pac. 404, following rule.

Grantee of Right of Way Over Public Lands may maintain ejectment to gain possession of strip of patentee's land traversed thereby.

Approved in Southern Pac. Co. v. Meyer (Cal.), 24 Pac. 1034, following rule; dissenting opinion in Kansas etc. Ry. Co. v. Burns, 70 Kan. 632, 79 Pac. 240, majority holding one not owner of fee who without right enters upon railroad right of way cannot justify such possession by showing his occupancy does not interfere with operation of road.

Distinguished in San Francisco v. Grote (Cal.), 47 Pac. 940, city cannot maintain ejectment for recovery of possession of street dedicated to public by user without showing ownership in fee.

Ejectment for Public Easement. See note, 11 L. R. A. (n. s.) 130.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 783.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 573, 574.

Nature of Railroad as Realty or Personalty. See note, 66 L. R. A. 40.

Miscellaneous.—Cited in Southern Cal. Ry. Co. v. O'Donnell, 3 Cal. App. 385, 85 Pac. 933, upholding finding that party was owner and in possession of mineral location.

86 Cal. 286-294, 21 Am. St. Rep. 39, 24 Pac. 1012, FLOURNOY v. FLOURNOY.

Presumption is That Husband Intended to advance money paid by him for benefit of wife's separate estate.

Approved in *Carlson v. Carlson*, 10 Cal. App. 303, 101 Pac. 925, in absence of agreement to that effect expenditures incurred by husband in improving wife's separate property do not constitute lien thereon so as to render it community property.

What is Community Property. See notes, 126 Am. St. Rep. 110; 4 Cof. Prob. 52.

Married Women's Separate Estate. See note, 87 Am. St. Rep. 704.

86 Cal. 295-298, 24 Pac. 1014, PEOPLE v. EUBANKS.

Presumption and Burden of Proof as to Sanity. See note, 36 L. R. A. 728.

86 Cal. 306-316, 21 Am. St. Rep. 44, 24 Pac. 1034, IN RE ORTIZ.

Domiciliary Executor must Gather in and account for foreign assets of testator to extent of his conscientious ability.

Approved in *Richards v. Blaisdell*, 12 Cal. App. 111, 106 Pac. 737, under section 1913 of Code of Civil Procedure, judgment establishing claim against executor in Minnesota cannot be basis of action against administrator in California; *Estate of Finch*, 3 Cof. Prob. 298, where administrator to whom claim is presented transmits it to administrator in sister state and receives funds to pay it, court will enforce payment thereof to claimant.

Miscellaneous.—Cited in *Estate of Dunsmuir*, 2 Cof. Prob. 65, sections 1322-1324 of Code of Civil Procedure apply only to wills made in other states or countries by persons domiciled outside of California.

86 Cal. 322-327, 24 Pac. 1019, BANK OF SONOMA COUNTY v. CHARLES.

Statement of Claims Against Estates of Decedents. See notes, 130 Am. St. Rep. 318; 5 Cof. Prob. 304.

86 Cal. 329-335, 24 Pac. 1021, PEOPLE v. OHUN HEONG.

It is not Error in Prosecution for homicide to give instruction on manslaughter.

Approved in *People v. Gallaner*, 3 Cal. App. 434, 86 Pac. 815, where in prosecution for homicide there is evidence which might induce jury to convict for manslaughter, it is not error to give instruction on manslaughter.

Use of Expression "Time and Place of Murder" in instruction upon question of alibi does not assume crime has been proved.

Approved in *People v. Wilkins*, 158 Cal. 536, 111 Pac. 615, instruction that to make killing murder party must die within year and day after "the" stroke was received does assume killing against prisoner's contention that death was by suicide.

If Instructions Construed Together are sufficiently accurate and free from error, conviction will not be reversed.

Approved in *Hayden v. Consolidated Min. etc. Co.*, 3 Cal. App. 139, 84 Pac. 423, holding certain instructions in action for damages to irrigation ditch are not contradictory.

Instance of Instruction on Reasonable Doubt held not prejudicial.

Cited in *People v. Del Cerro*, 9 Cal. App. 773, 100 Pac. 891, upholding instruction as to reasonable doubt given in larceny case.

Burden and Measure of Proof of Alibi. See note, 41 L. R. A. 537, 540.

86 Cal. 335-342, 24 Pac. 993, WEST COAST LUMBER CO. v. APFIELD.

Written Instrument Supersedes All Oral Negotiations concerning subject matter which preceded or accompanied its execution.

Approved in *Peterson v. Chaix*, 5 Cal. App. 534, 90 Pac. 951, terms "about" and "more or less," used in contract of sale of grapes, do not create such ambiguity as will justify admission of extrinsic evidence to show intention.

Fixtures Retaining by Agreement the character of personal property. See note, 84 Am. St. Rep. 901.

Lien on Landlord's Interest for Labor or materials furnished for building or improvement removable by tenant. See note, 6 L. R. A. (n. s.) 485.

Tenant's Duty to Leave Premises in Good Condition. See note, 64 L. R. A. 663.

86 Cal. 342-348, 24 Pac. 1064, BURLESON v. NORTHWESTERN MUTUAL INS. CO.

Insurance Agent cannot Recover Renewal Commissions on premiums accruing after termination of agency.

Approved in *King v. Raleigh*, 100 Mo. App. 7, 70 S. W. 253, following rule; *Scott v. Travelers' Ins. Co.*, 103 Md. 78, 63 Atl. 380, where company agreed to pay agent renewal commissions on premiums secured before execution of contract of agency, agent is not entitled to commissions on such premiums accruing after termination of agency.

Miscellaneous.—Cited in *Michigan Mutual Life Ins. Co. v. Coleman*, 118 Tenn. 235, 100 S. W. 128.

86 Cal. 348-351, 24 Pac. 1024, PERKINS v. ONYETT.

When Affidavit in Support of Claim against estate is made by person other than claimant, it must state why it is not made by claimant.

Approved in *Maier Packing Co. v. Frey*, 5 Cal. App. 82, 89 Pac. 876, holding affidavit made in behalf of corporate claimant by its president defective for failure to assign reason relieving corporate claimant from making it.

Statement of Claims Against Estates of Decedents. See notes, 130 Am. St. Rep. 316, 318, 320, 322; 5 Cof. Prob. 302, 304, 306, 308.

86 Cal. 352-353, 24 Pac. 1059, HYDE v. BOYLE.

Miscellaneous.—Cited in *Green v. Thornton*, 130 Cal. 484, 62 Pac. 750, and *Green v. Thornton*, 8 Cal. App. 162, 96 Pac. 383, other litigation over same premises.

86 Cal. 367-374, 24 Pac. 1072, GARDNER v. DONNELLY.

Undertaking to Release Attachment cannot be Repudiated by those who asked for it and received its benefits, although its conditions are more onerous than those of statutory undertaking.

Approved in *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 744, 91 Pac. 418, whether undertaking to release attachment be in statutory or common-law form, recitals therein are conclusive against obligor; *Moffitt v. Garrett*, 23 Okl. 403, 138 Am. St. Rep. 818, 100 Pac. 535, in action on bond to discharge attachment, obligor is liable whether attachment was rightfully or wrongfully issued; *Brady v. Onffroy*, 37 Wash. 489, 79 Pac. 1006, where, after filing of bond to release attachment, attachment is vacated and subsequently judgment in cause is rendered against defendant, it is error to release surety from liability on bond.

In Action on Undertaking to Release Attachment, allegation of neglect and refusal to pay judgment is sufficient averment of demand.

Approved in *Abby v. Dexter*, 18 Colo. App. 501, 72 Pac. 893, in action on agreement to pay certain sum for claim conveyed out of first proceeds received from claim, allegation that party failed and refused to pay is sufficient averment of demand; *Irwin v. Insurance Co. of N. A.*, 16 Cal. App. 145, 116 Pac. 295, allegation of neglect and refusal to pay insurance is sufficient allegation of nonpayment.

86 Cal. 374-384, 24 Pac. 1074, 10 L. R. A. 139, **TOOMEY v. SOUTHERN PACIFIC R. R. CO.**

Railroad Does not Owe Trespasser upon its tracks duty of doing acts to render trespass safe.

Approved in *Palmer v. Oregon Short Line R. R. Co.*, 34 Utah, 477, 98 Pac. 694, following rule; *Bygum v. Southern Pac. Co. (Cal.)*, 36 Pac. 415, in action against railroad for death of boy, questions of company's negligence and contributory negligence of boy and parents are for jury; *Duncan v. St. Louis etc. R. R. Co.*, 152 Ala. 125, 44 So. 421, holding failure of railroad to discover trespasser on track is not negligence.

Statute Requiring Signals to be Given on approaching crossing is for benefit of those only who use crossing.

Approved in *Cleveland etc. Ry. Co. v. Workman*, 66 Ohio St. 542, 90 Am. St. Rep. 602, 64 N. E. 588, following rule; *Indiana etc. Coal Co. v. Neal*, 166 Ind. 463, 465, 77 N. E. 851, 852, under section 7478 of Burns' Annotated Statutes of 1901, failure of mine operator to provide door-tender gives driver of car, who is injured by his head striking top of doorway while trying to keep door open while passing through, no cause of action; *New York etc. R. R. Co. v. Martin*, 35 Ind. 676, 72 N. E. 656, person who was approaching crossing and was turning on side road parallel with track when horse was frightened by approach of train without giving signal cannot recover for injuries sustained; *Lynch v. Great Northern Ry. Co.*, 38 Mont. 519, 100 Pac. 618, where accident does not occur at crossing, failure to give signal for crossing is not available to party in action for negligent killing on railroad track.

Whether Wrongdoer may Take Advantage of general statutory imposition of damages for negligence. See note, 28 L. R. A. 749.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 343, 345.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 543.

Doctrine of "Last Clear Chance." See note, 55 L. R. A. 432.

86 Cal. 386-390, 25 Pac. 90, BANK OF CALIFORNIA v. BOYD.

Same Particularity of Statement is not Required in affidavit for attachment that is required in pleading.

Approved in *Finch v. McVean*, 6 Cal. App. 274, 91 Pac. 1020, upholding action of court in dissolving writ of attachment where it recited amount in excess of amount imported in affidavit.

86 Cal. 390-393, 25 Pac. 14, SIEBE v. JOSHUA HENDY MACH. WORKS.

President Authorized to Transact Ordinary Business of corporation engaged in machinery business has power to purchase machinery for corporation and to give note therefor without resolution of board.

Approved in *Judell v. Goldfield Realty Co.*, 32 Nev. 359, 108 Pac. 458, where corporation holds secretary and manager out as possessing authority to settle claims, claimants can enforce note executed in name of corporation by its secretary and manager in payment thereof.

Powers of President and Vice-president of corporation. See note, 14 L. R. A. 356, 357.

86 Cal. 393-395, 24 Pac. 1091, PEOPLE v. NEYCE.

In Prosecution for Embezzlement, Evidence of previous acts of embezzlement similar to one charged and against same person is admissible.

Approved in *People v. Whalen*, 154 Cal. 476, 98 Pac. 197, in prosecution for obtaining money under false pretenses, evidence that accused previously made similar misrepresentations to others in endeavor to sell stock in same company in which he sold stock to prosecuting witness is admissible.

Evidence of Other Crimes in Criminal Cases. See note, 62 L. R. A. 226.

86 Cal. 395-401, 21 Am. St. Rep. 52, 24 Pac. 1089, REINHART v. LUGO.

Certificate of Service of Summons by deputy sheriff in own name is void as proof of such service.

Approved in *Karns v. State Bank & S. Co.*, 31 Nev. 179, 101 Pac. 567, under section 3051 of General Statutes of 1885, service of summons upon assistant cashier in charge of branch bank, who has power to sign drafts and correspondence but has nothing to do with management of corporation, is insufficient; *Lynch v. West*, 63 W. Va. 576, 60 S. E. 608, where process is served by private person, return must show time and place of service.

Persons in Whose Name Deputy Should Act. See notes, 106 Am. St. Rep. 826, 827, 828; 19 L. R. A. 180.

Defects in Proof of Service Necessary to entering of default cannot be cured by subsequent knowledge of fact.

Approved in *Lawrence v. Stone*, 160 Ala. 385, 135 Am. St. Rep. 105, 49 So. 377, on hearing of motion to set aside default judgment, evidence of service of process will not be received.

Motion to Vacate Judgment on Ground that it is void is direct attack.

Distinguished in *Estate of Davis*, 151 Cal. 324, 121 Am. St. Rep. 105, 86 Pac. 185, answer to petition for distribution alleging will is forgery and that probate thereof was fraudulently procured collaterally attacks judgment admitting will to probate.

Amendment of Pleading in Matter of Substance opens default on original pleading.

Distinguished in *Cole v. Roebling Construction Co.*, 156 Cal. 446, 105 Pac. 257, rule not applicable where judgment is entered on default based on original complaint before it was amended.

86 Cal. 402, 25 Pac. 9, EX PARTE BECKER.

Sufficiency of Evidence to Convict Accused will not be determined on habeas corpus.

Approved in *In re Vandiveer*, 4 Cal. App. 652, 88 Pac. 994, on habeas corpus court will only examine evidence to ascertain whether commitment is with probable cause; *State v. Beaverstad*, 12 N. D. 534, 97 N. W. 550, on habeas corpus court will not weigh conflicting testimony or measure credibility of witnesses; *Winnovich v. Emery*, 33 Utah, 361, 93 Pac. 994, on habeas corpus sufficiency of evidence adduced before magistrate to warrant holding of accused for trial will not be reviewed.

Prisoner's Right to Discharge on Habeas Corpus after commitment and before trial. See note, 100 Am. St. Rep. 33.

86 Cal. 405-415, 24 Pac. 1094, WOLFSKILL v. LOS ANGELES COUNTY.

What Constitutes Dedication to, and Acceptance of, a public street. See note, 129 Am. St. Rep. 619.

Public User as Acceptance of Highway. See note, 18 L. R. A. 510.

86 Cal. 415-422, 21 Am. St. Rep. 57, 24 Pac. 1093, BERONIO v. SOUTHERN PACIFIC R. R. CO.

When by One Act Several Pieces of Property are permanently injured, damages are assessed once for all.

Approved in *Williams v. Southern Pacific R. R. Co.*, 150 Cal. 626, 627, 89 Pac. 599, 600, where one's land is permanently injured by building of railroad thereon, entire cause of action for damages, past and prospective, accrues when injury is inflicted; *Gartner v. Chicago etc. R. R. Co.*, 71 Neb. 451, 98 N. W. 1054, where overflow of water caused by obstruction will indefinitely injure adjacent land unless interfered with, damages, past and prospective, can be recovered in one action only.

Miscellaneous.—Cited in *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 443, 82 Pac. 641, abutting land owner may recover for deprivation of access over street notwithstanding city has authorized use of street for railroad purposes.

86 Cal. 430-431, 25 Pac. 244, WILLIAMS v. DENNISON.

Where Appeal is Taken from Judgment and order denying new trial, one undertaking is sufficient.

Approved in *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 407, 95 Pac. 494, following rule.

86 Cal. 433-441, 25 Pac. 7, CORSON v. BERSON.

Claim Against Partners Need not be Presented to estate of deceased partner in order to enforce it against firm.

Approved in *Franklin v. Trickey*, 9 Ariz. 285, 80 Pac. 353, administrator of partner first deceased may bring suit for accounting against administrator of surviving partner without presenting demand.

Month to Month Tenancy may be terminated by giving of one month's notice.

Approved in *Owen v. Herzihoff*, 2 Cal. App. 623, 84 Pac. 275, applying rule in forcible detainer.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 318.

86 Cal. 445-449, 25 Pac. 5, **MADDEN v. OCCIDENTAL ETC. STEAMSHIP CO.**

Negligence will not be Inferred from Proof that employee while loading ship was injured by falling of freight caused by breaking of rope which carried freight.

Approved in *McDonald v. California Timber Co.*, 7 Cal. App. 378, 94 Pac. 377, proof that clevis attached to cable which anchored engine broke while engine was being moved by own power raises no presumption of negligence in furnishing clevis; *Fredenthal v. Brown*, 52 Or. 41, 35 Pac. 1117, proof that employee in hold of ship was injured by boards slipping from derrick is not prima facie proof of negligence.

Distinguished in *Dixon v. Pluns* (Cal.), 31 Pac. 932, when it is shown person dropped chisel from building and injured another on street, prima facie case of negligence is established.

86 Cal. 449-458, 25 Pac. 16, 10 L. R. A. 545, **STANBY v. McELRATH.**

Debt may be Paid by Giving of Note if it is offered and accepted as payment.

Approved in *Savings etc. Soc. v. Burnett* (Cal.), 37 Pac. 185, upholding finding that new note was given in payment of balance due upon original note.

Accommodation Indorser Who Pays Note may sue maker for amount of note as for money paid to his use.

Approved in *Crystal v. Hutton*, 1 Cal. App. 254, 81 Pac. 1116, where surety pays note and accepts assignment thereof, he can maintain action against maker on implied contract of indemnity only; *Yule v. Bishop* (Cal.), 62 Pac. 70, indorser of corporation's note who pays same and takes assignment thereof cannot enforce statutory liability of stockholders for such debt; *Blanchard v. Blanchard*, 201 N. Y. 138, 94 N. E. 631, statute of limitations as to accommodation indorser's right of action against maker of note does not run until indorser pays note.

Notice of Dishonor is for Benefit of indorser.

Approved in *Merchants' Nat. Bank v. Bentel*, 15 Cal. App. 173, 113 Pac. 709, under section 3143 of Civil Code, demand of payment of indorser is not notice that demand has been made on maker and payment refused.

Judicial Notice of Court's Own Records in other actions. See note, 11 L. R. A. (n. s.) 616.

86 Cal. 459-465, 25 Pac. 12, **GREENBAUM v. MARTINEZ.**

Amount of Damages Prayed for in action for damages is test of jurisdiction.

Approved in *Becker v. Superior Court*, 151 Cal. 316, 90 Pac. 690, if in action to recover money and establish lien, lien fails and amount of claim is not sufficient to confer jurisdiction, court may render personal judgment for amount due.

Query, Whether Money Paid as Attorneys' Fees is within rule of damages declared in section 3336 of Civil Code.

Cited in *Spooner v. Cady* (Cal.), 44 Pac. 1019, where only evidence of money expended in pursuit of converted property is that party gave note for expenses of proposed suit and it does not appear what expenses were incurred except that party had costs, money paid to attorney cannot be considered in estimating damages.

Where Party Brings Suit in Superior Court for more than three hundred dollars, penalty for recovery of less than jurisdictional amount is loss of costs.

Approved in *Pratt v. Welcome*, 6 Cal. App. 477, 92 Pac. 501, applying rule in replevin.

Under Section 1140 of Civil Code, title to property passes to buyer whenever parties agree to present transfer and thing is identified.

Approved in *Grange Co. v. Farmers' Union etc. Co.*, 3 Cal. App. 524, 86 Pac. 617, where seller's conduct indicates intention to pass title to grain on delivery to carrier, title vests in buyer as of date of shipment.

Sufficiency of Selection or Designation of Goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 17, 20, 48, 57.

86 Cal. 465-471, 25 Pac. 10, KRELING v. MULDER.

Miscellaneous.—Cited in *Ostrander v. Richmond*, 155 Cal. 472, 101 Pac. 454, refusing to construe word "may" in amendment of 1905 to Vrooman Act to mean "shall," so as to require expense of street work to be chargeable to district when cost exceeds one-half assessed value of abutting lots.

86 Cal. 471-478, 25 Pac. 17, MOWBY v. HENEY.

Conveyance Without Consideration in View of impending death, upon condition that in event of grantor's recovery grantee is to reconvey, vests absolute title in grantee.

Approved in *Hammond v. McCullough*, 159 Cal. 647, 115 Pac. 219, delivery of deed from one spouse to other upon condition that it is not to be recorded, but destroyed on grantee dying first, vests absolute title in grantee; *McDonnell v. McDonnell*, 10 Cal. App. 66, 101 Pac. 41, that conveyance is executed by uncle to nephew without consideration is not sufficient to avoid deed; *Dennison v. Barney*, 49 Colo. 455, 113 Pac. 523, grant without consideration in view of impending death, upon condition that grantee, in event of grantor's recovery, is to reconvey is absolute notwithstanding grantor continues in possession, pays taxes and improves property; *Sargent v. Cooley*, 12 N. D. 7, 94 N. W. 578, applying principle where mortgage was delivered upon condition.

Effect of Delivery of Deed to Grantee, subject to extrinsic condition. See note, 16 L. R. A. (n. s.) 941.

Parol Evidence is not Admissible to show delivery of deed is subject to any condition not expressed therein.

Approved in *Whitney v. Dewey*, 10 Idaho, 654, 80 Pac. 1122, 69 L. R. A. 572, following rule; *Albert v. Albert*, 12 Cal. App. 272, 107 Pac. 158, parol evidence is not admissible to show delivery of assignment of certificate of purchase of public lands is on condition; *Sargent v. Cooley*, 12 N. D. 7, 94 N. W. 578, applying rule to mortgage.

86 Cal. 479-483, 25 Pac. 5, COOKE v. AGUIRRE.

Judgment in Replevin must be in Alternative for return of property or its value.

Reaffirmed in *Hynes v. Barnes*, 30 Mont. 27, 75 Pac. 523.

86 Cal. 483-492, 25 Pac. 3, BARKLY v. COPELAND.

Court must Allow Counsel to Object to questions which are answered too quickly and must strike out answer for such purpose.

Approved in *State v. Forsha*, 190 Mo. 327, 88 S. W. 755, 4 L. R. A. (n. s.) 576, where party fails to object to admission of testimony and motion to strike out is denied, erroneous ruling admitting it is not available to party on appeal.

Witness may be Asked on Cross-examination whether he had not previously made agreement with party to suppress testimony given at trial.

Approved in *People v. Ye Foo*, 4 Cal. App. 737, 89 Pac. 452, where witness on cross-examination denies dissuading prosecution's witness from testifying, evidence to contradict him is admissible.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 54.

Witness cannot be Impeached by Evidence of specific wrongful acts not bearing upon matter in issue.

Approved in *People v. Monreal*, 7 Cal. App. 38, 93 Pac. 385, in prosecution for perjury, evidence showing witness was adulterer and that her husband had punished man in her room is not admissible for purposes of impeachment.

Evidence of Specific Instances to Prove Character. See note, 14 L. R. A. (n. s.) 706.

What Provable by Books of Account. See note, 52 L. R. A. 716.

86 Cal. 495-496, 25 Pac. 22, MOORE v. SUPERIOR COURT.

Order Substituting Trustee not Void on Face will not be set aside on motion.

Approved in *Tuffree v. Stearns Ranchos Co. (Cal.)*, 54 Pac. 827, judgment regular on face cannot be set aside on motion attacking its validity.

86 Cal. 497-499, 25 Pac. 65, WILLIAMSON v. TOBEY.

Presumption of Ownership Arises from possession.

Approved in *Weeks v. Cranmer*, 18 S. D. 442, 101 N. W. 32, possession by one claiming as owner under deed and judicial proceeding is sufficient evidence of title to justify recovery against one failing to establish title in himself.

86 Cal. 500-531, 24 Pac. 172, 25 Pac. 64, WATSON v. SUTRO.

Purchaser is Charged With Notice of Everything appearing in deed under which he buys.

Approved in *Guaranty etc. Co. v. Recreation Gun Club*, 12 Cal. App. 388, 107 Pac. 627, recitals in recorded deed are sufficient notice to grantee of purchaser of extent to which it affects remaining lands of original vendor.

Partition may be Maintained by Owner of equitable title.

Approved in *Varni v. Devoto*, 10 Cal. App. 306, 101 Pac. 934, following rule; *Buhrmeister v. Buhrmeister*, 10 Cal. App. 395, 102 Pac. 222, defendant in partition cannot object that plaintiff is in possession of entire premises under unexpired lease, under which defendant is not entitled to possession at commencement of action; *Koloa Sugar Co. v. Smith*, 10 Haw. 490, where tenants in common convey land to trustees, they may maintain suit for partition without joining trustees.

Right of One Out of Possession to Partition. See note, 20 L. R. A. 625.

When Equity Once Acquires Jurisdiction, it will decide whole case.

Approved in *Swan v. Talbot*, 152 Cal. 500, 94 Pac. 240, 17 L. R. A. (n. s.) 1066, where court acquires jurisdiction of suit to cancel bill of sale and to restore personalty, but restoration is impracticable, money judgment may be rendered against defendant; *Becker v. Superior Court*, 151 Cal. 316, 90 Pac. 690, if in action to recover money and establish lien, lien fails and amount of claim is not sufficient to confer jurisdiction, court may render personal judgment for amount due; *Curtin v. Krohn*, 4 Cal. App. 135, 87 Pac. 245, holding beneficiary, upon refusal of trustee to perform condition of certain trust deed given as security, could maintain suit to have rights of parties adjusted and property sold.

Statute of Limitations as to Adverse Possession of voluntary trustee does not begin until trustee's repudiation of trust.

Distinguished in *Norton v. Bassett*, 154 Cal. 418, 129 Am. St. Rep. 162, 97 Pac. 897, upon death of trustee of resulting trust, involuntary trust devolves upon heir, and beneficiary's right of action against latter to declare trust and for accounting accrues upon death of original trustee.

86 Cal. 538-542, 25 Pac. 67, REYNOLDS v. BOREL.

Where Imperfections are Found in Abstract which might give rise to litigation and which vendor refuses to remedy, vendee may recover deposit paid under contract providing for return of deposit if title proves defective.

Approved in *Crim v. Umbsen*, 155 Cal. 702, 132 Am. St. Rep. 127, 103 Pac. 180, where vendor is unable to furnish title "fairly deducible of record" because there are no complete records from which nature and defensibility of title can be determined, vendee may recover deposit paid pending examination of title; *Bartlett v. McGee* (Cal.), 45 Pac. 1031, unrecorded contract of which vendee has no notice between vendor and third person existing when contract was made and which includes same land is such defect as will entitle vendee to recover deposit if vendor fails to remove defect within reasonable time; *Whelan v. Rossiter*, 1 Cal. App. 704, 82 Pac. 1083, pending suit involving building restrictions on land is defect sufficient to entitle vendee to return of deposit paid on contract pending examination of title.

Good Title Should be Free from Litigation, palpable defects, grave doubts, and should consist of legal and equitable title and be fairly deducible of record.

Approved in *Dobson v. Zimmerman*, 55 Tex. Civ. App. 403, 118 S. W. 240, under contract to convey good title to lands acquired by vendor after wife's death with funds of his father's estate, vendor is not bound to procure probate order authorizing sale.

86 Cal. 542-552, 25 Pac. 60, FOLTZ v. COGSWELL.

Complaint Alleging Defendant Promised to pay plaintiff five thousand dollars for services, and further alleging performance of certain specified services, and that all the services rendered to defendant are reasonably worth five thousand dollars, counts on implied contract only.

Approved in *Johnson v. Lee Toma & Co.*, 16 Haw. 698, treating complaint for services which counts on special agreement as indebitatus assumpsit under rule that theory of pleadings on which case was tried will not be changed on appeal.

Services Rendered by Attorney in Persuading legislators to act favorably upon bill for client's interest for fixed compensation and in which no unfair means were used are not contrary to public policy.

Approved in *Sussman v. Porter*, 137 Fed. 165, declaring void agreement to procure consent of owners for construction of trolley line in front of their properties and also to obtain franchise to operate such line for fee contingent upon success; *Stroemer v. Van Orsdel*, 74 Neb. 140, 121 Am. St. Rep. 713, 103 N. W. 1055, 4 L. R. A. (n. s.) 212, upholding contract whereby attorney agreed to procure legislative action and which provided for contingent fee.

Validity of Lobbying Contracts. See notes, 121 Am. St. Rep. 733; 30 L. R. A. 739, 741.

Contracts, Consideration for Which has partly failed, or is partly illegal. See note, 117 Am. St. Rep. 518.

86 Cal. 552-554, 21 Am. St. Rep. 61, 25 Pac. 67, **DALY v. PENNIE.**

Fact That Right of Appeal is Lost by failure of clerk of party's attorney to file undertaking in due time is not ground for equitable relief.

Approved in *Smith v. Vandeppeer*, 3 Cal. App. 302, 85 Pac. 137, decree of distribution which becomes final by failure to appeal therefrom in due time, however erroneous, is conclusive.

If Decree of Final Distribution is Erroneous, remedy is by appeal only.

Distinguished in *Coats v. Harris*, 9 Idaho, 468, 75 Pac. 245, decree of distribution will not defeat action of one who is not heir and was not party to any of proceedings while estate was being settled.

Relief from Decrees of Courts having exclusive jurisdiction over estates of decedents, minors and incompetent persons. See notes, 106 Am. St. Rep. 645; 1 Cof. Prob. 268.

Final Decree of Distribution in Estate. See note, 135 Am. St. Rep. 995.

Nature and Elements of Estoppel. See note, 130 Am. St. Rep. 140.

86 Cal. 554-555, 25 Pac. 66, **CREW v. DILLER.**

Undertaking on Appeal from Judgment and order must state appeal is from both.

Approved in *Field v. Andrada* (Cal.), 37 Pac. 180, bond on appeal from order denying motion to dismiss and order denying new trial must state appeal is from both.

86 Cal. 556-565, 25 Pac. 55, **KITTLE v. BELLEGARDE.**

In so far as It is Necessary to Make principal relief in quiet title suit effective, it is proper to restrain execution of deeds in pursuance of certificates of sale upon which adverse claim is founded.

Approved in *Kittle v. McMullen* (Cal.), 25 Pac. 58, following rule; *Dorris v. McManus*, 3 Cal. App. 582, 86 Pac. 912, it is not error to enjoin parties in quiet title suit from maintaining action under which they claim property if injunction is unnecessary to make plaintiff's relief effectual; *Cottonwood Ditch Co. v. Thom*, 39 Mont. 119, 101 Pac. 826, where ditch and right of way therefor are property of plaintiff, defendant in quiet title suit is not aggrieved by order restraining his interference therewith.

86 Cal. 566-573, 25 Pac. 58, QUONG QUE SING v. ANGLO-NEVADA ASSURANCE CORP.

Agent Authorized to Procure Insurance is not thereby made agent of insured to cancel policy.

Approved in *Johnson v. North British etc. Ins. Co.*, 66 Ohio St. 16, 63 N. E. 612, following rule.

Insurance Agent as Agent of Assured. See note, 20 L. R. A. 284.

Liability of Railroad to Employee for injuries caused by defectively loaded car. See note, 13 L. R. A. (n. s.) 391.

Return of Premium as Condition of Canceling Insurance. See note, 13 L. R. A. (n. s.) 885.

86 Cal. 574-579, 21 Am. St. Rep. 63, 25 Pac. 52, 10 L. R. A. 369, CUTTING PACKING CO. v. PACKERS' EXCHANGE.

Non-negotiable Contract of Purchase and sale is transferable by indorsement.

Approved in *Frese v. Moore*, 1 Cal. App. 591, 82 Pac. 543, charter-party and contract to furnish cargo of lumber not involving personal skill in their performance are transferable without consent of ship owners.

Assignee of Contract Becomes Bound to assignor to perform contract according to its terms.

Approved in *Atlantic & North Carolina R. R. v. Atlantic & N. C. R. R. Co.*, 147 N. C. 386, 125 Am. St. Rep. 550, 61 S. E. 191, 23 L. R. A. (n. s.) 223, when lessee railroad company takes from lessor assignment of contract for delivery of fuel on its right of way, it must pay for it when delivered.

Liability of Assignee of Contract for purchase of land. See note, 126 Am. St. Rep. 90.

Sales of Property not Then in Existence. See note, 81 Am. St. Rep. 44.

86 Cal. 580-584, 21 Am. St. Rep. 67, 25 Pac. 51, PERKINS v. WAKEHAM.

State may Provide for Quieting Title to land within its limits by constructive service of summons.

Approved in *Hoffman v. Superior Court*, 151 Cal. 392, 90 Pac. 941, upholding sufficiency of affidavit required to be filed with complaint under McEnerney Act; *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 310, 314, 119 Am. St. Rep. 199, 88 Pac. 360, 362, 8 L. R. A. (n. s.) 682, upholding provisions of McEnerney Act providing for rendering of judgments against unknown claimants upon publication of summons; *American Land Co. v. Zaiss*, 219 U. S. 63, 31 Sup. Ct. 205, 55 L. Ed. 95, upholding provisions of McEnerney Act providing for rendering of judgments against unknown claimants upon publication of summons; *Clem v. Givens*, 106 Va. 149, 55 S. E. 568, in action for specific performance of contract to convey land against nonresident executor and widow and children of vendor, it is proper to proceed against executor by publication.

It is not Necessary in Support of Judgment in quiet title suit, where service has been had by publication, to determine whether it is judgment in personam or in rem.

Distinguished in *Silver Camp Min. Co. v. Dickert*, 31 Mont. 500, 78 Pac. 970, 67 L. R. A. 940, service by publication on nonresident in

action for specific performance of contract to convey land will not warrant personal judgment.

Whether Jurisdiction of Suit to Quiet Title or remove cloud on title of land within territorial jurisdiction may rest upon constructive service of nonresident. See note, 29 L. R. A. (n. s.) 626.

Jurisdiction of Foreign Corporations. See note, 85 Am. St. Rep. 924.

86 Cal. 580-584, 21 Am. St. Rep. 67, 25 Pac. 51, **PERKINS v. WAKEHAM.**

Foreign Judgments. See note, 94 Am. St. Rep. 552.

86 Cal. 589-590, 25 Pac. 51, **TAYLOR v. BLACK DIAMOND COAL MIN. CO.**

Attorney cannot Assign Contract for His Future services and substitute another attorney without consent of client.

Approved in Sumner v. Nevin, 4 Cal. App. 350, 87 Pac. 1106, where servant of real estate broker makes contract whereby he becomes agent for sale of land, court will not decree assignment of contract to master.

86 Cal. 591-594, 25 Pac. 54, **WOLVERTON v. BAKER.**

Valid Judgment, Although Erroneous, Properly Pleaded is bar to subsequent action between same parties for same thing.

Approved in Philbrook v. Newman, 148 Cal. 175, 82 Pac. 773, denying petition in supreme court to obtain order of that court setting aside its judgment affirming order denying new trial.

To Determine Whether Issues in two actions are the same, complaint and findings in evidence may be examined.

Approved in Page v. Graver, 5 Cal. App. 386, 90 Pac. 483, judgment rendered after grantor's death in action by him to set aside deed is bar to action by widow to set aside same deed on same ground; Baker v. Baker (Cal.), 31 Pac. 357, in action by son's wife to set aside partition deed because she did not join therein, not error to refuse admission of judgment-roll in action by mother against son, his wife and others, to set aside partition and enforce trust, wherein it was decided land not held in trust.

86 Cal. 594-596, 25 Pac. 50, **STONESIFER v. ARMSTRONG.**

Extending of Time Under Section 473 of Code of Civil Procedure lies in discretion of court.

Approved in Utah-Nevada Co. v. De Lamar, 9 Cal. App. 761, 100 Pac. 885, upholding order denying application for relief from default in failing to propose statement on appeal from order denying new trial within statutory time.

86 Cal. 596-605, 25 Pac. 132, **BUCKLEY v. HOWE.**

Equity will Decree Trust in Favor of party who shows better right to land which has been fraudulently patented by another.

Approved in Jameson v. James, 155 Cal. 279, 100 Pac. 702, sustaining demurrer to bill to cancel mineral land patent fraudulently procured, brought by person not entitled to acquire title to land.

Party cannot on Appeal First Complain that he was not permitted to amend his complaint.

Approved in Smith v. Ferris etc. Ry. Co. (Cal.), 51 Pac. 717, applying rule in action for accounting; Varni v. Devoto, 10 Cal. App. 306, 101 Pac. 934, applying rule in partition.

86 Cal. 605-614, 25 Pac. 137, 487, GRIFFITH v. HAPERSBERGER.

Failure of Contractor to Procure Approval of Architects is cured by act of owner in dismissing architects.

Approved in *Lavanway v. Cannon*, 37 Wash. 598, 79 Pac. 1119, acceptance of certificate of one partner after dissolution of partnership, where contract calls for certificates from both partners, waives that provision of contract.

Effect of Agreement to Perform Undertaking to certain person's satisfaction. See note, 17 L. R. A. 212.

Recovery upon Substantial Performance of building contract. See note, 24 L. R. A. (n. s.) 331.

Mechanics' Liens on Public Property. See note, 35 L. R. A. 142.

86 Cal. 615-616, 25 Pac. 128, McDOWELL v. BELL.

In Proceedings in Aid of Execution where judgment debtor conveyed property to third person, court has no jurisdiction to take possession of property by receiver.

Approved in *Union Collection Co. v. Snell*, 5 Cal. App. 131, 89 Pac. 860, where judgment debtor pays money to third person, court can only authorize judgment creditor to institute action against debtor for recovery of money and forbid its transfer until rendition of judgment; *Persing v. Reno Stock Brokerage Co.*, 30 Nev. 351, 96 Pac. 1056, court cannot order sale of judgment debtor's automobile held by third person as security to satisfy judgment; *Ryland v. Arkansas City Milling Co.*, 19 Okl. 442, 92 Pac. 163, court cannot order husband to apply property, title to which is in wife, to payment of judgment; *First Nat. Bk. v. Cook*, 12 Wyo. 539, 78 Pac. 1090, 2 L. R. A. (n. s.) 1012, where creditors appeal from order denying petition that property in receiver's hands be turned over, sale of certain personalty by receiver under stipulation and disposal of proceeds and settlement of receiver's accounts cannot be disposed of on appeal in first instance; *First Nat. Bank v. Cook*, 12 Wyo. 514, 76 Pac. 677, 2 L. R. A. (n. s.) 1012, court cannot order receiver to sell property of judgment debtor which is encumbered by mortgages to its full value to satisfy judgment.

86 Cal. 617-620, 25 Pac. 124, HARMON v. SAN FRANCISCO ETC. R. R. CO.

In Absence of Fraud, Fact That Lien is in excess of amount due will not defeat right to recover for material used.

Approved in *Lucas v. Rea* (Cal. App.), 101 Pac. 539, and *Lucas v. Rea*, 10 Cal. App. 646, 102 Pac. 824, both holding in absence of fraud small difference in amounts demanded in complaint to foreclose lien and notice of lien is immaterial variance; *Lucas v. Gobbi*, 10 Cal. App. 651, 103 Pac. 158, in absence of fraud, fact that notice of lien states amount in excess of that prayed for in complaint will not defeat claim.

Effect of Filing Excessive Mechanic's Lien. See note, 29 L. R. A. (n. s.) 318.

Miscellaneous.—Cited in *Nason v. John*, 1 Cal. App. 541, 82 Pac. 566, complaint in action by materialman against owner for materials furnished contractor, not alleging that at time of filing of notice of lien anything was owing from owner to contractor, does not state cause of action.

86 Cal. 620-623, 25 Pac. 125, GORDON HARDWARE CO. v. SAN FRANCISCO ETC. R. R. CO.

Persons Furnishing Contractor Tools with which to construct railroad are not entitled to lien on railroad.

Approved in *St. Louis etc. Ry. Co. v. Love*, 74 Ark. 535, 86 S. W. 298, persons furnishing contractor with teams, money or other supplies in construction of railroad are not entitled to lien on railroad; *Cincinnati etc. R. R. v. Shera*, 36 Ind. App. 317, 320, 73 N. E. 294, 295, under section 7265, Burns' Annotated Statutes of 1901, person furnishing coal consumed in operation of steam shovel in construction of railroad is not entitled to lien on railroad.

Work Done, or Material Furnished, in perfecting original work, as lienable items to establish period for filing claim. See note, 12 L. R. A. (n. s.) 865.

Fact That Lien is Partly for Articles not subject to lien will not vitiate claim if it is not willfully false.

Reaffirmed in *Wolfley v. Hughes*, 8 Ariz. 209, 71 Pac. 953, and *Barnes v. Colorado Spring etc. Ry. Co.*, 42 Colo. 469, 94 Pac. 573.

Effect of Filing Excessive Mechanic's Lien. See note, 29 L. R. A. (n. s.) 316, 318.

Miscellaneous.—Cited in *Harmon v. San Francisco etc. R. R. Co.*, 86 Cal. 618, 25 Pac. 125.

86 Cal. 623-631, 25 Pac. 135, SAN FRANCISCO WATER CO. v. PATTEE.

Where Attorney for Corporation Takes Conveyance of corporate property from managing agent with knowledge of latter's relation to corporation and of manner in which he acquired title, demand and refusal to reconvey are not conditions precedent to maintenance of suit by corporation for reconveyance.

Approved in *Meridian Oil Co. v. Dunham*, 5 Cal. App. 370, 90 Pac. 470, where corporation's president agrees to convey land to corporation for corporate stock, fact that stock, after issuance to vendor, is used by corporation and that vendor thereafter advances money to corporation will not justify vendor withholding conveyance until payment of claims; *Coombs v. Barker*, 31 Mont. 560, 79 Pac. 12, one who is present when directors in their personal capacity agree to redeem corporate property and takes part in redemption is charged with knowledge that transaction is constructively fraudulent as against corporation and stockholders.

Distinguished in *Fagan v. Stuttgart Normal Institute*, 91 Ark. 147, 120 S. W. 407, where director purchased corporate property at execution and at instance of stockholders endeavored to transfer it to third person whom stockholders urged to accept, corporation is estopped to deny validity of director's purchase.

86 Cal. 631-633, 25 Pac. 130, EX PARTE PALMER.

Where Facts Show Prima Facie That Accused committed offense in certain county, he will not be released on habeas corpus in absence of proof that offense was committed in another county.

Approved in *State v. Beaverstad*, 12 N. D. 534, 97 N. W. 551, finding of magistrate when acting within his jurisdiction is conclusive against collateral attack by habeas corpus.

86 Cal. 633-639, 25 Pac. 129, GOING v. DINWIDDIE.

In Absence of Facts Showing Acts are wrongful, allegation that acts constituting false imprisonment are wrongful is conclusion of law.

Distinguished in *Fisher v. Western Fuse etc. Co.*, 12 Cal. App. 748, 108 Pac. 663, upholding sufficiency of complaint in action for injury to property by explosion, alleging magazine was improperly constructed and negligently maintained, and setting forth location thereof.

Personal Liability of Judicial Officers. See note, 137 Am. St. Rep. 47.

86 Cal. 639-643, 25 Pac. 130, TOOMY v. DUNPHY.

Memorandum Signed by Owner of Land authorizing agent to sell it is sufficient memorandum of employment under statute of frauds.

Approved in *Kennedy v. Merickel*, 8 Cal. App. 380, 381, 97 Pac. 82, 83, following rule; *Naylor v. Adams*, 15 Cal. App. 554, 115 Pac. 338, letters written by owner of land authorizing broker to sell or exchange it are sufficient writing; *Curran v. Hubbard*, 14 Cal. App. 736, 114 Pac. 82, employment "to get offer" for land is one to make sale or exchange in reasonable time and not to procure single offer.

Memorandum Authorizing Agent to Sell Land need not state employment is for compensation.

Approved in *Kennedy v. Merickel*, 8 Cal. App. 381, 383, 97 Pac. 83, 84, following rule; *Baird v. Loescher*, 8 Cal. App. 68, 98 Pac. 50, memorandum need not recite terms of sale and amount of payments.

Written Instrument is Presumptive Evidence of Consideration.

Approved in dissenting opinion in *McGuffin v. Coyle & Guss*, 16 Okl. 692, 86 Pac. 965, 6 L. R. A. (n.s.) 524, majority holding note payable to director of railroad company in personal capacity for personal benefit on condition that road is built to certain point at certain time is void.

In Quantum Meruit for Services rendered under memorandum of employment, parol evidence is admissible to show what services were rendered and value thereof.

Approved in *Breen v. Roy*, 8 Cal. App. 479, 97 Pac. 172, where assignee of broker sues for compensation for broker's services rendered under contract, which is canceled before termination of contract term, contract is admissible in evidence; *Hill v. McCoy*, 1 Cal. App. 162, 81 Pac. 1016, where contract for sale of land refers to it as "Abbey Ranch," parol evidence is admissible to identify it.

86 Cal. 643-646, 25 Pac. 134, BUCKLEY v. ALTHORF.

On Appeal from Order Denying New Trial, only matters brought up in judgment-roll and bill of exceptions or statement will be considered.

Approved in *Sprigg v. Barber* (Cal.), 54 Pac. 899, notice of motion for new trial constitutes no part of statement on appeal without being referred to in statement as such.

Statement on Appeal from Order denying new trial served six days after expiration of statutory time and extensions will not be considered on appeal.

Approved in *Vinson v. Los Angeles Pac. R. Co.* (Cal.), 72 Pac. 842, pendency of proceedings to settle statement on appeal from order denying new trial after time for appeal from order has ex-

pired does not operate to extend time for filing of transcript on appeal from judgment nor authorize filing of such transcript more than forty days after time of perfecting appeal.

Where Transcript is not Filed Within forty days after perfecting of appeal and there is no statement or bill of exceptions which can be used upon appeal, appeal will be dismissed.

Approved in Gervais v. Joyce, 15 Cal. App. 190, 114 Pac. 410, where through appellant's negligence transcript is not filed within forty days, and it is not on file at time of notice to dismiss appeal, appeal may be dismissed.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 87 CALIFORNIA.

87 Cal. 1-11, 25 Pac. 157, 11 L. R. A. 264, IN RE OSBORN.

Executor is Liable for Misappropriation of funds by coexecutor when turned over to him without reason or not in good faith.

Approved in *Hewlett v. Beede*, 2 Cal. App. 566, 83 Pac. 1087, co-executor liable to heir if through inexcusable neglect he permitted his associate to lose estate.

Liability of Coexecutor for Default of one permitted to manage estate. See note, 11 L. R. A. (n. s.) 334, 338, 340, 341.

87 Cal. 11-15, 25 Pac. 162, ROBINSON v. MERRILL.

In Action to Foreclose Street Assessment Lien all owners are necessary parties.

Approved in *Pacific Paving Co. v. Vizelech*, 1 Cal. App. 284, 82 Pac. 83, one defendant properly dismissed when not shown to be owner.

87 Cal. 15-23, 25 Pac. 161, LEHMANN v. SCHMIDT.

When Goods are Converted Owner may waive tort and sue in assumpsit.

Reaffirmed in *Fountain v. Sacramento*, 1 Cal. App. 462, 82 Pac. 637, and *Bechtel v. Chase*, 156 Cal. 711, 106 Pac. 83.

87 Cal. 23-28, 25 Pac. 273, NORTHERN RY. CO. v. JORDAN.

Right of State to Grant Tide Lands. See note, 22 L. R. A. (n. s.) 337.

87 Cal. 29-34, 25 Pac. 752, BIDWELL v. BABCOCK.

Complaint in Action to Enforce stockholder's liability must state proportion in which stock owned by defendant when debt was incurred bears to whole subscribed stock.

Approved in *San Francisco Commercial Agency v. Miller*, 4 Cal. App. 293, 87 Pac. 631, and *Thomas v. Wentworth Hotel Co.*, 158 Cal. 277, 139 Am. St. Rep. 120, 110 Pac. 943, both following rule; *Bank of Yolo v. Weaver* (Cal.), 31 Pac. 161, complaint held sufficient in absence of demurrer.

87 Cal. 34-37, 25 Pac. 153, SAUER v. MEYER.

To Give Landlord Right of Re-entry for nonpayment of rent, demand must be made upon or after last day on which lessee has to pay to complete forfeiture.

Reaffirmed in *Ciapusci v. Clark*, 12 Cal. App. 53, 106 Pac. 440.

Effect of Re-entry Clauses in Leases. See note, 127 Am. St. Rep. 89.

Delay of Landlord in Enforcing Forfeiture as waiver. See note, 24 L. R. A. (n. s.) 1064.

87 Cal. 38-40, 25 Pac. 154, URTON v. WOOLSEY.

Action to Foreclose Vendor's Lien must be commenced in county where land is situated.

Approved in *Miller v. Kern County Land Co. (Cal.)*, 70 Pac. 184, action to recover damages for injury to real property must be brought in county where situated.

87 Cal. 40-48, 24 Pac. 600, 25 Pac. 249, SPAULDING v. NORTH SAN FRANCISCO HOMESTEAD ETC. ASSN.

Adjudication by Board of Supervisors that owners of majority frontage on street have signed petition for improvement is conclusive.

Reaffirmed in *Schank v. Asheville*, 154 N. C. 43, 69 S. E. 682.

Distinguished in *Wilcox v. Engebretsen*, 160 Cal. 292, 294, 116 Pac. 751, 752, order of city council directing change of street grade not conclusive adjudication that sufficient petition had been filed.

87 Cal. 49-61, 25 Pac. 249, BENSON v. SHOTWELL.

Acceptance of Option Before Its Expiration or revocation creates binding contract to sell land.

Approved in *Smith v. Baugham*, 156 Cal. 363, 104 Pac. 691, option accepted within time limited; *Reed v. Hickey*, 13 Cal. App. 149, 109 Pac. 44, holding option to purchase mine converted into contract by acceptance of terms, part payment, and delivery of deed in escrow pending payment of balance; *Kessler v. Pruitt*, 14 Idaho, 183, 93 Pac. 968, agreement for sale of land considered and held to be contract and not option.

Purchaser of Land Under Agreement for good title is entitled to return of deposit paid if evidence of good title is not furnished.

Approved in *Hoe v. O'Callahan*, 10 Cal. App. 570, 103 Pac. 175, following rule; *McCroskey v. Ladd (Cal.)*, 28 Pac. 217, purchaser with right to good title not bound to accept title resting on statute of limitations.

Where Contract for Sale of Land Provides for delivery of possession, actual delivery is condition precedent to demand for payment of purchase price.

Approved in *Pierce v. Edwards*, 150 Cal. 653, 654, 655, 89 Pac. 601, 602, contract to "deliver" land to vendee required that he be put in actual possession and was not satisfied by attornment of tenants.

Vendor Who Could Rescind Contract of Sale only on condition of restoring purchase price paid cannot quiet title to land in question without returning purchase money.

Approved in *Leach v. Rowley*, 138 Cal. 715, 72 Pac. 405, where vendee was not in default, vendor could not maintain suit to quiet title.

Distinguished in *Jenkins v. Schwab Co.*, 138 Ala. 668, 35 So. 651, where invalid mortgage was given to secure pre-existing debt, mortgagor not bound to return money obtained before rescinding.

Right of Vendee Under Land Contract to lien for amount paid where contract fails or is rescinded. See note, 20 L. R. A. (n. s.) 181.

What Constitutes "Satisfactory Title" within requirement of agreement relating to land. See note, 18 L. R. A. (n. s.) 742.

87 Cal. 62-78, 25 Pac. 245, 11 L. R. A. 130, **MITCHELL v. SOUTHERN PAC. R. R. CO.**

Instruction as to Burden of Proof of negligence considered and approved.

Approved in *Bonneau v. North Shore R. R. Co.*, 152 Cal. 410, 125 Am. St. Rep. 68, 93 Pac. 108, *Sambuck v. Southern Pac. Co.* (Cal.), 71 Pac. 175, *Thomas v. San Pedro etc. Ry. Co.*, 170 Fed. 131, 95 C. C. A. 371, *Kline v. Santa Barbara etc. Ry. Co.*, 150 Cal. 747, 90 Pac. 127, and *Roberts v. Sierra Ry. Co.*, 14 Cal. App. 195, 111 Pac. 525, all approving similar instructions.

Presumption of Negligence from Occurrence of accidents. See note, 113 Am. St. Rep. 1027, 15 L. R. A. 36.

Passenger Riding on Car Platform contrary to rules does so at his own risk.

Approved in *Cincinnati etc. Electric St. Ry. Co. v. Lohe*, 68 Ohio St. 111, 67 N. E. 163, 67 L. R. A. 637, following rule; *Knuckey v. Butte Electric Ry. Co.*, 41 Mont. 324, 109 Pac. 982, mere fact that passenger was injured while alighting from street-car was not sufficient to charge carrier with negligence.

What Record must Show Respecting Presentation and decision of federal question to confer jurisdiction on federal supreme court of writ of error to state court. See note, 63 L. R. A. 507.

87 Cal. 78-83, 24 Pac. 602, 25 Pac. 248, **EX PARTE WILLIAMS.**

Where Record is Silent as to Age of prisoner committed to house of correction upon conviction of felony, court is presumed to have determined prisoner was of such age as to give jurisdiction, and question cannot be raised on habeas corpus.

Approved in *In re Wallace*, 75 Kan. 436, 89 Pac. 688, erroneous finding as to age of person committed to state reformatory not subject to attack on habeas corpus; *Leiby v. State*, 79 Neb. 488, 113 N. W. 126, in committing boy to industrial school, court is presumed to have determined all facts necessary to support order.

87 Cal. 84-88, 25 Pac. 247, **NAPA v. HOWLAND.**

Evidence Showing Dedication for Public Landing supports finding of dedication as public levee for street purposes.

Approved in *Chicago etc. Co. v. People*, 222 Ill. 437, 78 N. E. 793, holding fact that portion of street along river had been called public landing did not preclude it from being held as part of street; *McAlpine v. Chicago Great Western Ry. Co.*, 68 Kan. 212, 75 Pac. 75, 64 L. R. A. 85, dedication of land as levee held to allow its use as street.

Ejectment for Public Easement. See note, 11 L. R. A. (n. s.) 130.

87 Cal. 88-91, 25 Pac. 264, WIDMER v. MARTIN.

Judgment on Pleadings cannot be Taken where answer presents any material issue.

Approved in *First Nat. Bank of Sutton v. Sutton Mercantile Co.*, 77 Neb. 599, 110 N. W. 307, holding void judgment on pleadings where answer stated one defense.

87 Cal. 91-96, 25 Pac. 258, EX PARTE TAYLOR.

Ordinance Forbidding Obstruction of Sidewalk and providing penalties therefor is valid.

Approved in *Merced Falls Gas etc. Co. v. Turner*, 2 Cal. App. 722, 84 Pac. 240, upholding power of city to compel electric light company to relocate poles on streets.

Power of Municipality to Punish Act also an offense under state law. See note, 17 L. R. A. (n. s.) 53.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 656, 679.

Right to Obstruct Sidewalk cannot be Acquired by prescription.

Approved in *Kern Island etc. Co. v. Bakersfield*, 151 Cal. 407, 90 Pac. 1053, right to maintain ditch in city street not acquired by prescription.

Prescriptive Right to Maintain Public Nuisance. See note, 53 L. R. A. 891, 903.

Miscellaneous.—Cited in *Ex parte Rinaldo* (Cal.), 25 Pac. 260, companion case.

87 Cal. 109-114, 23 Pac. 371, 25 Pac. 256, JONES v. DUCHOW.

Witness cannot be Impeached by Evidence of particular wrongful acts.

Reaffirmed in *Clements v. McGinn* (Cal.), 33 Pac. 922.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 700.

Cross-examination as Proper Mode of Proving conviction of crime for purposes of impeachment. See note, 30 L. R. A. (n. s.) 847.

87 Cal. 115-116, 25 Pac. 266, McPHAIL v. BUELL.

Under Agreement to Pay Broker Commission for selling land when vendees paid certain sum and gave mortgage for balance, recovery cannot be had if mortgage only was executed and required sum never paid.

Distinguished in *Finch v. Guardian Trust Co.*, 92 Mo. App. 269, where contract provided broker's commission should be paid out of first cash payment, broker's right to recover did not depend on making of cash payment.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 623.

Where Record Shows Appellant was not Entitled to recover in any event, errors of trial court do not warrant reversal of judgment.

Approved in *Peters v. Peters*, 156 Cal. 37, 103 Pac. 221, 23 L. R. A. (n. s.) 699, and *Bullion etc. Bank v. Spooner* (Cal.), 36 Pac. 123, both following rule; *People v. Davidson*, 2 Cal. App. 107, 83 Pac. 164, in election contest, where record showed appellant's claims defeated in any event, erroneous admission of testimony was harmless; *Madsen v. Utah Light & Ry. Co.*, 36 Utah, 545, 105 Pac. 804,

holding erroneous admission of evidence on issue rendered immaterial by reason of finding another vital issue in defendant's favor not ground for reversal.

Necessity That Authority of Agent to purchase or sell realty be written to enable him to recover compensation. See note, 9 L. R. A. (n. s.) 935.

87 Cal. 117-121, 25 Pac. 266, PEOPLE v. BEMMERLY.

Dying Declarations, to be Admissible, must be made under sense of impending death.

Approved in *People v. Shehadey*, 12 Cal. App. 653, 108 Pac. 148, declarations held to have been made under sense of impending death.

Dying Declarations as Evidence. See notes, 86 Am. St. Rep. 658, 659, 662; 56 L. R. A. 411, 424.

Prosecution cannot Peremptorily Challenge Juror after jury is sworn, without good cause shown.

Reaffirmed in *People v. Schmitz*, 7 Cal. App. 347, 94 Pac. 411.

Instruction Defining Reasonable Doubt as "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself," is erroneous.

Approved in *People v. Wohlfrom* (Cal.), 26 Pac. 237, disapproving similar instruction.

What Constitutes Reasonable Doubt in criminal cases. See note, 17 L. R. A. 706.

87 Cal. 124-125, 25 Pac. 269, McGIVNEY v. PIERCE.

City Charter Provision Giving Council exclusive jurisdiction of election contests held to be repealed by code provision that such contests shall be determined by superior court.

Approved in *Mannie v. Hatfield*, 22 S. D. 479, 118 N. W. 818, charter provision denying appeal in certain cases repealed by later code provisions.

87 Cal. 126-133, 22 Am. St. Rep. 239, 25 Pac. 268, 11 L. R. A. 134, FLICKINGER v. SHAW.

Parol License Acted upon in Good Faith by licensee who expends money becomes irrevocable.

Approved in *Stoner v. Zucker*, 148 Cal. 519, 113 Am. St. Rep. 301, 83 Pac. 810, holding executed parol license to construct irrigating ditch over licensor's land became easement; *Flick v. Bell* (Cal.), 42 Pac. 814, license to construct reservoir and lay pipes thereto, on faith of which licensee made expensive improvements, could not be revoked without allowing licensee to remove improvements or making compensation therefor; *Maple Orchard G. & V. Co. v. Marshall*, 27 Utah, 220, 75 Pac. 371, holding executed parol license to lay pipe-line for irrigation created irrevocable grant, and rights thereunder would be protected in equity.

Nature and Revocation of Parol Licenses. See note, 91 Am. St. Rep. 45.

Revocability of License to Maintain Burden on land, after licensee has incurred expense. See note, 49 L. R. A. 512, 524.

Part Performance of Oral Agreement for easement for irrigation ditch warrants specific performance.

Approved in *Churchill v. Russell*, 148 Cal. 5, 82 Pac. 441, statute of frauds not bar to specific performance of oral agreement for

water right executed by actual appropriation and use of water; *Bree v. Wheeler*, 4 Cal. App. 112, 87 Pac. 256, holding executed oral agreement for division of water right created equitable title.

87 Cal. 134-140, 26 Pac. 795, McMENOMY v. BAND;

Brass Foundry and Machinery Incident thereto are not prima facie nuisance.

Approved in *Lorenzi v. Star Market Co.*, 19 Idaho, 682, 115 Pac. 493, holding smoking meats, rendering lard, and making meat products not nuisance per se, and becomes such only by reason of particular facts, and location and mode of conducting business.

Where Injury Complained of as Resulting from factory may be prevented without abating all operations, only causes of injury should be enjoined.

Approved in *Schaub v. Perkinson Bros. Const. Co.*, 108 Mo. App. 129, 82 S. W. 1096, modifying injunction against quarry so as to allow its operation without injury to plaintiff's premises; *Blackford v. Heman Const. Co.*, 132 Mo. App. 166, 112 S. W. 291, holding decree restraining operation of stone quarry should not curtail its operation more than right to relief demands.

Distinguished in *Judson v. L. A. Suburban Gas Co.*, 157 Cal. 173, 106 Pac. 583, injunction abating gasworks not too broad, when nuisance existed even with greatest care.

87 Cal. 140-150, 26 Pac. 797, ORALL v. POSO IRRIGATION DIST.

Irrigation Districts are Public Corporations.

Approved in *People v. San Joaquin Valley Agricultural Assn.*, 151 Cal. 805, 91 Pac. 744, holding district agricultural association to be public corporation.

Special Proceeding Under Wright Act for confirmation of organization of district and issue and sale of bonds is in nature of proceeding in rem to determine status of district, and its power to issue valid bonds.

Approved in *Wyman v. Searle*, 88 Neb. 33, 128 N. W. 804, holding sale for taxes due irrigation district is proceeding in rem, and jurisdiction having been acquired, it cannot be collaterally attacked; *Progressive Irr. Dist. v. Anderson*, 19 Idaho, 512, 114 Pac. 18, statute concerning confirmation of proceedings for organization of irrigation districts were enacted to bind state as well as all others and set at rest at early date legal existence of district; *Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 484, 83 Pac. 503, construing irrigation act of 1903.

In Proceeding Under Wright Act to confirm organization of irrigation district, constructive service of process by publication and posting is sufficient to give court jurisdiction.

Approved in *Hoffman v. Superior Court*, 151 Cal. 392, 90 Pac. 941, upholding constructive service by publication under *McEnerney Act*; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 248, 101 Pac. 91, holding constructive service of notice under irrigation act sufficient to give jurisdiction of persons and subject matter; *Goodrich v. Ferris*, 145 Fed. 856, decree of superior court in California distributing estate, after giving statutory notice, is conclusive on all interested parties and cannot be set aside in equity where free from fraud.

Proceedings to Probate a Will are in Rem and conclusive upon all persons.

Approved in *In re Burton*, 5 Cal. Prob. 242, applying rule to all matters concerning administration of estates.

87 Cal. 151-155, 25 Pac. 270, WHITE v. PATTON.

In Foreclosure Suit, Answer of Subsequent Mortgagee praying foreclosure of junior mortgage, not served on mortgagor, who defaults, does not give court jurisdiction to render judgment foreclosing junior mortgage.

Approved in *Gulling v. Washoe County Bank*, 28 Nev. 487, 82 Pac. 802, answer directed against complainant, but which seeks affirmative relief against codefendant, raised no issue as to latter, when not served on him, and he filed no demurrer or answer thereto.

Miscellaneous.—Cited in *Patton v. Thomson* (Cal.), 33 Pac. 97, on another appeal.

87 Cal. 158-162, 25 Pac. 272, FIRST NAT. BANK v. HOLT.

Where, on Foreclosure, Court Finds there was due plaintiff certain sum for costs, percentage and disbursements, which sum was included in judgment, objection that court not authorized to add percentage to costs cannot be considered for first time on appeal.

Distinguished in *Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 308, failure to find upon material issue of cruelty in cross-complaint is reviewable on appeal from order denying new trial on ground that "decision is against law."

87 Cal. 162-166, 25 Pac. 277, EX PARTE HODGES.

Validity of Ordinance may be Inquired into on habeas corpus.

Reaffirmed in *In re McCoy*, 10 Cal. App. 125, 101 Pac. 423.

87 Cal. 166-177, 25 Pac. 240, EBY v. BOARD OF SCHOOL TRUSTEES.

Taxpayer of School District Whose Children attend school is party beneficially interested under section 1086, Code of Civil Procedure, and may apply for mandamus to compel location of school site.

Distinguished in *Webster v. Common Council*, 8 Cal. App. 482, 97 Pac. 93, resident elector, property owner, and taxpayer not entitled to sue for mandamus to compel submission of ordinance to people confirming grant of franchise by harbor commissioners to railroad.

87 Cal. 178-192, 25 Pac. 346, STAPLES v. MAY.

Order Appointing Receiver in Foreclosure Suit is void in so far as it confers right to occupy property not included in deed of trust to be foreclosed.

Approved in *Bowmen v. Hazen*, 69 Kan. 609, 77 Pac. 596, order giving receiver custody of property not involved in litigation held void.

Equitable Remedy to Subject Choses in Action to judgment after return of no property found. See note, 63 L. R. A. 693.

87 Cal. 192-200, 25 Pac. 677, 12 L. R. A. 104, KELLOGG v. COCHRAN.

Section 1766, Code of Civil Procedure, does not apply to persons committed to insane asylums under regulations of Political Code.

Reaffirmed in *Aldrich v. Barton*, 153 Cal. 493, 95 Pac. 902.

Discharge of Inmate from Insane Asylum, if no guardian has been appointed, restores his capacity to sue.

Approved in *Clements v. McGinn* (Cal.), 33 Pac. 923, discharge of person from insane asylum is prima facie evidence of restoration to reason, and he is therefore competent as witness; *Byers v. Solier*, 16 Wyo. 241, 242, 93 Pac. 61, 62, 14 L. R. A. (n. s.) 468, where patient was unconditionally discharged from insane asylum he could not be recommitted without another inquiry.

Rehearing in Supreme Court will not be Granted in order to consider points not made in argument upon which case was originally submitted.

Approved in *Powell v. Nevada etc. Ry. Co.*, 28 Nev. 343, 344, 82 Pac. 97, following rule.

87 Cal. 200-203, 22 Am. St. Rep. 239, 25 Pac. 405, **IN RE BABY.**

Satisfaction of Judgment Suspends proceedings on appeal therefrom.

Approved in *In re Black's Estate*, 32 Mont. 54, 79 Pac. 555, and *Signor v. Clark*, 13 N. D. 46, 99 N. W. 72, both following rule; *Turner v. Markham*, 152 Cal. 247, 248, 92 Pac. 486, judgment debtor whose homestead was sold on execution and who accepted five thousand dollars from sheriff thereby elected to abide by judgment; *National Bank v. Los Angeles etc. Co.*, 2 Cal. App. 660, 84 Pac. 467, payment of judgment by one codefendant who did not take assignment of it extinguished it; *Porco v. State Board of Barber Examiners* (Cal.), 73 Pac. 168, dismissing appeal from action to compel issuance of license, when act creating licensing board was repealed pending appeal; *Betchel v. Evans*, 10 Idaho, 149, 77 Pac. 213, where party collects judgment and by prosecuting appeal incurs hazard of eventually recovering less, appeal should be dismissed.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 750.

Right to Appeal from Unfavorable while accepting favorable part of decree, judgment or order. See note, 29 L. R. A. (n. s.) 13.

87 Cal. 203-209, 22 Am. St. Rep. 240, 25 Pac. 350, **MARTIN v. MORGAN.**

Where Time is Clearly of Essence of Contract to convey land, failure to make payments when due avoids it.

Approved in *Hanschka v. Vodopich*, 20 S. D. 554, 108 N. W. 29, where option for purchase of mine was wholly abandoned, purchaser could neither enforce specific performance nor recover amount paid on purchase price.

Distinguished in *Maffet v. Oregon & Cal. R. Co.*, 46 Or. 454, 80 Pac. 493, where vendor waived payments until uncertain title should be settled, and then declared contract forfeited for nonpayment, vendee could rescind and recover payments made.

Time as of Essence of Contract for sale of land. See note, 104 Am. St. Rep. 271.

Tender or Payment as Condition Precedent to suit for specific performance of option contract to convey realty. See note, 24 L. R. A. (n. s.) 91.

87 Cal. 209-211, 25 Pac. 403, FORD v. CUNNINGHAM.

Admissibility in Evidence of Books of account. See note, 138 Am. St. Rep. 469.

Partnership Books of Account as Evidence. See note, 52 L. R. A. 837.

What Provable by Books of Account. See note, 52 L. R. A. 720.

Miscellaneous.—Cited in *Sanborn v. Cunningham* (Cal.), 33 Pac. 894, 896, on another appeal.

87 Cal. 214-221, 25 Pac. 351, GILLIS v. CLEVELAND.

Expense of Street Improvement is Lien on property benefited, and not personal charge against owner.

Approved in *County of Los Angeles v. Winans*, 13 Cal. App. 249, 109 Pac. 647, entire title of property benefited subject to lien for street improvement.

Whether a Personal Liability may be Created for an assessment. See notes, 133 Am. St. Rep. 931, 932; 35 L. R. A. 61.

Validity of Statutory Provision for attorneys' fees in proceedings involving collection of taxes or assessments. See note, 28 L. R. A. (n. s.) 1063.

87 Cal. 221-225, 25 Pac. 405, SCOTT v. GLENN.

Where One Vendor Named in Contract signed his own name and that of another, who ratified signature and joined in tendering deed and demanding purchase money, such other is estopped to rescind on ground agent lacked authority.

Approved in *Gregg v. Carey*, 4 Cal. App. 355, 88 Pac. 283, holding signature by agent of contract of sale without written authority ratified by acts of principal.

87 Cal. 226-236, 25 Pac. 435, BISHOP v. SUPERIOR COURT.

Superior Court has Jurisdiction of Suit by city or town to condemn land for right of way by virtue of constitutional grant of jurisdiction over special cases not provided for.

Approved in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1017, superior court had jurisdiction of proceeding to condemn lands for right of way for railroad.

Regularity of Proceedings of Court within jurisdiction cannot be reviewed on prohibition.

Reaffirmed in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1017.

Writ of Prohibition. See note, 111 Am. St. Rep. 956.

87 Cal. 236-241, 25 Pac. 412, VORWERK v. NOLTE.

Where Printed Form of Contract is Used, printed parts which are repugnant to general scope of instrument are controlled by written parts.

Approved in *Colfax etc. Fruit Co. v. Southern Pac. Co.* (Cal.), 46 Pac. 670, where no repugnancy existed between parts of contract of carriage, fact that one was written and other printed was immaterial.

Time as of Essence of Contract for sale of land. See note, 104 Am. St. Rep. 273.

87 Cal. 241-245, 25 Pac. 411, PERKINS v. COOPER.

Failure to File Undertaking on Appeal can only be waived within time allowed for filing.

Approved in *Niles v. Gonzalez*, 152 Cal. 93, 92 Pac. 75, *Newman v. Maldonado* (Cal.), 30 Pac. 835, and *Village of Hailey v. Riley*, 13 Idaho, 754, 92 Pac. 757, all following rule; *Crowley v. Superior Court*, 10 Cal. App. 346, 101 Pac. 937, waiver of justification of sureties must be made within five days, or appellate court loses jurisdiction.

87 Cal. 245-249, 25 Pac. 420, WHITE v. ALLATT.

In Foreclosure of Mortgage Providing for reasonable attorney's fee, complaint need not aver what would be reasonable fee.

Approved in *Hewett v. Dean* (Cal.), 25 Pac. 756, holding averment as to reasonable attorney's fee in foreclosure suit sufficient to support judgment for such fee.

87 Cal. 249-253, 25 Pac. 414, GUERNSEY v. WEST COAST LUMBER CO.

Acceptance and Payment for Goods under contract without reserving right to object subsequently waives defects in quality.

Approved in *Byron Jackson Machine Works v. Duff*, 158 Cal. 49, 109 Pac. 617, holding where guaranty of efficiency of pumps contemplated settlement thereof by agreed test prior to installation and acceptance, retention and installation for three months without objection waived damages for defects.

Distinguished in *Bobrick Chemical Co. v. Prest-O'Lite Co.*, 160 Cal. 214, 116 Pac. 749, where buyer of articles manufactured for special purpose received installment and found articles would not accomplish purpose, he could rescind at once without waiting for seller to manufacture and deliver remainder.

Notice to Vendor as Condition of Right to refuse subsequent after breach as to earlier deliveries. See note, 8 L. R. A. (n. s.) 1110.

87 Cal. 253-256, 25 Pac. 420, DRINKHOUSE v. SPRING VALLEY WATERWORKS.

Lease Taken After Condemnation Proceedings have been begun against leased premises and lis pendens filed is subject to proceedings.

Approved in *Southern Illinois & Missouri Bridge Co. v. Stone*, 174 Mo. 35, 73 S. W. 461, 63 L. R. A. 301, applying rule to grantees in deed.

87 Cal. 256-266, 22 Am. St. Rep. 243, 25 Pac. 407, WINTER v. McMILLAN.

Appeal from Judgment and from Order denying new trial may be taken by one notice.

Approved in *Kinney v. Brotherhood of Am. Yeomen*, 15 N. D. 27, 106 N. W. 46, following rule.

In Quiet Title Suit, Burden Rests on plaintiff to show title in himself.

Approved in *Williams v. San Pedro*, 153 Cal. 49, 94 Pac. 236, reaffirming rule; *House v. Ponce*, 13 Cal. App. 281, 109 Pac. 161, where plaintiff failed to show title in himself, he could not attack defendant's title.

Cross-complaint is Proper in Action to quiet title when it seeks to enforce equitable title against plaintiff as holder of legal title.

Approved in *Bacon v. Rice*, 14 Idaho, 113, 93 Pac. 512, following rule; *Keller v. McGilliard*, 5 Cal. App. 398, 90 Pac. 484, holding

cross-complaint not presenting ground for affirmative relief should be stricken out; *Martin v. Molera*, 4 Cal. App. 301, 87 Pac. 1105, cross-complaint proper in ejectment where affirmative relief sought included right to relief from vexatious attempts to relitigate questions already settled.

Defendant in Quiet Title Suit may Bring in by cross-complaint whatever parties are necessary to determine controversy.

Approved in *Mitau v. Roddan*, 149 Cal. 9, 84 Pac. 148, 6 L. R. A. (n. s.) 275, in action to enforce deed of trust, failure of court to bring in necessary parties was fatal to judgment; *Syvertson v. Butler*, 3 Cal. App. 347, 85 Pac. 164, holding court had discretion to bring in new parties on cross-complaint in absence of plaintiff's objection.

Use of Cross-bill or Cross-complaint to bring in new parties. See note, 26 L. R. A. (n. s.) 130.

87 Cal. 267-275, 25 Pac. 433, 10 L. R. A. 650, HAVEMEYER v. SUPERIOR COURT.

Prohibition Lies to Arrest Action of inferior tribunal in excess of jurisdiction when there is no plain, speedy, and adequate remedy at law.

Approved in *Clark County Court etc. v. Warner*, 116 Ky. 810, 76 S. W. 830, circuit court in which application for ferry privilege was pending could issue writ of prohibition to county court in which another application for same privilege was pending.

Writ of Prohibition. See note, 111 Am. St. Rep. 977.

Exclusiveness of Jurisdiction by Appointment of receiver. See note, 20 L. R. A. 393.

87 Cal. 275-280, 25 Pac. 354, WOODRUFF v. SEMI-TROPIC LAND ETC. CO.

Time as of Essence of Contract for sale of land. See note, 104 Am. St. Rep. 270.

87 Cal. 281-287, 25 Pac. 417, PEOPLE v. DOUGLASS.

Enhancing Penalty for Crimes by Habitual Criminals or prior offenders. See note, 34 L. R. A. 400.

87 Cal. 292-295. 22 Am. St. Rep. 250, 25 Pac. 413, 10 L. R. A. 567, IN RE McMANUS.

Statutes Exempting Personal Property from execution should be liberally construed for benefit of debtor.

Approved in *Van Lue v. Wharlich-Cornett Co.*, 12 Cal. App. 753, 108 Pac. 719, following rule; *In re Conley*, 162 Fed. 808, holding bankrupt who deals in eggs and poultry entitled to exemption of wagon, horse, etc., for gathering in produce, and also office furniture, scales, coops, etc., necessary to conduct of business.

Exemption of Tools and Implements. See note, 123 Am. St. Rep. 140, 146.

Exemption of Wages, Salaries and Earnings. See note, 102 Am. St. Rep. 103.

87 Cal. 296-306, 25 Pac. 399, CONKLING v. PACIFIC IMP. CO.

Where Diversion of Water from Riparian Owner is wrongful, damages need not be shown to entitle him to injunction.

Approved in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 333, 88 Pac. 981, 11 L. R. A. (n. s.) 1062, following rule; *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 532, 89 Pac. 343, owner of riparian right, though not used, entitled to judgment declaring rights of subsequent appropriators to be subject to his right.

Ejectment for Public Easement. See note, 11 L. R. A. (n. s.) 130.

Change of Use or Channel of Water Appropriated. See note, 30 L. R. A. 388.

87 Cal. 306-313, 25 Pac. 409, BOWMAN v. MOORE.

Where **Mutual Benefit Association Certificate** provides members may change beneficiary at will, person named therein as beneficiary cannot object to change without her consent.

Approved in *Waring v. Wilcox*, 8 Cal. App. 321, 96 Pac. 912, holding mother could not object to substitution of mistress as beneficiary of life insurance policy.

Where **Holder of Mutual Benefit Certificate** has absolute right to change of beneficiary, which must be in writing, sending of letter asking such change and indorsement on certificate by secretary is sufficient.

Approved in *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 405, 126 N. W. 951, where holder of certificate who had absolute right to change of beneficiary did all required of him to effect change, equitable assignment was worked, though new certificate was not issued before death of member.

Power of Insured to Destroy Rights of beneficiary. See note, 49 L. R. A. 754.

87 Cal. 313-323, 25 Pac. 430, FISKE v. SOULE.

Written Contract for Sale of Land for gross sum, which does not except growing crops, binds vendor to convey crops with land.

Disapproved in *Grabow v. McCracken*, 23 Okl. 616, 102 Pac. 84, 23 L. R. A. (n. s.) 1218, oral evidence admissible to show crops were part of consideration for sale.

Whether Contract for Sale of Growing Crops or reservation thereof by a grantor must be in writing. See note, 23 L. R. A. (n. s.) 1222.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 595, 602, 604, 609.

87 Cal. 323-328, 25 Pac. 693, ABBOT v. THE '76 LAND & WATER CO.

Statements of Secretary of Corporation, made on renewing lease, as to immateriality of certain omissions in lease, are binding on corporation.

Approved in *Cudahy v. Hays*, 74 Kan. 127, 85 Pac. 812, holding admission by foreman of corporation of knowledge of defect in machinery, from which plaintiff's injury resulted, showed knowledge of corporation.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 321.

Miscellaneous.—Cited in *Abbott v. Seventy-six Land & Water Co.* (Cal.), 25 Pac. 694, *Shipe v. Seventy-six Land & Water Co.* (Cal.), 25 Pac. 694, and *Tyner v. Seventy-six Land & Water Co.* (Cal.), 25 Pac. 694, all companion cases.

87 Cal. 329-344, 25 Pac. 489, 1067, BAKER v. BRICKELL.

Homestead, Under Act of 1862, on Death of either spouse, vests absolutely in other.

Approved in *Estate of McCarthy*, 7 Cal. App. 201, 93 Pac. 1048, homestead selected by husband from community property vested absolutely in widow free from general debts of husband.

Character of Property as Community or Separate where title not completed until after death of spouse. See note, 17 L. R. A. (n.s.) 155.

Fact That Administratrix by Mistake inventories her own lands as part of husband's estate does not estop her from claiming property as her own.

Criticised in *In re Estate of Fletcher*, 83 Neb. 159, 119 N. W. 234, inventory filed by executrix is open to explanation; *Carruthers v. Whitney*, 56 Wash. 332, 105 Pac. 833, 134 Am. St. Rep. 1114, where property so inventoried was conveyed to purchaser, who took in good faith under representation he would receive title, administratrix was estopped to deny validity of deed.

Title of City of San Francisco to Pueblo Lands was in nature of trust for benefit of inhabitants.

Reaffirmed in *Merritt v. Barta*, 158 Cal. 380, 111 Pac. 260, reaffirming rule.

Miscellaneous.—Cited in *Whelan v. Brickell* (Cal.), 33 Pac. 397, and *Wheelan v. Brickell* (Cal.), 38 Pac. 85, both on further appeals.

87 Cal. 348-366, 25 Pac. 481, 11 L. R. A. 75, PEOPLE v. POWELL.

Where Constitution Does not Define Right of trial by jury, common-law right must be understood.

Approved in *State v. Lewis*, 142 N. C. 639, 642, 55 S. E. 607, 7 L. R. A. (n.s.) 669, following rule; *People v. Ebey*, 6 Cal. App. 771, 93 Pac. 380, bill of rights of state constitution provides accused shall have right of trial by jury as right existed at common law.

Section 1033, Penal Code, Authorizing Change of place of trial of criminal action to another county upon application of district attorney, without consent of defendant, when no jury can be obtained, is void.

Approved in *In re Nelson*, 19 S. D. 222, 102 N. W. 887, holding void similar statute.

Distinguished in *Queenan v. Territory*, 11 Okl. 271, 71 Pac. 221, 61 L. R. A. 324, holding fact that juror had been convicted of felony in another state was not ground for reversal.

Disapproved in *Barry v. Traux*, 13 N. D. 149, 112 Am. St. Rep. 662, 99 N. W. 775, 65 L. R. A. 762, and *State v. Durlinger*, 73 Ohio St. 161, 76 N. E. 293, both upholding statutes providing for change of venue on application of district attorney when it appears fair trial cannot be had.

Statements of Deceased to Third Persons showing state of mind toward defendant in murder case are inadmissible as hearsay.

Approved in *People v. Driggs*, 12 Cal. App. 246, 108 Pac. 64, holding statements of deceased owner of land in whose name lease was forged made outside presence of defendant and not part of *res gestae* to be inadmissible hearsay.

Uncontradicted Statement in Presence of accused as confession. See note, 25 L. R. A. (n.s.) 555.

Where Defendant Pleads Killing in Self-defense, under honest belief he was in danger, it is competent to show that before killing he was informed deceased was dangerous character.

Approved in *State v. Hazlet*, 16 N. D. 436, 113 N. W. 377, holding defense of accidental killing to be denial of criminal intent, and burden was on state to prove such intent beyond reasonable doubt; *State v. Churchill*, 52 Wash. 214, 215, 100 Pac. 311, on prosecution for murder, where accused pleaded self-defense, he could not show quarrels between deceased and third persons, where defendant had no knowledge of such.

Character and Reputation of Deceased as affecting homicide. See note, 3 L. R. A. (n.s.) 355, 369.

Court has Discretion to Allow Private Counsel to be employed to assist district attorney.

Reaffirmed in *State v. Steers*, 12 Idaho, 182, 85 Pac. 107.

Applicability of Rule of Reasonable Doubt to self-defense in homicide. See note, 19 L. R. A. (n.s.) 490.

Evidence of Threats of Accused, or of person injured or killed. See note, 17 L. R. A. 661.

87 Cal. 367-369, 25 Pac. 547, **COFFEY v. GRAND COUNCIL.**

Miscellaneous.—Cited in *Coffey v. Grand Council*, 87 Cal. 370, 25 Pac. 548, companion case.

87 Cal. 371-389, 26 Pac. 345, **SHANKLIN v. McNAMARA.**

Decisions of Land Department upon Questions of fact on contest of right to purchase lands is conclusive and binding on parties and those claiming under them.

Reaffirmed in *McHarry v. Stewart* (Cal.), 35 Pac. 142.

87 Cal. 390-393, 25 Pac. 500, **VANCE v. SUPERIOR COURT.**

Supreme Court will Only Prove Exception refused in superior court when it was one which that court had power to allow.

Approved in *People v. Lapique*, 9 Cal. App. 135, 98 Pac. 256, for supreme court to interfere in authenticating record on appeal, party seeking relief must clearly show right thereto.

87 Cal. 394-398, 25 Pac. 488, **KIRKWOOD v. SOTO.**

Section 9, Article XI, Constitution, Does not Forbid Allowance for incidental expenses of office after election of officer.

Approved in *Newman v. Lester*, 11 Cal. App. 581, 105 Pac. 787, holding number of deputy assessors could be increased during assessor's term of office; *Bailey v. Kelley*, 70 Kan. 876, 79 Pac. 737, act of 1903 appropriating money for maintaining executive residence does not authorize employment of any part of sum so appropriated for purchase of provisions to be used there.

"Compensation" and "Salary" as Used in Constitution are synonymous.

Reaffirmed in *Marionaux v. Cutler*, 32 Utah, 481, 91 Pac. 356.

87 Cal. 399-409, 25 Pac. 497, **SUKEFORTH v. LORD.**

Where Answer Alleges Fraud and Plaintiff goes to trial upon issue without objection to pleading or evidence of fraud, it cannot be urged on appeal that fraud was not in issue.

Approved in *Eaton v. Metz* (Cal.), 40 Pac. 948, following rule; *Gervaise v. Brookins*, 156 Cal. 112, 103 Pac. 333, holding presence in record of finding of fact which appellant claimed was not in issue was sufficient showing action was tried upon theory fact was in issue; *Peck v. Noee*, 154 Cal. 354, 97 Pac. 866, where trial was had upon theory certain facts were in issue, objection to findings thereon could not be raised on appeal; *Spreckels v. Gorrill*, 152 Cal. 387, 92 Pac. 1013, where complaint did not directly allege statements were false, but implied fraud and deceit, in absence of demurrer, defect was cured by verdict and could not be raised on appeal; *Christensen v. Jessen* (Cal.), 40 Pac. 748, holding judgment would not be reversed because of defective allegation which did not mislead other party, and was not objected to.

Sufficiency of Exceptions to Instructions Considered.

Approved in *Love v. Anchor Raisin Vineyard Co.* (Cal.), 45 Pac. 1046, holding exception, "to which said charge and the whole thereof, defendant duly excepted," not sufficiently specific.

Right of Creditor to Buy Property from Debtor in satisfaction of debt. See note, 36 L. R. A. 356.

87 Cal. 410-413, 25 Pac. 487, MILLER v. WADE.

On Appeal from Judgment of Nonsuit, ruling of court cannot be reviewed unless bill of exceptions specifies such ruling as error.

Overruled in *Martin v. Southern Pacific Co.*, 150 Cal. 131, 88 Pac. 704, specification of particular errors relied on not required in bill of exceptions on appeal from judgment of nonsuit.

Nonsuit will be Upheld if it could have been granted on any ground.

Approved in *Bailey v. Brown*, 4 Cal. App. 516, 88 Pac. 519, following rule; *Occidental Co. v. Gantner & Mattern*, 7 Cal. App. 731, 95 Pac. 1044, holding order setting aside verdict should be sustained, though not on ground stated by trial court.

87 Cal. 413-421, 25 Pac. 493, CLAVEY v. LORD.

Court may in Its Discretion Permit taking of further evidence when it sets aside verdict in equity case.

Approved in *San Pedro Lumber Co. v. Schroeter*, 156 Cal. 160, 103 Pac. 889, when motion for nonsuit was made at close of plaintiff's case on ground of variance, court could permit him to reopen case and give further testimony; *Hohn v. Pauly*, 11 Cal. App. 733, 106 Pac. 269, holding case properly reopened for further evidence after submission and before decision.

Error in Admitting Evidence on Issue rendered immaterial by findings on other issues which sustain judgment is harmless.

Approved in *Union Transportation Co. v. Bassett* (Cal.), 46 Pac. 911, *Bullion etc. Bank v. Spooner* (Cal.), 36 Pac. 123, *Hayden v. Collins*, 1 Cal. App. 266, 81 Pac. 1123, and *Madsen v. Utah Light & Ry. Co.*, 36 Utah. 545, 105 Pac. 804, all following rule; *Hatton v. Gregg*, 4 Cal. App. 546, 88 Pac. 595, where findings for plaintiff were sufficient to support judgment in any event, failure to find on plea of limitations was harmless; *People v. Davidson*, 2 Cal. App. 104, 83 Pac. 162, both holding error in immaterial findings not prejudicial when other findings support judgment.

87 Cal. 424-425, 25 Pac. 545, JOYCE v. WING YET LUNG.

Written Order Given by Debtor to Creditor for amount of debt addressed to person indebted to drawer in like sum, and partly paid by drawee, is binding contract.

Approved in *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 567, 86 Pac. 822, holding order drawn in favor of bank by charterer of vessels upon one who was to advance money, to collect commissions for and finally account to charterer, was valid contract; *Wolters v. Thomas* (Cal.), 32 Pac. 566, where debtor gave to creditor written order on third party indebted to him, who accepted it, such facts constituted novation. -

87 Cal. 428-429, 25 Pac. 545, CAMPBELL v. THOMAS.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal and defective title. See note, 43 L. R. A. 610.

87 Cal. 430-434, 22 Am. St. Rep. 254, 25 Pac. 550, MILLER v. HIGHLAND DITCH CO.

Joint Judgment for Damages Against Several independent tortfeasors not acting in concert is erroneous.

Approved in *Livesay v. First Nat. Bank*, 36 Colo. 534, 118 Am. St. Rep. 120, 86 Pac. 105, 6 L. R. A. (n.s.) 598, and *Bonte v. Postel*, 109 Ky. 74, 58 S. W. 539, 51 L. R. A. 187, both following rule; *Hannon v. Nuevo Land Co.*, 14 Cal. App. 703, 112 Pac. 1105, complaint showing action brought on theory plaintiff was damaged by acts of one of two joint defendants, but not of both, states no cause of action against either; *Paddock-Hawley Iron Co. v. Rice*, 179 Mo. 493, 494, 78 S. W. 637, 638, holding several creditors independently attaching property not jointly liable to interpleader for whom judgment was rendered; *Barton v. Barton*, 119 Mo. App. 531, 94 S. W. 582, holding to authorize joint judgment against persons causing husband to leave wife they must have co-operated; *Watson v. Colusa-Parrot M. & S. Co.*, 31 Mont. 517, 79 Pac. 15, holding several mining companies independently polluting stream not jointly liable for damages caused thereby; *City of Mansfield v. Bristor*, 76 Ohio St. 281, 118 Am. St. Rep. 852, 81 N. E. 633, 10 L. R. A. (n.s.) 806, parties independently discharging sewage in stream so as to cause actionable nuisance not jointly liable for damages; *Swain v. Tenn. Copper Co.*, 111 Tenn. 441, 450, 78 S. W. 95, 97, two smelting corporations independently polluting air to injury of crops could not be joined in action for damages; *Sun Company v. Wyatt*, 48 Tex. Civ. 353, 354, 107 S. W. 935, 936, three oil companies each independently laying pipes in front of plaintiff's premises could not be joined in action for damages; *Man v. Stoner*, 15 Wyo. 134, 87 Pac. 440, where defendants separately interfered with plaintiff's irrigation ditch, they could not be joined in action for trespass.

Distinguished in *West Muncie Strawboard Co. v. Slack*, 164 Ind. 24, 72 N. E. 880, holding one creating public nuisance liable for whole damage, though he was but one of several who independently contributed to nuisance; *San Marcos Elec. Light & Power Co. v. Compton*, 48 Tex. Civ. 592, 107 S. W. 1154, where negligence of telephone company and of electric light company was each efficient cause of plaintiff's injury, joint judgment sustained.

Independent Tort-feasors Whose Acts Contribute to same injury may be joined in suit to prevent their wrongful acts.

Approved in *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 595, 77 Pac. 1119, independent diverters of waters may be joined in action to restrain diversion where damages are not sought; *Crawford Co. v. Hathaway*, 67 Neb. 370, 108 Am. St. Rep. 647, 93 N. W. 796, 60 L. R. A. 889, and *Frost v. Alturas W. Co.*, 11 Idaho, 299, 81 Pac. 997, both holding settlers along stream having right to appropriate its waters could unite in suit to quiet their title, and enjoin interference therewith; *Warren v. Parkhurst*, 186 N. Y. 55, 78 N. E. 582, several riparian owners acting independently to pollute stream to plaintiff's injury may be joined as defendants in suit to enjoin such pollution; *Draper v. Brown*, 115 Wis. 370, 91 N. W. 1003, in suit to maintain lake level, owners of dam at outlet, owner of lock in canal, and owner of dam at outlet of tributary lake were all properly joined as defendants.

Actions Against Two or More Persons, creating or maintaining a nuisance. See note, 118 Am. St. Rep. 873.

Character of Liability of Several Whose Independent wrongs contribute to enhance degree or extent of injury. See note, 10 L. R. A. (n.s.) 169.

Liability of One of Several Polluters of Stream. See note, 24 L. R. A. (n.s.) 1185.

87 Cal. 434-440, 25 Pac. 549, **CARPENTER v. HATHAWAY.**

Extent of Rule That Parol Evidence is inadmissible to vary, etc., written contract. See note, 17 L. R. A. 272.

87 Cal. 443-452, 22 Am. St. Rep. 257, 25 Pac. 749, **DREW v. PEDLAR.**

Rescission of Contract in Toto Leaves rights of parties to be determined under general rules of equity.

Approved in *Lytle v. Scottish-American Mortgage Co.*, 122 Ga. 466, 50 S. E. 405, reaffirming rule.

Where Vendor Rescinds Contract After Tender of purchase price by vendee, he must return purchase money paid.

Approved in *Law Credit Co. v. Tibbitts*, 160 Cal. 629, 117 Pac. 773, in absence of agreement as to terms of rescission, on rescission of contract to purchase land for purchaser's default, purchaser could recover partial payments made less damages from breach; *Pierce v. Staub*, 78 Conn. 467, 112 Am. St. Rep. 163, 62 Atl. 763, 3 L. R. A. (n.s.) 785, holding purchase price must be returned on rescission when contract did not call for forfeiture; *Lytle v. Scottish-American Mortgage Co.*, 122 Ga. 71, 50 S. E. 408, vendor seeking to recover land on rescission must return purchase money paid.

Distinguished in *Cleary v. Folger* (Cal.), 33 Pac. 878, where vendee notified vendor he would not complete purchase, vendor need not offer to perform, and by his failing to do so, vendee could not elect to treat contract as rescinded and sue for purchase money paid.

Rescission of Contract to Purchase Land. See note, 119 Am. St. Rep. 560.

Rescission of Contract of Sale. See note, 112 Am. St. Rep. 170.

Stipulation in Contract That Payments Made should be liquidated damages in case of breach is void under sections 1670 and 1671, Code of Civil Procedure.

Approved in *Phelps v. Brown* (Cal.), 27 Pac. 421, holding void stipulation for forfeiture of money advanced on exchange of lands in case exchange not finished in time limited.

Distinguished in *Aikman v. Sanborn* (Cal.), 52 Pac. 730, under sections 3387, 3389, Civil Code, parties may agree to stipulated damages in contracts for purchase of land.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 62.

87 Cal. 453-460, 25 Pac. 675, **WILHOIT v. CUNNINGHAM.**

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 124.

Miscellaneous.—Cited in *Sargent v. Cunningham* (Cal.), 25 Pac. 677, companion case.

87 Cal. 461-464, 25 Pac. 680, **PETTINGER v. FAST.**

Word "Sold" is Used to Indicate executory agreement for sale of property.

Approved in *Christensen v. Cram*, 156 Cal. 634, 105 Pac. 950, complaint alleging plaintiff "sold" property and certain sum remains due thereon is sufficient.

87 Cal. 464-471, 25 Pac. 681, 11 L. R. A. 252, **McFADDEN v. SANTA ANA ETC. RY. CO.**

Damages Recovered for Injury to Wife are community property, and husband is necessary party to action for their recovery.

Approved in *Basler v. Sacramento Gas etc. Co.*, 158 Cal. 518, 111 Pac. 532, and *Justis v. Atchison etc. Ry. Co.*, 12 Cal. App. 642, 108 Pac. 329, both following rule; *Gomez v. Scanlan*, 155 Cal. 530, 102 Pac. 13, in action by husband for injuries to wife, wife is necessary party.

What is Community Property. See notes, 126 Am. St. Rep. 120; 4 Cof. Prob. 62.

Cross-examination of Party Should be Allowed liberal range, touching all matters testified to in chief.

Approved in *Taggart v. Bosch* (Cal.), 48 Pac. 1094, holding cross-examination of plaintiff erroneously limited.

Imputed Negligence of Driver to Passenger. See notes, 14 L. R. A. 733; 8 L. R. A. (n. s.) 656.

Husband's Negligence as Bar to Recovery for wife's personal injuries. See note, 22 L. R. A. 460.

87 Cal. 471-475, 25 Pac. 683, **BRUMLEY v. FLINT.**

General Objection to Evidence is Sufficient if it is absolutely inadmissible for any purpose.

Reaffirmed in *Kirby v. State*, 44 Fla. 93, 32 So. 840.

Objection That Witness is not Qualified to testify as expert cannot be first raised on appeal.

Approved in *Louisville etc. R. R. Co. v. Ratliffe*, 104 Ala. 150, 51 So. 336, holding question as to qualification of expert witness not raised by proper objection.

87 Cal. 475-479, 25 Pac. 684, PEOPLE v. TYRRELL.

Appointment by Governor During Recess of legislature, for term of four years, to fill vacancy on board of health, is in legal effect appointment during recess.

Approved in *Cobb v. Hammock*, 82 Ark. 589, 102 S. W. 384, general appointment to vacancy required to be filled by special election was valid, and rendered appointee officer de jure until vacancy was filled by election.

Mere Expiration of Term of Incumbent of office does not create vacancy such as governor alone is authorized to fill.

Reaffirmed in *Pruitt v. Squires*, 64 Kan. 861, 68 Pac. 644.

87 Cal. 483-488, 22 Am. St. Rep. 265, 26 Pac. 92, MOORE v. LONG BEACH DEVELOPMENT CO.

Family Going to Inn at Pleasure Resort for indefinite time held to have become boarders, and innkeeper was not liable for loss of baggage by fire.

Approved in *Haff v. Adams*, 6 Ariz. 403, 59 Pac. 113, person stopping at hotel for six months held to be boarder and hotel-keeper not liable for loss of property from her room.

Who are Guests at Inn. See note, 105 Am. St. Rep. 938.

Payment of Board by Week as Affecting Relation between hotel proprietor and guest. See note, 14 L. R. A. (n. s.) 476.

87 Cal. 489-498, 25 Pac. 696, SMITH v. MOHN.

Where Time is of Essence of Contract of sale of land, failure of vendee to make payments does not avoid contract as to vendor, and he may enforce contract and sue for purchase money due.

Approved in *Freeman v. Griswold* (Cal.), 34 Pac. 329, where time was of essence of contract to sell land, purchaser was not bound to tender deed except on payment of purchase price; *Cughan v. Larson*, 13 N. D. 382, 100 N. W. 1091, where time had not been treated by vendor as of essence of contract in respect to defaults, forfeiture could not be declared therefor.

Time as of Essence of Contract for sale of land. See note, 104 Am. St. Rep. 267.

87 Cal. 499-505, 25 Pac. 694, CITY OF SAN LUIS OBISPO v. PETTIT.

Tax Assessment not Made as Required by statute is invalid.

Approved in *Houser & Haines Mfg. Co. v. Hargrove* (Cal.), 59 Pac. 949, 950, holding void sale of one's personal property for taxes on property not owned by him, but given to assessor as property of another.

Where Statute Requires Money Paid into court and deposited with county treasurer to be assessed to treasurer, assessment to plaintiff in suit is void.

Distinguished in *In re Assignment of Boyd*, 138 Iowa, 590, 116 N. W. 703, 17 L. R. A. (n. s.) 1220, receiver who holds funds awaiting distribution is not regarded as owner for purposes of taxation.

If Part of Law is Invalid, and is distinctly separable from remainder, latter will stand, and former be rejected.

Reaffirmed in *In re Hallawell*, 8 Cal. App. 565, 97 Pac. 321.

87 Cal. 505-507, 25 Pac. 679, BALL v. KEHL.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 677.

87 Cal. 508-513, 25 Pac. 686, HARLAN v. STUFFLEBEEM.

Under Mechanic's Lien Law for Purpose of filing liens, building shall not be held to be uncompleted because of trivial imperfections.

Approved in Seebach v. Kuhn, 9 Cal. App. 488, 99 Pac. 725, holding rule did not apply when contract contained valid fire and earthquake clause, and building was destroyed when not quite completed; Hill v. Clark, 7 Cal. App. 611, 95 Pac. 384, and Schindler v. Green, 149 Cal. 754, 755, 87 Pac. 627, both upholding lien when only trivial imperfections existed; Santa Clara Valley Mill & Lumber Co. v. Williams (Cal.), 31 Pac. 1129, completion of building on given date except for trivial imperfection renders void lien filed more than thirty days later.

Right of Building Contractor to Recover for substantial performance of contract. See notes, 134 Am. St. Rep. 683, 690, 693; 24 L. R. A. (n. s.) 329, 342, 348.

Finding That Plaintiffs Substantially completed contract is consistent with finding that some places in house were not properly grained and finished.

Distinguished in Schindler v. Green (Cal. App.), 82 Pac. 632, finding that windows were not put in in workmanlike manner, held inconsistent with finding failure to place windows in vertical line was trivial imperfection.

Interest of Lessor of Land on Which Building is constructed with his knowledge is subject to mechanics' liens if he fails to give notice of nonliability.

Distinguished in Christianson Drug Co. v. Hughes, 18 N. D. 285, 138 Am. St. Rep. 762, 122 N. W. 385, where husband, without consent and over protests of wife, purchased paint for dwelling on land of wife, who had no knowledge of place of purchase, materialman acquired no lien by reason of wife's failure to give notice.

Power of Lessee or Vendee to Subject Owner's Interest to mechanics' liens. See note, 23 L. R. A. (n. s.) 618.

87 Cal. 514-520, 25 Pac. 673, LATHAM v. CITY OF LOS ANGELES.

Presumption Attaches to Grant of pueblo lands to private person, who has been put in possession, that authorities of pueblo acted within limits of official authority.

Approved in Sisk v. Caswell, 14 Cal. App. 391, 112 Pac. 190, person holding under deed presumed to have read it.

87 Cal. 523-525, 25 Pac. 1065, UNDERWOOD v. UNDERWOOD.

Vacation of Judgments for Negligence or mistake of attorney. See note, 96 Am. St. Rep. 109.

87 Cal. 530-532, 25 Pac. 691, JUSTICE v. OTT.

Judgments for or Against Insane Persons. See note, 130 Am. St. Rep. 842, 845.

87 Cal. 532-542, 26 Pac. 632, WILLIAMS v. MITCHELL.

Constructive Trusts. See note, 105 Am. St. Rep. 107.

87 Cal. 545-552, 26 Pac. 793, ROSENBERG v. DURFEE.

Permitting Child to Ride on Sweep drawn by horse in circumstances of danger, as result of which child is injured, is negligence.

Approved in *Houston etc. Ry. Co. v. Bulger*, 35 Tex. Civ. App. 483, 80 S. W. 560, permitting child to play about premises of pumping plant, where he was injured, was negligence.

87 Cal. 552-557, 22 Am. St. Rep. 268, 26 Pac. 599, **NORDHOLT v. NORDHOLT.**

Constructive Trust Arises Where Party procures deed to himself under parol promise, made with intention not to perform, to reconvey.

Approved in *Bollinger v. Bollinger*, 154 Cal. 699, 99 Pac. 198, where father conveyed land to defendant on express trust to divide between his children after his death, and widow brought untenable action to enforce trust, executors of deceased child, made defendant, could enforce it by cross-complaint; *Cooney v. Glynn*, 157 Cal. 587, 108 Pac. 508, holding conveyance by mother to son to hold in trust for daughter created constructive trust; *Sanguinetti v. Rossen*, 12 Cal. App. 629, 107 Pac. 562, where property was conveyed to trusted friend for specific purpose, and by agreement of clients transferred to attorney for their benefit, constructive trust was created; *Crabtree v. Potter*, 150 Cal. 713, 89 Pac. 972, deed from parents to daughter on her promise to pay mortgage, and that grantors should have use during life, made without intention to perform latter, created constructive trust.

87 Cal. 557-561, 26 Pac. 792, **HARVEY v. HADLEY.**

Expression of Opinion as Fraud. See note, 35 L. R. A. 421.

87 Cal. 561-565, 25 Pac. 756, 26 Pac. 825, **SAN DIEGO FLUME CO. v. CHASE.**

Contract for Water Supply Construed from its express terms.

Approved in *Grosse v. Barman*, 9 Cal. App. 663, 100 Pac. 354, evidence of circumstances under which contract was made not admissible when terms were clear and unambiguous.

Miscellaneous.—Cited in *San Diego Flume Co. v. Chase* (Cal.), 32 Pac. 245, on another appeal.

87 Cal. 566-568, 25 Pac. 763, **CAMPODONICO v. OREGON IMP. CO.**

Mortgagees' Right of Action Against Third Persons for invasion of their rights. See note, 109 Am. St. Rep. 433.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 467.

87 Cal. 569-576, 25 Pac. 760, **McLENNAN v. BANK OF CALIFORNIA.**

Section 632, Code of Civil Procedure, is directory, and failure of judge to file decision in thirty days after submission is not ground for new trial.

Approved in *Toole v. Weirick*, 39 Mont. 365, 133 Am. St. Rep. 576, 102 Pac. 592, code provision as to time for filing findings directory only, and failure to decide within statutory time did not deprive court of jurisdiction to decide at later date.

Books of Bank are Admissible in Action against it for purpose of showing state of plaintiff's account.

Approved in *Blinn Lumber Co. v. McArthur*, 150 Cal. 614, 89 Pac. 438, bank-books admitted to show state of customer's account.

Party's Books of Account as Evidence in own favor. See note, 52 L. R. A. 569.

87 Cal. 576-581, 25 Pac. 764, FRICK v. MORFORD.

Assessment for Street Work Embracing only frontage covered by resolution of intention, but including expense of excess work done according to specifications, but not authorized by resolution, may be corrected by appeal to city council.

Approved in *Dowling v. Altschul* (Cal.), 33 Pac. 496, city council had power to determine question raised by appeal on ground assessment for paving cul-de-sac failed to assess land at end of same.

87 Cal. 581-588, 25 Pac. 963, BROOK v. PEARSON.

Rule as to Conflict of Testimony Applies to contradictions in testimony of witness.

Approved in *Humphrey v. Pope*, 1 Cal. App. 375, 82 Pac. 224, upholding finding against defendant when her own testimony was conflicting.

87 Cal. 597-602, 25 Pac. 765, FINCH v. RIVERSIDE & ARLINGTON RY. CO.

Dedication of Street to Public Use authorizes use for street-car line, and abutting owner is not entitled to further compensation.

Approved in *Wagner v. Bristol Belt Line Co.*, 108 Va. 600, 62 S. E. 393, following rule.

What are Additional Servitudes in highways. See notes, 106 Am. St. Rep. 243; 17 L. R. A. 477.

Mere Fact That It is More Convenient to public to have track at side of street is not sufficient reason for not complying with law that track be in center.

Approved in *Longnecker v. Wichita R. R. & Light Co.*, 80 Kan. 418, 102 Pac. 494, track not laid in center of street held to be nuisance, and injunction lay for abatement.

Injury to Abutting Owner by Street Railway near side of street. See note, 43 L. R. A. 555, 560.

Franchise Granted to Corporation of whose stock member of committee to which application was referred is subscriber is void.

Approved in *Woods v. Potter*, 8 Cal. App. 44, 95 Pac. 1127, members of city council occupy trust relation, and cannot claim compensation not allowed by charter or statute.

Validity of Vote of Common Council or similar body as affected by personal interest of members. See note, 18 L. R. A. 368.

87 Cal. 603-610, 25 Pac. 767, YARNELL v. LOS ANGELES.

Section 13, Article XI, Constitution, forbids delegation of power to municipal corporation to do what legislature is forbidden to do.

Distinguished in *In re Pfahler*, 150 Cal. 88, 88 Pac. 277, 11 L. R. A. (n. s.) 1092, initiative and referendum not within provision of section 13, article XI, Constitution.

Deposit of Public Money of City with private corporation is unauthorized by Constitution, and any taxpayer may maintain action to prevent such deposit.

Reaffirmed in *Rothschild v. Bantel*, 152 Cal. 6, 8, 91 Pac. 804, 805.

87 Cal. 613-618, 25 Pac. 917, HASS v. WHITTIER, FULLER & CO.

Unless Insolvent Transferred Property to creditor within one month before insolvency proceedings with intention to give preference, motives of creditor are immaterial.

Approved in *Salisbury v. Burr* (Cal.), 44 Pac. 462, holding complaint in replevin against creditor sufficiently alleged insolvent transferred property to creditor with intent to defraud other creditors.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 467.

87 Cal. 619-629, 22 Am. St. Rep. 272, 25 Pac. 919, **AVERY v. CLARK.**

Vendor's Lien is Simple Equity raised by courts for benefit of vendor after he has parted with title.

Approved in *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 746, 137 Am. St. Rep. 165, 110 Pac. 128, where no intention of parties appeared, lien presumed to exist.

So Long as Title is Retained by vendor, he has express lien for unpaid purchase money.

Distinguished in *Vance Redwood Lumber Co. v. Durphy*, 8 Cal. App. 671, 97 Pac. 705, vendor's lien on land to which he retains title does not require vendee to pay taxes on unpaid purchase money.

Mechanic's Lien Takes Precedence of any lien recorded subsequently to time materials were commenced to be furnished.

Distinguished in *Valley Lumber Co. v. Wright*, 2 Cal. App. 289, 84 Pac. 59, prior recorded deed of trust to secure note of owner for loan to erect building, which was to be further security for loan, precedent to subsequent mechanic's lien, though loan was paid after commencement of work.

Mechanics' Liens, When Superior to earlier mortgages. See note, 14 L. R. A. 307.

Where Seller of Real Property Takes Written contract for payment of price, absolute transfer of such contract by seller waives lien.

Approved in *Finnell v. Finnell*, 156 Cal. 594, 134 Am. St. Rep. 143, 105 Pac. 742, holding vendor's lien not waived by his acts.

Waiver of Vendor's Lien. See notes, 137 Am. St. Rep. 187, 188, 204; 127 Am. St. Rep. 308; 86 Am. St. Rep. 164.

Power of Lessee or Vendee to Subject owner's interest to mechanics' liens. See note, 23 L. R. A. (n. s.) 618.

87 Cal. 629-631, 25 Pac. 921, **SHATTO v. CROCKER.**

Injury to Feelings Caused by Arrest may be proved as ground for damages in action for malicious prosecution.

Approved in *Cowan v. Western Union Telegraph Co.*, 122 Iowa, 383, 101 Am. St. Rep. 268, 98 N. W. 282, 64 L. R. A. 545, holding mental suffering resulting from negligent transmission of telegram is injury for which recovery may be had.

Objection to Series of Documents offered in evidence as whole is not well taken if some are admissible.

Approved in *Thornton-Thomas Co. v. Bretherton*, 32 Mont. 93, 80 Pac. 13, following rule.

87 Cal. 631-637, 25 Pac. 968, **WINN v. SHAW.**

Taxpayer may Bring Action to restrain payment of public money on illegal claim.

Approved in *Clouse v. San Diego*, 159 Cal. 438, 114 Pac. 575, citizens, to maintain action to enjoin illegal expenditure of public funds, need not show special injury to themselves.

Limited in *Thomas v. Joplin*, 14 Cal. App. 664, 112 Pac. 730, such right restricted by section 526a, Code of Civil Procedure, to resident citizen or corporation, liable to pay tax in county, or who has paid tax within one year.

87 Cal. 638-642, 25 Pac. 967, EX PARTE CLARK.

Statutes Relating to Adoption are in alteration of common law and must be strictly construed.

Approved in *Purinton v. Jamrock*, 195 Mass. 197, 80 N. E. 804, following rule; *Estate of Benton*, 3 Cal. Prob. 525, holding petition alleging contestants of will were adopted defective in not alleging place of adoption; *Albring v. Ward*, 137 Mich. 354, 100 N. W. 610, person adopted under void statute not an heir; *Henry v. Taylor*, 16 S. D. 428, 93 N. W. 642, holding fact that one is an Indian and during childhood probably resided with family of another Indian raised no presumption of adoption; dissenting opinion in *Sires v. Melvin*, 135 Iowa, 479, 480, 13 N. W. 113, majority holding deed of adoption not invalid because not containing father's name.

Disapproved in *Ferguson v. Herr*, 64 Neb. 664, 94 N. W. 544, holding statutes relating to adoption should be liberally construed, to end that decree of adoption may be valid.

87 Cal. 643-651, 25 Pac. 922, CORKER v. CORKER.

Will is Revoked by Marriage of Testator unless provision be made for wife by marriage contract.

Approved in *Griffing v. Gislason*, 21 S. D. 62, 109 N. W. 648, following rule; *In re Larsen's Estate*, 18 S. D. 339, 100 N. W. 739, where testator after making will remarried, will was properly refused probate in absence of showing of condition excepting will from rule of revocation by marriage; *In re Adler's Estate*, 52 Wash. 543, 100 Pac. 1021, holding where testator married woman for whom he had already provided in will, will was not revoked by marriage.

Where Antenuptial Will is Revoked by marriage, and no marriage contract is proved, court can only deny probate of will, and cannot inquire into facts affecting deed of separation of husband and wife.

Approved in *In re Tillman's Estate* (Cal.), 31 Pac. 563, contest of probate of will on ground property therein disposed of was conveyed by testator to contestant after execution of will presented no ground for contest, and validity of deed under which contestant claimed could not be inquired into.

Distinguished in *Estate of Warner*, 6 Cal. App. 367, 92 Pac. 193, where by antenuptial contract wife relinquished claim as heir, but contested son's claim for letters of administration on ground of fraud in contract, court could pass on all questions necessary to determine right to letters.

Evidence to Sustain Immaterial Findings will not be inquired into on appeal if there is sufficient evidence to sustain material findings which support judgment.

Reaffirmed in *Hayden v. Collins*, 1 Cal. App. 266, 81 Pac. 1123.

Miscellaneous.—Cited in *In re Estate of Brown*, 139 Iowa, 227, 117 N. W. 263, to point that will in favor of wife not revoked by divorce.

NOTES

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88 Cal. 1-5, 25 Pac. 915, IN RE MOORE.

Compensation of Special Administrator is in discretion of court.

Reaffirmed in *In re Ford's Estate*, 29 Mont. 286, 74 Pac. 736.

Duties of Special Administrator. See note, 130 Am. St. Rep. 579.

88 Cal. 6-13, 25 Pac. 972, LIND v. CLOSS.

Where Accused is Convicted of Rape on testimony of complainant alone, under circumstances tending to throw discredit on her testimony, judgment should be reversed.

Distinguished in *People v. Moore*, 155 Cal. 241, 100 Pac. 690, holding rule did not apply when assault was brutal and indecent, and only question was as to intention of accused.

Right to Reversal or New Trial where jury disregard erroneous instructions. See note, 21 L. R. A. (n. s.) 853.

88 Cal. 13-15, 25 Pac. 966, SHAIN v. EIKERENKOTTER.

On Appeal from Order Vacating Levy of execution, it must appear that all papers used on hearing are contained in transcript.

Approved in *Muzzy v. McEwen Lumber Co.*, 154 Cal. 687, 98 Pac. 1062, authentication held insufficient for failure to state papers in transcript were all those used on hearing; *Manuel v. Flynn*, 5 Cal. App. 329, 90 Pac. 467, and *Higgins v. Los Angeles Ry. Co.*, 5 Cal. App. 751, 91 Pac. 345, both holding affidavits used on motion for new trial must be incorporated in bill of exceptions, to be considered on appeal.

Distinguished in *Estate of Davis*, 8 Cal. App. 358, 97 Pac. 87, holding certificate by judge that he has examined transcript on appeal and finds it correct to be sufficient certification that it contains all papers used on hearing of motion for order appealed from.

88 Cal. 26-29, 25 Pac. 983, LUCO v. DE TORO.

Judgment of Affirmance Follows from equal division of court, but judgment, though it bars subsequent action, does not decide matters of law involved.

Reaffirmed in *State v. McClung*, 47 Fla. 227, 37 So. 52.

88 Cal. 30-35, 25 Pac. 1064, WISE v. WILLIAMS.

Allowance and Approval of Claim against estate tolls statute of limitations.

Approved in *Shively v. Harris*, 5 Cal. App. 515, 90 Pac. 971, limitations do not run against judgment against estate.

Mortgage Given by Husband and Wife upon homestead must be presented as claim against estate, though mortgagee waives recourse to property of estate other than mortgaged premises.

Approved in *In re Bailey*, 176 Fed. 993, where creditor has mortgage on debtor's exempt homestead, and also right to prove debt against debtor's estate in bankruptcy, debtor's homestead equity is superior to rights of general creditors, who cannot require secured creditor to exhaust his security before resorting to general assets.

Authority of One of Several Executors or administrators. See notes, 127 Am. St. Rep. 386; 5 Cof. Prob. 382.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 338.

Miscellaneous.—Cited in *Wise v. Williams* (Cal.), 42 Pac. 573, 574, on another appeal.

88 Cal. 36-44, 23 Pac. 200, 25 Pac. 1101, BOOTH v. PENDOLA.

Failure of Claimant of Mechanic's Lien on two separate buildings to specify work done on each merely has effect to postpone his lien to other liens, and owner cannot object.

Approved in *Kritzer v. Tracy Engineering Co.*, 16 Cal. App. 292, 116 Pac. 702, amount due on each property need not be designated when there is but one claimant; *Eccles Lumber Co. v. Martin*, 31 Utah, 264, 87 Pac. 718, where two houses were built on one parcel of land, claim of lien need not set forth amount due on each.

Claimant of Mechanic's Lien Against Buildings erected by deceased is competent witness to testify to facts occurring before death of owner, in action against representative of estate.

Approved in *Wadleigh v. Phelps*, 149 Cal. 640, 87 Pac. 99, holding evidence of plaintiff against deceased mortgagor as to matter occurring before death, admissible in action to redeem from mortgage.

88 Cal. 45-49, 25 Pac. 1062, COOPER v. COOPER.

In Action for Divorce, Plaintiff need not be corroborated as to every fact and circumstance alleged.

Approved in *Clark v. Clark*, 86 Minn. 251, 90 N. W. 391, following rule; *Avery v. Avery*, 148 Cal. 243, 82 Pac. 969, and *Blanchard v. Blanchard*, 10 Cal. App. 204, 101 Pac. 536, both holding evidence of extreme cruelty sufficiently corroborated to sustain decree.

88 Cal. 50-68, 25 Pac. 977, SAN DIEGO LAND ETC. CO. v. NEALE.

In Condemnation Suit, Value of Land for any special purpose may be taken into account as element tending to show market value.

Approved in *Sacramento etc. R. R. Co. v. Heilbron*, 156 Cal. 410, 411, 412, 104 Pac. 980, 981, while evidence that land is valuable for special purpose is admissible, its value in terms of money which witness might think it would have for such purpose is inadmissible; *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 533, 539, 28 Pac. 682, 685, admitting evidence of value of land for reservoir site.

Distinguished in *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 446, 82 Pac. 642, measure of damages for injury to abutting owner for being deprived of access by street railroad is amount which will compensate for detriment caused by such use of street.

Special Value of Property for Purpose as element of compensation on condemnation. See note, 11 L. R. A. (n. s.) 996.

When Witness in Condemnation Suit states opinion as to market value of land, widest latitude in cross-examination should be allowed.

Approved in *Central Pacific Ry. Co. v. Feldman*, 152 Cal. 310, 92 Pac. 852, witness could be asked on cross-examination in regard to assessment on property.

Party Seeking to Condemn Land may be required to pay costs of appeal by owner, even though order of condemnation is affirmed.

Approved in *Gano v. Minneapolis & St. L. R. R. Co.*, 114 Iowa, 722, 89 Am. St. Rep. 393, 87 N. W. 718, 55 L. R. A. 263, upholding statute requiring railroad to pay all costs of condemnation suits.

Miscellaneous.—Cited in *Hollister v. State*, 9 Idaho, 16, 71 Pac. 543.

88 Cal. 68-78, 25 Pac. 1101, ALHAMBRA ETC. WATER CO. v. MAY-BERRY.

Grantee of Party Who Contracted for division of water of stream is estopped to question contract by appropriating whole of stream.

Approved in *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 217, 110 Pac. 932, party estopped by grantor's deed conveying all water for irrigation of his land to defendant's grantors.

88 Cal. 79-83, 25 Pac. 962, POIRIER v. GRAVEL.

Complaint for Breach of Contract to pay sum of money in installments, when realized from products of land, which alleges contract, and sale of land and products by defendant, and nonpayment of money due, sufficiently alleges breach.

Approved in *Sherlag v. Kelley*, 200 Mass. 236, 128 Am. St. Rep. 414, 86 N. E. 294, 19 L. R. A. (n. s.) 633, holding breach sufficiently alleged by assignment in negative words of contract.

If One Voluntarily Puts It Out of his power to perform contract, he breaks it, and is immediately liable for breach.

Approved in *Cabrea v. Payne*, 10 Cal. App. 678, 103 Pac. 177, holding tender of insufficient deed, not refusal to do more, gave immediate right of action for recovery of purchase money; *Cooley v. Moss*, 123 Ga. 709, 51 S. E. 626, where owner, who had entered into binding contract to sell lot on certain condition, disposed of it before condition occurred, it was such breach of contract as gave other party immediate right of action.

88 Cal. 84-85, 25 Pac. 966, EX PARTE BAKER.

Where Information is Set Aside on Ground defendant has not been legally committed by magistrate, new information cannot be filed without second examination.

Distinguished in *People v. Kilvington* (Cal.), 36 Pac. 13, 14, rule does not apply where information was set aside on technical defect.

88 Cal. 86-92, 25 Pac. 1106, NAGLE v. CALIFORNIA SO. R. R. CO.

Where Facts are Undisputed, Court should determine question of negligence.

Approved in *Rudd v. Byrnes*, 156 Cal. 640, 105 Pac. 959, 26 L. R. A. (n. s.) 134, holding question of negligence improperly withdrawn from jury.

88 Cal. 92-99, 25 Pac. 1105, HILL v. WILSON.

Expression of Opinion as Fraud. See note, 35 L. R. A. 441.

88 Cal. 103-106, 25 Pac. 1109, COLE v. SEGRAVES.

Courts will Take Judicial Notice of what towns are established by law as county seats in state.

Approved in *Metteer v. Smith*, 156 Cal. 575, 105 Pac. 736, taking judicial notice of class of city.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 443.

88 Cal. 108-109, 25 Pac. 1109, PERRI v. BEAUMONT.

Appellate Court will be Liberal in granting amendments to proof of service of notice of appeal, when no injustice can result.

Approved in *Jones v. Gunn*, 149 Cal. 693, 87 Pac. 579, where service of summons was actually proven, defective return could be amended.

88 Cal. 114-121, 26 Pac. 95, PEOPLE v. WHEATLEY.

Where Defendant Charged With Previous Conviction pleads not guilty thereto, he may withdraw plea and plead guilty for purpose of keeping evidence of such conviction from jury.

Approved in *People v. King*, 4 Cal. App. 215, 87 Pac. 401, holding action of court in calling on defendant to plead to charge of former conviction to be within jurisdiction and beneficial to prisoner in keeping evidence of such conviction from jury.

Plea of not Guilty Puts in Issue both particular offense charged and charges of convictions for other offenses.

Reaffirmed in *State v. Gordon*, 35 Mont. 464, 90 Pac. 175.

Separation of One Juror from Others for few minutes held not such separation as to justify new trial.

Approved in *People v. Cord*, 157 Cal. 571, 108 Pac. 515, holding visit of juror to sick wife with officer during recess did not justify new trial.

Effect of Separation of Jury. See note, 103 Am. St. Rep. 162.

88 Cal. 121-132, 22 Am. St. Rep. 283, 25 Pac. 1096, DONAHUE v. MEISTER.

In Quiet Title Suit Defendant who pleads ejectment is entitled to jury trial.

Approved in *Seliner v. McKay*, 2 Alaska, 565, 567, *Kenny v. McKenzie*, 25 S. D. 489, 127 N. W. 599, and *Burleigh v. Hecht*, 22 S. D. 307, 117 N. W. 370, all following rule; *McNeil v. Morgan*, 157 Cal. 378, 379, 108 Pac. 70, 71, where suit is in nature of ejectment, plaintiff cannot, by adopting equitable form of action to quiet title, prevent defendant from demanding jury trial; *Gordon v. Munn*, 83 Kan. 245, 111 Pac. 179, where in partition suit ownership and right of possession was involved, jury trial could not be denied.

Distinguished in *Wiencke v. Bibby*, 15 Cal. App. 56, 113 Pac. 879, holding it immaterial in unlawful detainer suit whether special issues were submitted by consent of parties, since court had power to submit such issues; *Smith Oyster Co. v. Darbee & Immel Oyster Co.*, 149 Fed. 559, and *Davis v. Judson*, 159 Cal. 126, 113 Pac. 150, both holding where no legal issues were involved in quiet title suit, defendant could not have jury trial; *Elbing v. Hastings*, 3 Alaska, 129, 133,

where possession was set up as defense in quiet title suit, court had equitable jurisdiction to determine issue, and deny jury trial; *Shields v. Johnson*, 10 Idaho, 482, 79 Pac. 393, in action in district court by party in actual possession, to quiet title to leasehold, under Revised Statutes of 1887, section 4538, neither party is entitled to jury as matter of right; *Costello v. Scott*, 30 Nev. 64, 93 Pac. 4, right to jury trial of legal issues in suit to dissolve partnership waived by failure to demand jury.

Action to Quiet Title. See note, 118 Am. St. Rep. 786.

Chief Value of Notice of Mining Location is as temporary protection of claimant while other acts of location are being performed.

Approved in *Green v. Gavin*, 10 Cal. App. 333, 101 Pac. 932, inartificial notice held sufficient in view of purpose; *Upton v. Santa Rita*, 14 N. M. 128, 89 Pac. 285, mere fact that portion of claim on which notice is posted by mistake overlaps pre-existing claim does not invalidate location.

Marking of Boundaries of Mining Location on ground is main act of original location.

Reaffirmed in *McCleary v. Broaddus*, 14 Cal. App. 64, 111 Pac. 126.

88 Cal. 132-136, 25 Pac. 1112, WHOLEY v. CAVANAUGH.

Deed to Land to Which Grantor holds certificate of purchase from state passes title later acquired by patent.

Distinguished in *Polk v. Sleeper*, 158 Cal. 634, 112 Pac. 181, right of person who has merely filed application to purchase state land does not survive him.

88 Cal. 136-140, 25 Pac. 1110, PEOPLE v. FOWLER.

Information is Sufficient if It Follows language of statute.

Approved in *People v. Silva*, 8 Cal. App. 352, 97 Pac. 203, upholding indictment charging crime of living in adultery.

Information Alleging Defendant Took Child from custody of mother without consent and against will for purposes of prostitution is sufficient.

Approved in *State v. Sager*, 99 Minn. 57, 58, 108 N. W. 814, upholding indictment charging felonious taking of child for purpose of marriage; *Caldwell v. State*, 73 Ark. 144, 108 Am. St. Rep. 28, 83 S. W. 931, upholding indictment charging seduction under promise of marriage.

Effect of Mistake as to Age of Girl under statute denouncing sexual offenses. See note, 25 L. R. A. (n. s.) 662.

88 Cal. 146-151, 25 Pac. 1111, HAGMAN v. WILLIAMS.

Specifications of Errors of Law on which appellant will rely are not necessary in bill of exceptions.

Approved in *Martin v. Southern Pacific Co.*, 150 Cal. 131, 88 Pac. 704, and *Nord v. Boston etc. Min. Co.*, 30 Mont. 56, 75 Pac. 683, both following rule; *Smith Table Co. v. Madsen*, 30 Utah, 300, 84 Pac. 886, assignment of errors need not be filed in court below; *Humphrey v. Whitney*, 17 Idaho, 24, 103 Pac. 392, bill of exceptions need not contain specifications of error except where claimed on appeal that findings are not supported by evidence.

Denials upon Information and Belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 780.

88 Cal. 152-159, 26 Pac. 103, **NOONE v. TRANS-ATLANTIC ETC. INS. CO.**

Statements as Representations, Although Expressly denominated in policy as warranties. See note, 11 L. R. A. (n. s.) 983.

88 Cal. 159-168, 22 Am. St. Rep. 291, 25 Pac. 1114, **HAWTHORNE v. SIEGEL.**

Measure of Damages Recoverable for Trespass on leased premises, forcibly changing construction, and compelling tenants to abandon them, is amount which will compensate for all detriment proximately caused thereby, whether anticipated or not.

Approved in *Hale Bros. v. Milliken*, 5 Cal. App. 352, 90 Pac. 369, holding damages resulting from breach of contract to be such as would reasonably flow therefrom, in view of circumstances attending its making, known to both parties; *Enlow v. Hawkins*, 71 Kan. 636, 81 Pac. 190, where corn was purchased to feed cattle, and was subsequently wrongfully destroyed by vendor at time when feed of same character could not be procured, wrongdoer was liable not only for property destroyed, but for direct consequences of destruction.

Where Established Business is Wrongfully Injured, damages are recoverable for loss of prospective profits.

Approved in *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 85, 108 Pac. 890, holding prospective profits from particular crops on land damaged by negligent flooding recoverable as damages.

Damages for Tort as Affected by loss of profits. See note, 52 L. R. A. 34.

Extent of Trespasser's Liability for consequential injuries. See note, 53 L. R. A. 627.

Where Complaint is Amended as to one paragraph only, court can limit demurrer to that paragraph.

Approved in *Flood v. Templeton*, 148 Cal. 377, 83 Pac. 150, brief immaterial additions to complaint did not constitute amended complaint allowing new demurrer.

88 Cal. 171-176, 25 Pac. 1116, **PEOPLE v. JOHNSON.**

When No Objection is Made by Defendant that date of passing sentence is premature, he is presumed to have assented to it.

Approved in *People v. Sykes*, 10 Cal. App. 70, 101 Pac. 22, following rule; *Marx v. People*, 204 Ill. 252, 68 N. E. 437, court presumed to have heard evidence as to age of party sentenced to reformatory.

88 Cal. 179-183, 25 Pac. 1119, **SWASEY v. ADAIR.**

Court has No Right to Pass upon legal defense by virtue of being first called upon to dispose of equitable issues.

Approved in *Horwege v. Sage*, 137 Cal. 541, 70 Pac. 622, in action on note, defendant pleading equitable defense had right to have equitable issues determined by court before trial of legal issues by jury; *Mass v. Dunmeyer*, 21 Okl. 440, 96 Pac. 593, defendant pleading equitable defense in foreclosure suit not entitled to jury trial on issues raised by cross-petition; *Schumacher v. Crane-Churchill Co.*, 66 Neb. 443, 92 N. W. 610, consent to placing case involving both legal and

equitable issues on equity docket did not waive jury trial for legal issues.

Equitable Right of Action Plead in defense must be of such character as may be ripened into decree in defendant's favor.

Approved in *McColgan v. Muirland*, 2 Cal. App. 12, 82 Pac. 1115, holding statute of limitations inapplicable to defense of fraud against judgment.

Distinguished in *Swanston v. Clark*, 153 Cal. 303, 95 Pac. 1119, in action to enforce specific performance, plea of rescission, admitting defendant made valuable improvements, but not offering compensation, stated no defense.

Jury can Only be Waived in Modes provided by statute, and failure of defendant to make second demand after written demand is refused, on ground answer presents equitable defense, is not waiver of right.

Approved in *Chessman v. Hale*, 31 Mont. 592, 79 Pac. 259, 68 L. R. A. 410, plaintiff's right to jury trial in action for damages for nuisance not waived by failure to demand jury, or to submit to court question whether he had right to jury trial; *Cleveland v. Smith*, 102 Tex. 492, 119 S. W. 843, where plaintiff on first day of term demanded jury trial and tendered fees, it was error to deny it, though he had not demanded one at previous term.

88 Cal. 184-202, 26 Pac. 111, WOODROOF v. HOWES.

When Trustee Makes Profit Out of his cestui que trust, presumption is against him, and he must show affirmatively transaction was perfectly fair.

Approved in *Smith v. Elderton*, 16 Cal. App. 426, 117 Pac. 564, party receiving money from another to purchase stock for both was guilty of fraud when he misrepresented purchase price and obtains his own share for nothing.

Right of Majority Stockholder to Purchase or lease corporate property. See note, 16 L. R. A. (n. s.) 894.

Actions by Stockholders in Behalf of Corporations. See note, 97 Am. St. Rep. 45.

88 Cal. 207-216, 26 Pac. 85, WILSON v. MORIARITY.

Mere Conflict of Testimony as to Mistake in written instrument does not justify setting aside decree reforming it for mistake.

Reaffirmed in *Home & Farm Co. v. Freitas*, 153 Cal. 684, 96 Pac. 310.

Neglect of Lessor, Where Lease was Read to her by notary, to discover it was for ten years instead of five held not sufficient to defeat her action for reformation.

Approved in *Los Angeles etc. R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 26, 27, 87 Pac. 1031, carelessness in failing to read deed did not prevent reformation for mistake; *Faxon v. Baldwin*, 136 Iowa, 526, 114 N. W. 43, when vendor of interest in land, believing he possessed smaller interest than he actually did possess, conveyed to vendee by quitclaim deed, vendee knowing his mistake, equity will grant relief therefrom.

Failure to Read Contract as Affecting Right to relief on ground of fraud. See note, 6 L. R. A. (n. s.) 464.

Mistakes for Which Written Instruments may be canceled or corrected in equity. See note, 117 Am. St. Rep. 237.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 804, 857, 885, 906, 921.

- 88 Cal. 217-221, 22 Am. St. Rep. 298, 26 Pac. 84, **GRIMSHAW v. BELCHER.**

Where Revocation of Executed Parol License would be fraud, equity will give remedy by restraining revocation, or construing license as agreement to give right and enforcing specific performance.

Approved in *Flick v. Bell* (Cal.), 42 Pac. 814, executed parol license to construct reservoirs and lay pipes thereto, with view to joint use, could be revoked only upon compensation for expense incurred, or upon allowing licensee to remove structures if it could be done without material loss.

Revocability of License to Maintain Burden on land, after licensee has incurred expense. See note, 49 L. R. A. 514.

- 88 Cal. 221-230, 26 Pac. 80, **ORTEGA v. CORDERO.**

Findings of Facts Contrary to Admissions of pleadings will be disregarded on appeal from judgment.

Reaffirmed in *Lambert v. Lambert*, 1 Cal. App. 115, 81 Pac. 716.

Where Parties Try Issues not Raised by pleadings by tacit consent, objection to findings thereon cannot be raised on appeal.

Approved in *Schroeder v. Mauzy*, 16 Cal. App. 447, 118 Pac. 461, following rule; *Haines v. Stilwell* (Cal.), 40 Pac. 333, where count in complaint stated facts only by recital, but no demurrer was made or objection to taking evidence thereunder, objection could not be raised on appeal.

- 88 Cal. 230-232, 26 Pac. 108, **TOWNSEND v. BRIGGS.**

Order Granting New Trial will not be reversed on appeal if it can be justified on any grounds upon which motion was made.

Approved in *Scrivani v. Dondero* (Cal.), 44 Pac. 1066, refusing to disturb order granting new trial.

Inadequacy of Damages as Ground for setting aside verdict. See note, 47 L. R. A. 44, 51.

Miscellaneous.—Cited in *Townsend v. Briggs* (Cal.), 32 Pac. 307, on another appeal.

- 88 Cal. 233-241, 26 Pac. 88, **PEOPLE v. TRAVERS.**

Defendant Indicted Without Opportunity to challenge grand jury may have indictment set aside on any ground which would have been good for challenge, but facts must be proven in same way as other facts.

Approved in *Parker v. Territory*, 5 Ariz. 290, 52 Pac. 364, holding motion to set aside indictment on ground justifying challenge to grand jury improperly made when nothing was adduced to show facts.

Person is Presumed to be Sane until contrary is shown, and burden is on defendant relying on insanity as defense to establish it by preponderance of evidence.

Approved in *People v. Willard*, 150 Cal. 552, 89 Pac. 128, upholding instructions as to defense of insanity.

Presumption and Burden of Proof as to sanity. See note, 36 L. R. A. 722, 727.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 739.

Temporary Insanity Produced by Use of intoxicants is no defense to criminal charge.

Reaffirmed in *People v. Hower*, 151 Cal. 642, 91 Pac. 508, and *State v. Kidwell*, 62 W. Va. 470, 59 S. E. 495, 13 L. R. A. (n. s.) 1024.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 479, 481.

Instruction Considered and Held Erroneous as indicating hostility to defendant, and invading province of jury.

Approved in *People v. Olsen*, 1 Cal. App. 19, 81 Pac. 676, holding improper remark of judge on impaneling jury as to circumstantial evidence was not injurious to defendant; *State v. Marren*, 17 Idaho, 788, 107 Pac. 1000, holding it error for judge to argue relative weight of circumstantial and of positive evidence.

Qualification of Grand Jurors. See note, 28 L. R. A. 201.

88 Cal. 241-245, 26 Pac. 117, **WOODY v. BENNETT.**

Where Evidence is Conflicting, that in support of verdict is assumed on appeal to be true.

Reaffirmed in *Walsh v. Bradshaw*, 16 Cal. App. 587, 117 Pac. 690.

88 Cal. 245-252, 22 Am. St. Rep. 301, 26 Pac. 99, **PREBLE v. ABRAHAM.**

Parol Evidence is Admissible to Explain meaning of term "forty acres of eighty acre tract at Biggs," used in deed.

Approved in *Carr v. Howell*, 154 Cal. 376, 97 Pac. 887, uncertain description of land sold rendered certain by parol evidence; *Hill v. McCoy*, 1 Cal. App. 162, 81 Pac. 1016, admitting parol evidence to identify land referred to by name in contract; *Spongberg v. First Nat. Bank*, 15 Idaho, 676, 99 Pac. 713, admitting parol evidence to identify side of room referred to in lease; *Howard v. Adkins*, 167 Ind. 188, 78 N. E. 666, admitting parol evidence to complete incomplete description of land in contract and identify it.

Agreement Signed by Both Parties in which one agrees to sell certain land on payment of certain price obligates other party to purchase.

Approved in *King-Keystone Co. v. S. F. Brick Co.*, 148 Cal. 89, 82 Pac. 850, where contract signed by both parties bound plaintiff to deliver oil in certain quantities at certain price, other party was bound to purchase.

Contract to Deliver Good Title requires title free from encumbrances.

Reaffirmed in *Glassman v. Condon*, 27 Utah, 467, 76 Pac. 344.

Contracts by Telegraph. See note, 110 Am. St. Rep. 761.

88 Cal. 262, 26 Pac. 101, **IN THE MATTER OF VANCE.**

No Appeal Lies from Judgment in contempt.

Reaffirmed in *Estate of Wittmeier*, 118 Cal. 256, 50 Pac. 393, and *Natoma Water etc. Co. v. Hancock (Cal.)*, 36 Pac. 100.

88 Cal. 263-267, 26 Pac. 106, **LOGAN v. ROSE.**

Selling Lots With Reference to Map of town made by owner showing streets laid out is offer to dedicate such streets.

Approved in *Los Angeles v. McCollum*, 156 Cal. 151, 103 Pac. 916, 23 L. R. A. (n. s.) 378, recording such map is offer to dedicate streets shown thereon.

88 Cal. 268-272, 25 Pac. 1099, PEOPLE v. CHEW SING WING.

Charge to Jury That if Testimony is believed it would make out murder in first degree is charge on matter of fact, and erroneous.

Approved in *State v. Yates*, 99 Minn. 467, 109 N. W. 1072, reversing judgment because of argumentative review of evidence in instructions.

88 Cal. 274-277, 26 Pac. 100, WREN v. MANGAN.

Application for Purchase of State Swamp Land filed before survey and segregation of such land by United States confers no rights.

Reaffirmed in *Marsh v. Hendy* (Cal.), 27 Pac. 648.

88 Cal. 277-281, 26 Pac. 105, CALIFORNIA SOUTHERN HOTEL CO. v. RUSSELL.

Conditional Subscriptions cannot be Counted in making up proposed subscription of certain amount of stock before organization of corporation.

Approved in *Morgan v. Landstreet*, 109 Md. 590, 130 Am. St. Rep. 531, 72 Atl. 403, following rule.

Liability to Corporations of Subscribers to Stock. See note, 93 Am. St. Rep. 377.

88 Cal. 281-283, 26 Pac. 118, EX PARTE VANCE.

Judgment of Contempt for Violation of injunction upheld.

Cited in *Maloney v. King*, 30 Mont. 420, 76 Pac. 941, where injunction was to prevent taking away any part of or interfering with mining claim, parties enjoined could not sue for value of ore after it was taken from claim.

88 Cal. 283-289, 26 Pac. 91, DEAN v. PARKER.

Delivery of Deed to Third Person, or record, or delivery for record, by grantor. See note, 54 L. R. A. 875.

88 Cal. 290-293, 26 Pac. 94, FOREMAN v. BOYLE.

Parties Owning Independent Water Rights in same stream cannot join as plaintiffs in action for damages against third party diverting water, but may unite in action to abate nuisance.

Approved in *Frost v. Alturas Water Co.*, 11 Idaho, 299, 81 Pac. 997, settlers along stream having right to appropriate water therefrom could join in action to quiet title to respective rights and enjoin interference therewith.

Where Several Owners of Stream join in action for damages for diversion of water, and for injunction to restrain diversion, complaint is subject to demurrer both for misjoinder of causes and of parties plaintiff.

Approved in *First Nat. Bank v. Johnson Land Mtg. Co.*, 17 S. D. 529, 97 N. W. 750, complaint in action to quiet title and for cancellation of instruments affecting title which in first cause shows no interest of one of joint plaintiffs, and in other shows interest of both, is bad for misjoinder of causes.

88 Cal. 294-299, 22 Am. St. Rep. 306, 26 Pac. 119, **PEERS v. McLAUGHLIN**.

Imperfect Attempt to Create Mortgage on specific property to secure debt creates equitable lien on such property.

Reaffirmed in *Harrigan v. Gilchrist*, 121 Wis. 360, 361, 99 N. W. 981.

88 Cal. 302-316, 26 Pac. 373, **IN RE BANQUIER**.

"Integrity," as Used in Section 1350, Code of Civil Procedure, is synonymous with probity, honesty, and uprightness in business relations with others.

Reaffirmed in *Estate of Piercy*, 3 Cof. Prob. 480.

Requisite Moral Qualifications of Executors. See note, 16 L. R. A. 539.

When Will is Admitted to Probate, court must appoint as executor person named as such in will if he petitions therefor and is competent.

Approved in *Estate of King*, 4 Cof. Prob. 19, and *Clark v. Patterson*, 214 Ill. 542, 105 Am. St. Rep. 127, 73 N. E. 809, both following rule.

Distinguished in *Van Vleck's Estate*, 123 Iowa, 90, 98 N. W. 557, holding named executor who probated will but did not ask appointment for four years, during which time he had acquired interests hostile to other beneficiaries, not entitled to appointment; *Rice v. Tilton*, 13 Wyo. 430, 80 Pac. 830, holding rights of named executors forfeited by delay in application for appointment.

No Degree of Legal or Moral Delinquency is sufficient to exclude person from administration of estate as next of kin in cases of preference given by statute.

Approved in *Estate of Piercy*, 3 Cof. Prob. 480, holding one who had conducted gaming resort and lost heavily in gambling not disqualified on ground of improvidence.

Grounds for Removal of Executors and administrators. See note, 138 Am. St. Rep. 538.

Where Issue of Fact Arises in Probate Proceeding and is determined, it may be re-examined on motion for new trial.

Approved in *Estate of Sutro*, 152 Cal. 257, 92 Pac. 490, and *Carter v. Waste*, 159 Cal. 25, 26, 27, 112 Pac. 728, both holding motion for new trial could be made, when issues of fact were framed in proceeding for final distribution; *In re Antonoli's Estate*, 42 Mont. 223, 111 Pac. 1034, motion for new trial did not lie when two ex parte applications for letters of administration were heard together, and no issue joined as to competency of either applicant; *State v. Langan*, 32 Nev. 180, 105 Pac. 570, holding motion for new trial preliminary to appeal is proper in proceedings to set aside homestead to widow.

Miscellaneous.—Cited in *In re Moore's Estate* (Cal.), 26 Pac. 787, companion case.

88 Cal. 316-319, 26 Pac. 209, **EX PARTE ESTRADO**.

Information Charging Female was Taken from her father for purpose of prostitution held sufficient.

Approved in *State v. Sager*, 99 Minn. 57, 108 N. W. 813, upholding indictment charging girl of fifteen was taken from custody of parents without consent for purpose of marriage.

88 Cal. 319-328, 26 Pac. 180, HYDE v. MANGAN.

Equitable Title to Land is Good defense in ejectment against holder of legal title.

Approved in *Doherty v. Courtney*, 150 Cal. 609, 89 Pac. 435, following rule; *Cassin v. Nicholson*, 154 Cal. 500, 98 Pac. 191, holding fraud of predecessor in title could be pleaded as defense in ejectment.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 791.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 56, 57, 72.

88 Cal. 334-360, 26 Pac. 237, MODESTO IRR. DIST. v. TREGEE.

Wright Act Providing for Formation of irrigation districts is valid.

Approved in *Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 485, 83 Pac. 503, and *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 533, 85 Pac. 316, both upholding similar acts.

Object of Act Providing for Judicial Confirmation of irrigation bonds is to provide for security of investors and promote advantage of districts by making judgment binding on all world as to validity of bonds.

Approved in *Progressive Irr. Dist. v. Anderson*, 19 Idaho, 510, 512, 114 Pac. 17, 18, holding organization of district could not be collaterally attacked; *Oregon etc. R. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 588, 591, 593, 102 Pac. 907, 908, 909, where right of way of railroad had been included in irrigation district, jurisdiction of district to assess taxes thereon could not be attacked in collateral proceeding.

Notice Required to be Published under act providing for judicial confirmation of validity of bonds of irrigation districts is to be construed and aided by reference to statute, and is sufficient if in substantial compliance therewith.

Distinguished in *Ahern v. High Line Irr. District*, 39 Colo. 417, 418, 89 Pac. 965, notice considered and held insufficient to give court jurisdiction.

Supervisors may Include in Irrigation District all lands which in natural state would be benefited by irrigation, and are susceptible to irrigation by one system.

Approved in *Jenison v. Redfield*, 149 Cal. 504, 87 Pac. 64, holding owner of land entitled to use of water of irrigation district, and as assignee of water rights of another not entitled to receive any portion of his share of water for use on lands outside district.

Lands Within City may be Included in irrigation district, since each owner within district receives equivalent in water for tax levied on his land.

Approved in *Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 484, 83 Pac. 503, following rule; *Robinson v. Linscott*, 12 Cal. App. 433, 107 Pac. 705, payment for road ten miles long out of general county fund did not impose double taxation on property owners of town within county which was required to maintain its own streets.

Decision of Supervisors as to What Lands will be benefited by proposed irrigation district is conclusive and not open to review by courts.

Approved in *Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 253, 101 Pac. 93, following rule; *Inglin v. Hoppin*, 156 Cal. 487, 105 Pac. 584, mandamus lies to compel supervisors to form independent reclamation district when petitioners have taken all required steps; *Rico v. Snider*, 134 Fed. 958, question of fact whether lands have been reclaimed, arising on petition for division of reclamation district, is within jurisdiction of board of supervisors, and to be determined by them.

Land Owner of Irrigation District may show supervisors fraudulently included certain lands in district.

Approved in *People v. Sacramento Drainage Dist.*, 155 Cal. 388, 103 Pac. 215, holding fraudulent exercise of powers of board of equalization reviewable by courts.

Exclusion of Part of Land from irrigation district does not destroy identity of district, and those which remain will receive all benefits of bonds issued.

Approved in *Nampa etc. Irr. Dist. v. Brose*, 11 Idaho, 488, 83 Pac. 504, holding land owner within irrigation district could waive his right to water when no one would be injured thereby and could have his proportion of bonds apportioned to others.

Rescissions With Reference to Formation of swamp land reclamation districts are authority on formation of irrigation districts.

Approved in *Billings Sugar Co. v. Fish*, 40 Mont. 269, 106 Pac. 569, 26 L. R. A. (n.s.) 973, holding former legislative enactments and court decisions should be considered in determining whether statute providing for system of drainage for agricultural purposes is valid as being levy of taxes for public purposes only.

Where Petition is Amended to Conform to evidence, and evidence already taken is applicable to amended petition, court may refuse trial de novo under amended pleadings.

Reaffirmed in *Maionchi v. Nicholini*, 1 Cal. App. 693, 82 Pac. 1053.

88 Cal. 360-372, 26 Pac. 175, CONGRAVE v. SOUTHERN PAC. R. R. CO.

Master is not Liable for Injury to Servant caused by negligence of fellow-servant, unless negligent in selecting servant in fault.

Approved in *Scwind v. Floriston Pulp & Paper Co.*, 5 Cal. App. 202, 89 Pac. 1069, mill company not liable for injury of employee while walking between cars in its yards, caused by negligence of engineer in moving cars; *McDonald v. Calif. Timber Co.*, 7 Cal. App. 378, 94 Pac. 377, master not liable for injury to servant caused by appliance used by fellow-servant and made unsafe by his negligent act.

Liability of Master for Injuries to Servant by incompetency of fellow-servant. See note, 25 L. R. A. 713.

Duty of Master With Respect to Employment of his servants. See note, 48 L. R. A. 370.

Section 1970, Civil Code—fellow-servant rule—restates rule of common law.

Approved in *Judd v. Letts*, 158 Cal. 363, 111 Pac. 13, holding under amendment of 1907 to section 1970, Civil Code, salesman in department store could recover for injury caused by negligent operation of elevator; *Hardesty v. Largy Lumber Co.*, 34 Mont. 164, 86

Pac. 33, code provisions in regard to liability of master impose no greater liability than was imposed by common law.

Superior Servant is Fellow-servant to inferior servant within meaning of fellow-servant act.

Approved in *McDonald v. Hoffman*, 10 Cal. App. 518, 102 Pac. 674, holding foreman carpenter fellow-servant of other carpenters working under his orders; *Leishman v. Union Iron Works*, 148 Cal. 282, 113 Am. St. Rep. 243, 83 Pac. 34, 3 L. R. A. (n.s.) 500, foreman of molders held to be their fellow-servant.

Who are Fellow-servants Generally. See note, 18 L. R. A. 797, 825.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 525, 607.

When Conductor Deemed a Coservant of other railway employees. See note, 46 L. R. A. 338.

88 Cal. 372-373, 26 Pac. 211, NEVADA SCHOOL DIST. v. SHOE-ORAPT.

Constitutional Provision Against Special or local laws is not retroactive.

Approved in *Board of Education v. Hyatt*, 152 Cal. 519, 93 Pac. 119, holding city and county of San Francisco could establish high schools under special act of 1872.

Constitutional Inhibition Against Special Legislation where general law can be made applicable. See note, 93 Am. St. Rep. 106.

88 Cal. 374-384, 26 Pac. 206, SMITH v. WESTERFIELD.

Jurisdiction of Superior Court While Sitting in probate is limited and special, and acts in excess of its statutory powers are void.

Approved in *Lay v. Superior Court*, 11 Cal. App. 560, 105 Pac. 776, holding jurisdiction of superior court over proceeding for arrest in civil action limited by terms of statute.

Heirship of Claimants of Estate can only be determined by special proceeding under section 1664, Code of Civil Procedure.

Approved in *Estate of Heeney*, 3 Cal. App. 552, 86 Pac. 844, holding rights of heirs or lienors could not be adjudicated in proceeding for settlement of account of administrator; *Caron v. Old Reliable etc. Min. Co.*, 12 N. M. 223, 78 Pac. 65, probate court cannot determine contested claims of title to property as between estate and stranger.

Admission of Incompetent Evidence Bearing on main issue is presumed on appeal to have injured opposite party.

Approved in *Salmon v. Rathjens*, 152 Cal. 300, 92 Pac. 738, holding incompetent testimony did not strengthen case of either party, and was harmless; *King v. Green*, 7 Cal. App. 478, 94 Pac. 779, testimony on question of contributory negligence in action for wrongful injury was material, and jury is assumed to have given it some weight.

88 Cal. 384-395, 26 Pac. 601, MURDOCK v. CLARKE.

Where Neither Debtor nor Creditor Makes application of payments, law will make such application as is most in accordance with equity.

Approved in *Crisman v. Lanterman*, 149 Cal. 658, 117 Am. St. Rep. 167, 87 Pac. 93, where payment was by forced sale, neither debtor nor creditor had right to make application; but court should make it according to equities of case.

Application of Payments. See note, 96 Am. St. Rep. 47, 49, 54, 61.

In Action for Accounting, Where Settlement involves amount due on note, it should embrace whole amount of principal and interest, which should bear interest from date of finding to date of judgment at legal rate.

Approved in *United States Nat. Bank v. Waddingham*, 7 Cal. App. 175, 93 Pac. 1047, judgment on note should give legal interest on amount of principal and interest from date of decision.

88 Cal. 396-399, 22 Am. St. Rep. 310, 26 Pac. 213, **MASON v. VESTAL.**

Where Witness is Impeached by Showing he has made statements inconsistent with his testimony, other statements consistent therewith cannot be shown in rebuttal.

Approved in *People v. Wright*, 4 Cal. App. 709, 89 Pac. 366, *People v. Turner*, 1 Cal. App. 421, 422, 82 Pac. 398, and *Burks v. State*, 78 Ark. 273, 93 S. W. 984, all following rule.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 65.

Sheriff Sued for Value of Property Seized on attachment need not plead sale to plaintiff from attachment debtor was fraudulent, but may prove fact under general denial.

Approved in *Calkins v. Howard*, 2 Cal. App. 237, 83 Pac. 281, following rule; *Eaton v. Metz* (Cal.), 40 Pac. 948, holding under denial of plaintiff's title, officer could show there was no immediate delivery or continued change of possession as between plaintiff and vendor.

88 Cal. 399-407, 26 Pac. 211, **ESREY v. SOUTHERN PAC. CO.**

Complaint Alleging Defendant Carelessly and negligently did act causing injury does not support judgment for plaintiff when evidence shows act was wantonly done.

Approved in *Kramm v. Stockton Electric R. R. Co.*, 3 Cal. App. 617, 86 Pac. 904, upholding complaint as against general demurrer, charging defendant "carelessly and negligently, and willfully and wantonly" ran car upon deceased.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 544.

88 Cal. 407-413, 26 Pac. 606, **PRINCE v. FRESNO.**

Recorder of City may be Justice of Peace as to some matters and recorder as to others.

Approved in *In re Baxter*, 3 Cal. App. 722, 86 Pac. 1000, holding recorder's court had same power as police court to convict for misdemeanor; *Carlisle v. Tulare County* (Cal.), 49 Pac. 5, holding where recorder acts as justice of peace, marshal's fees for service of process issuing out of recorder's court under state statute are chargeable to county.

88 Cal. 419-421, 26 Pac. 608, **CHAPMAN v. BANK OF CALIFORNIA.**

Appeal will not be Dismissed on Motion, for delay in filing transcript, filed after service of notice of motion to dismiss, when circumstances causing delay would have justified order extending time.

Reaffirmed in *Curtis v. Ingle*, 9 Cal. App. 244, 98 Pac. 870.

88 Cal. 422-428, 26 Pac. 502, PEOPLE v. GORDON.

Burden of Proving Circumstances in Mitigation or justification of homicide rests upon accused.

Reaffirmed in *People v. Jones*, 160 Cal. 371, 117 Pac. 182.

88 Cal. 429-430, 26 Pac. 236, WHITE v. WHITE.

Appeal from Order Made After Final Judgment will be dismissed if affidavits used are not authenticated by incorporation into bill of exceptions.

Approved in *Norris v. Norris* (Cal.), 28 Pac. 593, following rule; *Linforth v. S. F. Gas & Electric Co.*, 156 Cal. 67, 103 Pac. 324, affidavits used on motion for new trial could not be considered on appeal when not authenticated by bill of exceptions; *Huse v. Den* (Cal.), 30 Pac. 1104, dismissing appeal from order refusing to vacate judgment when no bill of exceptions was settled.

Miscellaneous.—Cited in *White v. White* (Cal.), 33 Pac. 400, on another appeal.

88 Cal. 434-436, 26 Pac. 360, HALL v. WALLACE.

Contract for Sale of Land Made by agent is invalid unless agent's authority be in writing.

Approved in *Thompson v. Burns*, 15 Idaho, 601, 99 Pac. 121, following rule; *Hickox v. Bacon*, 17 S. D. 568, 97 N. W. 848, holding void authorization to sell land written by defendant's daughter, but not dictated nor signed by defendant; *Moody v. Howe*, 17 S. D. 547, 97 N. W. 842, refusing specific performance of contract to sell land when not signed by party to be charged or his agent.

Entry on Land Under Void Verbal Contract of sale creates tenancy at will.

Approved in *Rogers v. Hill*, 3 Ind. Ter. 564, 64 S. W. 537, following rule; *Bristow v. Carriger*, 24 Okl. 328, 103 Pac. 597, party entering under void lease is tenant at will; *Tate v. Gaines*, 25 Okl. 144, 105 Pac. 194, possession under deed, void because grantor had not power to alienate, is tenancy at will.

88 Cal. 437-446, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137, SPECT v. SPECT.

Mortgagor cannot Recover Mortgaged Premises from mortgagee in possession without payment of debt, even though barred by limitations.

Approved in *Payne v. Neuval*, 155 Cal. 51, 99 Pac. 479, *Cory v. Santa Ynez Land etc. Co.*, 151 Cal. 782, 91 Pac. 648, *Green v. Thornton*, 8 Cal. App. 163, 96 Pac. 384, *Cassel v. Lowry*, 164 Ind. 5, 72 N. E. 641, and *Tracy v. Wheeler*, 15 N. D. 250, 107 N. W. 69, 6 L. R. A. (n. s.) 516, all following rule; *Puckhaber v. Henry*, 152 Cal. 423, 424, 125 Am. St. Rep. 75, 93 Pac. 116, applying rule to pledge; *Burns v. Hiatt*, 149 Cal. 621, 623, 625, 117 Am. St. Rep. 157, 87 Pac. 197, 198, applying rule to grantee of mortgagor; *Raggio v. Palmtag*, 155 Cal. 802, 103 Pac. 314, where mortgagee purchased homestead subject to mortgage at probate sale, successors to surviving wife could not quiet title to homestead without payment of mortgage debt; *Trippet v. State*, 149 Cal. 531, 86 Pac. 1087, 8 L. R. A. (n. s.) 1210, heir cannot maintain action to quiet title against state without payment of inheritance tax levied on his share, though tax is barred by

limitations; *Fitch v. Miller*, 200 Ill. 179, 65 N. E. 653, heirs of mortgagor cannot redeem without payment of mortgage debt; *Investment Securities Co. v. Adams*, 37 Wash. 215, 79 Pac. 626, holding limitations do not run against mortgagee in possession under void foreclosure sale.

Distinguished in *Cameron v. Ah Quong*, 8 Cal. App. 313, 314, 96 Pac. 1026, in ejectment against tenant, mortgagee who intervenes and sets up mortgages without alleging possession or right thereto is entitled to no relief; *Marshutz v. Seltzor*, 5 Cal. App. 143, 144, 89 Pac. 878, rule inapplicable when mortgage was by third party and plaintiff's title originated from state subsequently to mortgage and was adverse thereto; dissenting opinion in *Burns v. Hiatt*, 149 Cal. 626, 117 Am. St. Rep. 157, 87 Pac. 199, majority applying rule to grantee of mortgagor.

88 Cal. 446-447, 26 Pac. 210, MOULTON v. KNAPP.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 340.

Injunctions Against Judgments Entered on confessions. See note, 30 L. R. A. 242.

Injunctions Against Judgment for Matters subsequent to rendition. See note, 30 L. R. A. 563.

88 Cal. 447-450, 26 Pac. 210, BARNHART v. KRON.

Affidavit of Attorney of Party in whose favor costs were given is sufficient evidence costs were necessarily incurred.

Approved in *King v. Allen*, 29 Mont. 8, 73 Pac. 1108, following rule; *Gaffey v. Mann*, 3 Cal. App. 127, 84 Pac. 425, holding such affidavit sufficient evidence of incurring expenses.

88 Cal. 450-453, 26 Pac. 504, WINSLOW v. GOHRANSEN.

Where on Appeal Issue Does not Appear to have been found upon, it is not ground for reversal, unless it be shown evidence was submitted on such issue sufficient to authorize such finding as would invalidate judgment.

Approved in *Coats v. Coats*, 160 Cal. 680, 118 Pac. 445, *Schoonover v. Birnbaum*, 150 Cal. 737, 89 Pac. 1109, *People v. McCue*, 150 Cal. 200, 88 Pac. 901, *Rauer's Law etc. Co. v. Leffingwell*, 11 Cal. App. 497, 105 Pac. 428, *Mushet v. Fox*, 6 Cal. App. 78, 91 Pac. 535, *Hutton v. Gregg*, 4 Cal. App. 546, 88 Pac. 596, *Craig v. Gray*, 1 Cal. App. 601, 82 Pac. 701, *Downing v. Donegan*, 1 Cal. App. 712, 714, 82 Pac. 1112, 1113, *Bailiff v. Powers* (Cal.), 37 Pac. 509, and *Newman v. Maldonado* (Cal.), 30 Pac. 834, all following rule; *Reed v. Harshall*, 12 Cal. App. 701, 108 Pac. 721, counterclaim presumed abandoned when no evidence in regard thereto appeared of record; *Roberts v. Ball* (Cal.), 38 Pac. 950, holding failure to find on certain issues of pleadings and finding on outside issues was harmless error where findings on material issues warranted judgment regardless of other issues.

Judgment will not be Reversed for failure to find on material issue if finding must have been adverse to appellant.

Approved in *Gerth v. Gerth*, 7 Cal. App. 738, 95 Pac. 905, following rule; *Bell v. Adams*, 150 Cal. 774, 90 Pac. 119, finding on limitations not necessary when it must have been against appellant; *Societa*

di Mutuo Socorso v. Mantel, 1 Cal. App. 110, 81 Pac. 660, holding immaterial issue not found upon.

88 Cal. 454-462, 26 Pac. 506, FULTON v. BRANNAN.

Courts can Make No Other Classification of state lands for purposes of sale than that made by Constitution, as suitable or unsuitable for cultivation.

Approved in Boggs v. Ganeard, 148 Cal. 715, 84 Pac. 197, court could not make classification based on manner in which lands become suitable.

Whether Particular Tract of Land is suitable for cultivation is question of fact.

Reaffirmed in Robinson v. Eberhart, 148 Cal. 499, 501, 83 Pac. 454.

All Swamp Lands Which at Time of application for purchase are fit for habitation and by ordinary farming processes can be made suitable for cultivation can be sold only to actual settlers, in quantities not exceeding three hundred and twenty acres to each.

Approved in Boggs v. Ganeard, 148 Cal. 714, 715, 84 Pac. 196, 197, holding overflowed land which had, previous to time of application, been made fit for cultivation could only be sold to actual settler; Robinson v. Eberhart, 148 Cal. 499, 83 Pac. 454, "suitable for cultivation," as used in section 3, article XVII, Constitution, includes lands which by ordinary farming processes are fit for agriculture; Sanford v. Maxwell, 3 Cal. App. 244, 245, 84 Pac. 1001, 1002, school land, some portion of which in each subdivision is fit for cultivation, could not be purchased by one not settler thereon; Smith v. Roberts, 1 Cal. App. 150, 81 Pac. 1027, holding settler on land claiming it fit for cultivation could intervene in contest of right to purchase state swamp land; Marsh v. Hendy (Cal.), 27 Pac. 648, holding article XVII, section 3, Constitution, applies to swamp lands granted to state when such lands are suitable for cultivation and can be reclaimed and cultivated by actual settler.

Where Swamp Land can be Reclaimed without co-operation of others, it is suitable for cultivation.

Distinguished in Robinson v. Eberhart, 148 Cal. 500, 501, 83 Pac. 454, holding possibility of obtaining artesian water does not render land "suitable for cultivation"; Boggs v. Ganeard, 148 Cal. 715, 84 Pac. 197, holding void sale of swamp land, already reclaimed by settler, to one not actual settler thereon.

Miscellaneous.—Cited in Harney v. Farren (Cal.), 26 Pac. 792, companion case.

88 Cal. 462-467, 26 Pac. 354, McKEEN v. NAUGHTON.

Estoppel Relied on as Defense must be pleaded.

Approved in Andrews v. Wheeler (Cal.), 103 Pac. 147, and Smith v. Cascaden, 148 Fed. 799, 78 C. C. A. 458, both following rule; Nolan v. Fidelity & Deposit Co., 2 Cal. App. 4, 82 Pac. 1120, in action on stay bond, sureties could not, without pleading facts, claim plaintiff estopped to enforce bond for reason execution was issued on judgment appealed from after bond was given.

To Effectuate Appeal from Justice's Court, notice of appeal must be filed and served and undertaking filed, all within thirty days from judgment.

Approved in Regan v. Superior Court, 14 Cal. App. 574, 114 Pac. 73, holding section 978a, Code of Civil Procedure, does not operate

to extend time for filing undertaking beyond thirty days from judgment.

Statement of Law cannot Work Estoppel.

Approved in *Township of Portsmouth v. Cranage S. S. Co.*, 148 Mich. 232, 118 Am. St. Rep. 578, 111 N. W. 750, and *Schoonover v. Osborne*, 117 Iowa, 430, 90 N. W. 845, both following rule.

88 Cal. 468-472, 26 Pac. 361, IN RE NOAH.

Miscellaneous.—Cited in *Estate of Noah*, 5 Cof. Prob. 278, historically referring to principal case.

88 Cal. 473-478, 26 Pac. 352, KLOSE v. HILLENBRAND.

Delivery of Deed to Third Person, or record, or delivery for record, by grantor. See note, 54 L. R. A. 880.

88 Cal. 478-479, 26 Pac. 373, IN RE BAUQUIER.

Order Denying Letters of Administration to applicant is appealable.

Cited in *State v. Reddish*, 148 Mo. App. 721, 129 S. W. 55, holding such order not appealable.

88 Cal. 480-482, 26 Pac. 505, IN RE DANIELSON.

Administrator Who Appeals from Order revoking his letters must give undertaking on appeal.

Approved in *Estate of Morales*, 11 Ariz. 162, 89 Pac. 541, and *Ransier v. Hyndman*, 18 N. D. 199, 119 N. W. 545, both following rule.

Distinguished in *Estate of McPhee*, 154 Cal. 392, 97 Pac. 881, administrator, as such, may appeal from order settling his accounts, though his letters have been revoked.

88 Cal. 483-491, 26 Pac. 362, PEOPLE v. O'BRIEN.

Section 1181, Penal Code, Enumerates all grounds on which defendant may move for new trial.

Approved in *State v. Coleman*, 17 S. D. 618, 98 N. W. 181, section 430, Code of Criminal Procedure, enumerates all grounds for new trial.

88 Cal. 491-495, 22 Am. St. Rep. 321, 26 Pac. 375, BOARD OF HARBOR COMMISSIONERS OF PORT EUREKA v. REDWOOD CO.

Legislature cannot Delegate Power to impose penalty to executive body.

Approved in *United States v. Grimaud*, 170 Fed. 212, holding void act of Congress making it criminal offense to violate regulations for protection of forest reserve which should be made by Secretary of Interior.

Distinguished in *State v. Atlantic etc. R. R. Co.*, 56 Fla. 626, 47 So. 972, holding railroad commission law does not confer legislative power on commission; *Brodline v. Inhabitants of Revere*, 182 Mass. 600, 66 N. E. 608, holding statute giving park commissioners power to make regulations for use of roadways under their care not delegation of legislative power.

Powers Which may be Delegated to boards of health. See note, 80 Am. St. Rep. 233.

88 Cal. 495-497, 26 Pac. 506, IRVINE v. DAVY.

Filing Answer After Default does not affect default, which will not be set aside without showing ground therefor.

Approved in *Andreen v. Andreen*, 15 Cal. App. 730, 115 Pac. 762, and *Harr v. Kight*, 18 Idaho, 60, 108 Pac. 541, both following rule.

88 Cal. 497-509, 22 Am. St. Rep. 324, 26 Pac. 509, NATIONAL BANK OF D. O. MILLS & CO. v. UNION INS. CO.

Statement of Fact in Insurance Policy relating to thing insured is not express warranty when it can be seen from entire policy that such was not intention of parties.

Approved in *Port Blakely Mill. Co. v. Springfield etc. Ins. Co.*, 59 Wash. 515, 110 Pac. 41, construing in favor of insured stipulation in policy which doubtfully imposed on him express warranty.

Mortgage is not Foreclosed until purchaser's right of redemption is cut off.

Approved in *North Dakota etc. Cattle Co. v. Serumgard*, 17 N. D. 485, 138 Am. St. Rep. 717, 117 N. W. 460, foreclosure sale under power in mortgage not terminated until execution of deed after expiration of period for redemption.

Where Insurance Policy Makes Loss payable to mortgagee, deed to him upon foreclosure does not forfeit his right to recover on policy.

Cited in *Brecht v. Law etc. Ins. Co.*, 160 Fed. 403, 87 C. C. A. 351, 18 L. R. A. (n. s.) 197, when policy was void as to insured, insured's appointee under clause providing for payment to third person could not recover on policy.

Insurance on Mortgaged Premises. See note, 79 Am. St. Rep. 22.

Fire Insurance as Security for Mortgagee or other lienholder. See note, 135 Am. St. Rep. 758.

Right to Insurance Where Loss Occurs during period of redemption from foreclosure. See note, 6 L. R. A. (n. s.) 449.

Effect of Breach of Insurance Policy by mortgagor on rights of mortgagee. See note, 18 L. R. A. (n. s.) 205.

Rights Given by Attachment of Mortgage Slip to insurance policy. See note, 25 L. R. A. 681.

88 Cal. 510-513, 26 Pac. 365, LASSEN COUNTY v. SHINN.

Board of Supervisors may Employ Counsel, other than district attorney, on contingent fee, to collect money due county.

Approved in *Kelley v. Sersanous* (Cal.), 46 Pac. 300, upholding contract to same effect; *Reed v. Gormley*, 47 Wash. 357, 91 Pac. 1094, county commissioners can employ counsel, other than prosecuting attorney, when they deem it for interest of county.

88 Cal. 519-521, 26 Pac. 508, McNEE v. LYNCH.

State Swamp Lands Suitable for Cultivation can be granted only to actual settlers.

Approved in *Smith v. Roberts*, 1 Cal. App. 150, 81 Pac. 1027, and *Marsh v. Hendy* (Cal.), 27 Pac. 648, both following rule.

88 Cal. 522-529, 22 Am. St. Rep. 331, 26 Pac. 518, 12 L. R. A. 508, DUNSMOOR v. FURSTENFELDT.

Funds in Hands of Officer of Court may be garnished after order for payment has been made.

Reaffirmed in *Green v. Robertson*, 80 Ark. 7, 96 S. W. 139, and *Robertson v. Detroit Pattern Wks.*, 152 Mich. 613, 116 N. W. 197.

Disapproved in *In re Argonaut Shoe Co.*, 187 Fed. 786, holding dividends declared by bankrupt's trustee while in his possession not subject to garnishment; *Dale v. Brumbly*, 98 Md. 472, 56 Atl. 809, 64 L. R. A. 112, holding funds in hands of clerk of court after order for payment to party had been made could not be garnished in suit against such party.

Right to Attach or Garnish Fund in Hands of officer of court after order to pay same to party. See note, 13 L. R. A. (n. s.) 758.

Any Kind of Obligation of One Man to pay money to another is a debt.

Approved in *Proctor-Gamble Co. v. Warren Cotton Oil Co.*, 180 Fed. 546, holding debt included corporate obligation consisting of unliquidated damages for breach of contract.

88 Cal. 530-536, 26 Pac. 370, DONLON v. JEWETT.

Revised and Amended Act must be Construed as new and original piece of legislation.

Approved in *Application of Bunkers*, 1 Cal. App. 65, 81 Pac. 749, holding section 86, Penal Code, as re-enacted April 6, 1880, punishing legislative bribery as felony is revised and independent act, not subject to section 26, article IV, Constitution.

88 Cal. 537-543, 26 Pac. 355, REMY v. OLDS.

Where It Appears from Defendant's Act in repudiating contract for sale of land that demand for deed would have been refused, such demand is not condition to bringing action for breach.

Approved in *Lowe v. Yolo County etc. Water Co.*, 8 Cal. App. 172, 96 Pac. 381, where complaint alleged that prior to demand defendant refused to supply water for irrigation, specific demand and tender were waived; *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 233, 90 Pac. 41, where agent was guilty of breach of duty in failing to ratify principal of moneys collected, demand was unnecessary before bringing suit; *O'Neill v. Supreme Council A. L. of H.*, 70 N. J. L. 414, 57 Atl. 465, holding repudiation of benefit certificate excused holder from further performance under its terms.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 56.

Miscellaneous.—Cited in *Remy v. Olds (Cal.)*, 34 Pac. 216, on another appeal.

88 Cal. 543-553, 26 Pac. 515, CAVANAUGH v. CASELMAN.

Contract Purporting to be Inter Partes need not be signed by all parties named in order to become operative, and parties signing are held in absence of showing contract was not to be deemed complete until other signatures were obtained.

Approved in *Stanton v. Singleton (Cal.)*, 54 Pac. 589, where contract giving option to purchase mine was signed by two of three co-owners and action to enforce was brought against them, burden was on them to show contract was not to be operative until signed by third owner.

Who must Sign Memorandum of Executory Sale Contract within statute of frauds. See note, 28 L. R. A. (n. s.) 697.

Execution of Written Agreement by Vendor for sale of land, and delivery and acceptance of deed by vendee, creates obligation upon

vendor which is sufficient consideration for vendee's parol promise to pay purchase price.

Distinguished in *Mullarky v. Young*, 9 Cal. App. 689, 100 Pac. 710, holding void contract between two named parties and two other named parties, but signed by only one of each.

Agreement for Conveyance of Specific Amount of land cannot be satisfied by conveyance of less amount, except by agreement between parties.

Approved in *Bixby v. Bastady*, 4 Cal. App. 532, 88 Pac. 495, holding party who installed pumping plant could not maintain action on contract without showing value of plant actually installed as compared with that called for in contract.

88 Cal. 553-556, 26 Pac. 369, RODGERS v. WITTENMYER.

Payment of Illegal Bonus for Discharge of mortgage pending foreclosure, as duress. See note, 2 L. R. A. (n. s.) 577.

Miscellaneous.—Cited in *Rogers Dev. Co. v. California Real Estate Inv. Co.*, 159 Cal. 740, 115 Pac. 935, mutual stipulations of parties to contract for sale of land, that is, actual conveyance in escrow by one, and promise of other to pay price, constituted sufficient consideration.

88 Cal. 557-560, 26 Pac. 366, HEINLEN v. PHILLIPS.

Section 892, Code of Civil Procedure, providing that when trial is by court, judgment be rendered at close of trial, is directory, and judgment rendered after submission is not void.

Approved in *Hall v. Justice's Court*, 5 Cal. App. 137, 89 Pac. 871, holding provision for entry of default judgment is directory only, and judgment by default entered after eight years' delay was valid; *Nadel v. Campbell*, 18 Idaho, 342, 110 Pac. 264, holding error in continuing case in justice's court did not divest court of jurisdiction; *Tomlin v. Woods*, 125 Iowa, 377, 101 N. W. 138, failure to enter judgment on return day in action in justice's court where defendant failed to appear did not affect jurisdiction of court.

Distinguished in *State v. Houston*, 36 Mont. 180, 92 Pac. 476, holding justice's court lost jurisdiction by taking case under advisement before decision for more than one month after trial.

88 Cal. 560-568, 26 Pac. 367, HAYS v. GLOSTER.

Where Title to Property is Transferred by one in weak mental condition to another upon promises which he does not intend to perform, constructive trust arises in favor of grantor.

Approved in *De Leonis v. Hammel*, 1 Cal. App. 395, 82 Pac. 351, following rule; *Crabtree v. Potter*, 150 Cal. 713, 89 Pac. 972, holding deed from parents to daughter in consideration of her parol promise to pay mortgage and give them use for life created constructive trust; *Sanguinetti v. Rossen*, 12 Cal. App. 629, 107 Pac. 562, where property was conveyed to trusted friend for specific purpose, and was by agreement of clients transferred to their attorney for their benefit, attorney held property under constructive trust; *Nobles v. Hutton*, 7 Cal. App. 20, 93 Pac. 292, holding gift of valuable property by principal to agent under circumstances in which undue influence could easily be exercised is presumed fraudulent.

Future Promise as Fraud. See note, 10 L. R. A. (n. s.) 647.

88 Cal. 572-579, 26 Pac. 356, SMITH v. SMITH.

Where Real and Personal Actions are joined in same complaint, cause must be tried in county of defendant's residence.

Approved in Anaheim O. F. Hall Assn. v. Mitchell, 6 Cal. App. 433, 92 Pac. 331, holding action to recover price of party-wall was personal action, and defendant could demand change of venue to county of residence; Cochrane v. McDonald, 4 Cof. Prob. 538, 543, 544, 545, denying change of venue to county where real estate was situated where basis of action was fraud and collusion rather than determination of interest in realty; White v. Adler (Cal.), 42 Pac. 1070, 1071, holding action on contract to pay certain sum for land in case title was cleared, or to reconvey if not so cleared, and praying relief in alternative, was not action for recovery of real property which must be tried in county where situated.

Distinguished in Grocers' Fruit etc. Union v. Kern County Land Co., 150 Cal. 468, 473, 89 Pac. 121, 123, holding action by purchaser to compel specific performance of contract to convey land, alleging purchase price paid from proceeds of sales of fruit and lands made by defendant, and for accounting for surplus, was essentially action to determine interest in real property; Robinson v. Williams, 12 Cal. App. 520, 107 Pac. 707, holding action to cancel contract of purchase for nonpayment of installments, to declare payments forfeited, and to quiet vendor's title to land, did not present case of joinder of real and personal actions; Hannah v. Canty, 1 Cal. App. 226, 227, 81 Pac. 1036, holding action to enforce trust in land and asking accounting of amount due plaintiff was local action, and defendant could not demand change of venue to county of his residence.

In Action for Accounting It is Proper to give personal judgment for balance of money found due plaintiff after such accounting is had.

Approved in Title Insurance etc. Co. v. Ingersoll, 158 Cal. 480, 111 Pac. 363, following rule.

Miscellaneous.—Cited in Smith v. Smith (Cal.), 38 Pac. 43, on another appeal.

88 Cal. 579-580, 26 Pac. 372, EX PARTE ERDMANN.

Defendant Sentenced to Pay Fine, and imprisonment in lieu thereof, is entitled to discharge after expiration of maximum term allowed by statute as punishment for offense.

Approved in In re Holley, 154 N. C. 168, 69 S. E. 874, where sentence extended in duration beyond limit allowed by law, prisoner could demand discharge on habeas corpus.

Effect of Excessive Sentence. See note, 45 L. R. A. 145.

88 Cal. 582-590, 22 Am. St. Rep. 336, 26 Pac. 521, 12 L. R. A. 46, SMITH v. OLMSTEAD.

Title to Estate of Person Dying Intestate vests in his heirs immediately upon his death.

Reaffirmed in State v. Miller, 149 Cal. 210, 85 Pac. 610.

Pretermitted Heirs. See note, 115 Am. St. Rep. 580.

Effect of Provision in Will for Forfeiture of contestant's interest. See note, 68 L. R. A. 464.

88 Cal. 591-594, 26 Pac. 512, BUCHANAN v. NAGLE.

Swamp Lands Granted State are not subject to application for purchase before segregation.

Approved in *Marsh v. Hendy* (Cal.), 27 Pac. 648, *Stevens v. Lovejoy* (Cal.), 27 Pac. 33, *Ross v. Kennedy* (Cal.), 26 Pac. 599, *Diss v. Long* (Cal.), 26 Pac. 515, and *Harney v. Farren* (Cal.), 26 Pac. 792, all following rule.

Approval of United States Survey constitutes segregation of swamp lands to state.

Approved in *State v. Warner Valley Stock Co.*, 56 Or. 293, 106 Pac. 784, holding swamp lands could not be selected by state and approved by Secretary of Interior under act of 1860 until survey was made.

88 Cal. 595-596, 26 Pac. 962, MARSH v. SUPERIOR COURT.

Averment in Petition for Writ of Review that petition asking for removal of assignee for benefit of creditors contained "no allegations of any legal cause" why said assignee should be removed, states only conclusion of law, and is insufficient.

Distinguished in *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 310, 90 Pac. 206, in complaint to foreclose mortgage, where it was alleged mortgage was assigned pursuant to order of court without alleging order, allegation of ownership of note and mortgage was sufficient to supply defect and support judgment.

88 Cal. 597-598, 26 Pac. 374, HINKEL v. DONOHUE.

Defendants not Served With Summons and not appearing need not be served with notice of appeal.

Reaffirmed in *Nason v. John*, 1 Cal. App. 540, 82 Pac. 566.

88 Cal. 600-601, 26 Pac. 597, CARLOCK v. CAGNAOOL.

Firm Name Composed of Surnames of all parties is not fictitious name requiring filing of certificate of partnership.

Approved in *Patterson Furniture Co. v. Byers*, 17 Okl. 638, 89 Pac. 1116, and *Bovee v. De Jong*, 22 S. D. 164, 116 N. W. 83, both following rule.

Failure of Partners to File Certificate of partnership required by section 2466, Civil Code, is affirmative defense only to action brought by partners.

Approved in *Nicholson v. Auburn Gold Min. etc. Co.*, 6 Cal. App. 548, 92 Pac. 651, following rule; *Wilson v. Yegen Bros.*, 38 Mont. 509, 100 Pac. 615, holding objection to capacity of copartners to sue waived by failure to plead that certificate was not filed.

88 Cal. 602-609, 26 Pac. 500, PEOPLE v. DEEGAN.

Mere Fact That Juror Drank Intoxicants during trial, without showing it affected his understanding of evidence, does not vitiate verdict.

Approved in *People v. Romero*, 12 Cal. App. 470, 107 Pac. 711, and *People v. Emmons*, 7 Cal. App. 698, 95 Pac. 1038, both following rule.

If Juror is Palpably Intoxicated in Court, defendant should object before jury retires.

Reaffirmed in *State v. Salverson*, 87 Minn. 48, 91 N. W. 4

Number and Agreement of Jurors Necessary to valid verdict. See note, 43 L. R. A. 60, 62.

88 Cal. 609-615, 26 Pac. 514, YORE v. BANKERS' ETC. ASSN.

Until All Terms of Proposed Insurance Contract have received assent of parties, no obligation is imposed on either.

Approved in Wood v. Brotherhood of American Yeomen, 148 Iowa, 406, 126 N. W. 951, where certificate was surrendered and application made for new certificate identical with original, issuance of new certificate differing therefrom does not create new proposition, but does not take effect until accepted.

Conflict of Laws as to Insurance Contracts. See note, 63 L. R. A. 846.

88 Cal. 616-620, 26 Pac. 373, IN RE CARMODY.

Where Wife Dies Leaving Husband, but no issue, father, mother, brother, or sister, surviving husband is entitled to succeed to whole of her estate.

Reaffirmed in Estate of Nigro, 149 Cal. 703, 87 Pac. 384.

Succession to Estates is Purely Matter of statutory regulation, which cannot be changed by courts.

Approved in Estate of De Cigaran, 150 Cal. 688, 89 Pac. 836, holding surviving spouse of illegitimate woman does not inherit her separate estate.

One not Entitled to Succeed to Any Portion of estate of deceased is not entitled to letters of administration.

Reaffirmed in Estate of Crites, 155 Cal. 393, 101 Pac. 316.

88 Cal. 621-624, 26 Pac. 344, FRAZER v. LYNCH.

Power to Punish Disobedience to Orders in case by striking pleadings. See note, 4 L. R. A. (n. s.) 1185, 1186.

88 Cal. 624-631, 26 Pac. 530, EX PARTE SOTO.

Recorder's Court of City Organized under general municipal corporations act cannot be distinguished from police court.

Approved in Graham v. Fresno, 151 Cal. 470, 91 Pac. 149, holding "police courts," as used in section 8½, article XI, Constitution, should be construed to include recorders' courts.

Judgment Directing Fine be Satisfied by imprisonment at greater rate than prescribed by statute is not void and does not authorize discharge of prisoner.

Approved in People v. Oliver, 7 Cal. App. 602, 95 Pac. 173, holding judgment for imprisonment for less than minimum time prescribed by statute was not void, and would not be corrected to detriment of defendant on his appeal.

Overruled in In re Smith, 152 Cal. 568, 93 Pac. 192, arguendo.

Effect of Excessive Sentence. See note, 45 L. R. A. 147.

88 Cal. 636-640, 26 Pac. 529, CHADBOURNE v. STOCKTON SAVING ETC. SOCIETY.

Miscellaneous.—Cited in Chadbourne v. Stockton Saving etc. Society (Cal.), 36 Pac. 127, on another appeal.

88 Cal. 640-644, 22 Am. St. Rep. 341, 26 Pac. 608, EX PARTE SPEARS.

Affidavit on Requisition to Governor of another state that "affiant has reason to believe, and does believe," accused embezzled certain property states no fact and is fatally defective.

Distinguished in *Leigh v. Green*, 64 Neb. 535, 101 Am. St. Rep. 592, 90 N. W. 255, upholding affidavit on information and belief, where affiant stated at end he verily believed facts to be true.

Extradition Proceedings. See note, 112 Am. St. Rep. 124, 125, 135.

Right of Court of Asylum State to examine sufficiency of papers charging offense for which extradition demanded. See note, 11 L. R. A. (n. s.) 425.

Papers Necessary to Obtain Surrender of fugitives from another state. See note, 28 L. R. A. 804.

Complaint or Information on Information and belief as basis for warrant or examination preliminary thereto. See note, 25 L. R. A. (n. s.) 63.

88 Cal. 644-650, 26 Pac. 596, McLEAN v. CROW.

Firm Name Containing Surnames of all partners is not fictitious name requiring filing of certificate under section 2466, Civil Code.

Approved in *Walker v. Stimmel*, 15 N. D. 488, 107 N. W. 1083, and *Patterson Furniture Co. v. Byers*, 17 Okl. 636, 89 Pac. 1115, both following rule.

Action on Claim Against Estate may be brought in any court having jurisdiction of amount involved.

Reaffirmed in *Idaho Trust Co. v. Miller*, 16 Idaho, 312, 102 Pac. 361.

Conclusiveness of Testimony of Experts. See note, 42 L. R. A. 754, 766.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 89 CALIFORNIA.

89 Cal. 1-5, 26 Pac. 610, DERBY v. JACKMAN.

Judgment on Pleadings Should not be Entered when denial in answer raises any issue.

Approved in Casci v. Ozalli, 158 Cal. 283, 110 Pac. 933, holding judgment improperly entered on pleadings in action to quiet title when allegations of ownership and possession were denied in answer.

89 Cal. 5-10, 26 Pac. 611, HERMOCILLA v. HUBBELL.

Defendants in Possession of Sixteenth or thirty-sixth section, known to be mineral land prior to 1853, and holding it as mining claims under laws of Congress, may attack state patent in action of ejectment.

Approved in Ramus v. Humphreys (Cal.), 65 Pac. 876, holding void state patent to land possessed by one who had located it as mining land.

Criticised in Worcester v. Kitts, 8 Cal. App. 183, 96 Pac. 336, holding state patent to sixteenth section could not be collaterally attacked by mineral claimant in quiet title suit based on patent.

89 Cal. 11-14, 26 Pac. 615, KEENA v. BOARD OF SUPERVISORS OF PLACER CO.

Proper Order of Board of Supervisors is all that is essential to effect abandonment of road under section 2643, Political Code.

Distinguished in County of Tehama v. Sisson, 152 Cal. 174, 92 Pac. 68, holding board of supervisors could not by pretended sale and purchase of county property in effect pay one year's expenses from taxes for next year.

Discontinuance or Vacation of Highway by acts of authorities. See note, 26 L. R. A. 832.

89 Cal. 15-23, 26 Pac. 612, PEOPLE ex rel. MARIPOSA COUNTY v. COUNTS.

Object of Statute in Requiring Supervisors to specify particular purpose for which bonds are to be issued and their amount is to notify electors of such facts, to enable them to form judgment thereon.

Approved in *State v. Carbon County*, 36 Utah, 396, 104 Pac. 223, holding sufficient notice of special bond election which failed to designate polling places; *Cheyenne v. State*, 17 Wyo. 102, 96 Pac. 247, holding statute providing for issuance of bonds substantially complied with.

Specification of Purpose to Construct two wagon roads with bonds to be issued is not objectionable as being expressive of more than one object or purpose.

Approved in *Clark v. Los Angeles*, 160 Cal. 321, 116 Pac. 968, holding bond proposition for construction of docks, wharves, harbors, and opening of highways to navigable waters and construction of canals was not objectionable as submitting distinct propositions in single question; *Clark v. Los Angeles*, 160 Cal. 47, 116 Pac. 729, holding "acquire," as used in proposition for bonds for electric works, includes both purchase and construction; *Cary v. Blodgett*, 10 Cal. App. 470, 102 Pac. 671, holding in bond election for combined water and electric light plant separate estimates of cost were not necessary; *State v. Gordon*, 223 Mo. 25, 122 S. W. 1014, holding bond proposition for building two schoolhouses in different wards of district was single; *Linn v. City of Omaha*, 76 Neb. 558, 107 N. W. 985, holding proposition for bonds for two fire-engine houses not to be dual.

Distinguished in *Stern v. City of Fargo*, 18 N. D. 303, 122 N. W. 409, holding proposition for bonds for waterworks and light plant to be dual.

What Objects or Purposes may be Combined in single question submitted to voters. See note, 26 L. R. A. (n. s.) 667.

89 Cal. 23-25, 26 Pac. 615, 835, SAN FRANCISCO v. PACIFIC BANK.

Questions not Raised on Original Hearing will not be considered on rehearing.

Approved in *Powell v. Nevada etc. Ry. Co.*, 28 Nev. 343, 82 Pac. 97, following rule.

89 Cal. 26-31, 26 Pac. 618, GARDNER v. STROEVER.

To Warrant Action by Individual to Restrain public nuisance, he must show special injury differing from that suffered by general public.

Approved in *Cushing-Wetmore Co. v. Gray*, 152 Cal. 121, 125 Am. St. Rep. 47, 92 Pac. 71, owner of quarry abutting on street could sue to remove obstructions blocking access; *City Store v. San Jose-Los Gatos etc. Ry. Co.*, 150 Cal. 279, 88 Pac. 978, abutting owner, access to whose property was cut off by railroad in street, could sue to enjoin it as nuisance.

Right of One Prevented by Unlawful Obstruction from using highway to maintain action. See note, 28 L. R. A. (n. s.) 1055.

Obstruction to Free Use of Property is nuisance and may be abated by injunction that obstruction be removed and nuisance abated.

Approved in *McRae v. Blakeley*, 3 Cal. App. 174, 84 Pac. 680, holding party wrongfully constructing ditch across another's land could be compelled to fill it up and restore premises to original condition.

Power to Grant Mandatory Injunctions. See note, 20 L. R. A. 162.

89 Cal. 31-34, 26 Pac. 617, PENNIE v. SUPERIOR COURT.

Upon Appeal from Order Requiring Administrator to pay family allowance, bond for three hundred dollars stays proceedings upon order.

Approved in Estate of McGinn, 3 Cof. Prob. 129, undertaking for double costs not required on appeal from decree revoking probate of will and awarding costs to contestant.

Order of Superior Court Requiring Administrator to pay family allowance during pendency of appeal from order making allowance, taken by other claimants, is in excess of jurisdiction and will be annulled on certiorari.

Approved in Estate of Fretwell, 152 Cal. 574, 93 Pac. 284, creditor of insolvent estate of deceased may appeal from order for family allowance erroneously made.

89 Cal. 35-36, 26 Pac. 615, CROOKS v. MILLER.

Order Granting New Trial on Ground of insufficiency of evidence will not be disturbed when there was substantial conflict in evidence.

Reaffirmed in Scrivani v. Dondero (Cal.), 44 Pac. 1066, and Warner v. Thomas Parisian etc. Cleaning Works (Cal.), 37 Pac. 153.

89 Cal. 38-41, 26 Pac. 619, KELLEHER v. ORECIAT.

Service of Copy of Findings and Judgment on attorneys of defeated party after entry of judgment is sufficient notice of entry of judgment.

Approved in Estate of Keating, 158 Cal. 114, 110 Pac. 111, appellant not entitled to wait for written notice of entry of order appealed from before time to file notice of appeal would begin to run when he had actual notice.

89 Cal. 41-42, 26 Pac. 620, EX PARTE MILLER.

Cruel and Unusual Punishments. See note, 35 L. R. A. 568, 576.

89 Cal. 42-45, 26 Pac. 595, McDONALD v. TAYLOR.

Errors Against Party not Appealing cannot be considered on appeal. Reaffirmed in People v. Rea, 2 Cal. App. 111, 83 Pac. 165.

89 Cal. 46-51, 23 Am. St. Rep. 447, 26 Pac. 636, KILBURN v. KILBURN.

Marriage is Contract According to Form prescribed by law, by which man and woman capable of entering into such contract mutually engage to live together in state of union which ought to exist between husband and wife.

Approved in Estate of Campbell, 12 Cal. App. 717, 108 Pac. 673, holding void attempted marriage between slaves.

Common-law Marriages. See notes, 124 Am. St. Rep. 113; 3 Cof. Prob. 204, 205.

89 Cal. 63-68, 26 Pac. 788, ONETO v. RESTANO.

Lessee in Possession When Lease was Made who did not enter under it is not estopped from disputing lessor's title.

Approved in Strong v. Baldwin, 154 Cal. 162, 129 Am. St. Rep. 149, 97 Pac. 183, following rule.

89 Cal. 73-79, 26 Pac. 791, BELOHER v. FARREN.

Miscellaneous.—Cited in Harney v. Farren (Cal.), 26 Pac. 792, companion case.

89 Cal. 79-81, 26 Pac. 638, EX PARTE SMITH.

Habeas Corpus in Supreme Court is proper mode of procedure on refusal of admission to bail on appeal.

Reaffirmed in Pakenham v. Reed, 37 Wash. 262, 79 Pac. 787.

Admission to Bail Pending Appeal from conviction for felony is within sound discretion of trial court.

Reaffirmed in Ex parte Hatch, 15 Cal. App. 187, 114 Pac. 410.

89 Cal. 82-86, 26 Pac. 642, PEOPLE v. MERKLE.

Affidavits on Motion for New Trial in murder case, as to removal of disability of witness, should be carefully considered by judge, and right to new trial determined by reference to all evidence.

Approved in People v. Sullivan, 3 Cal. App. 513, 86 Pac. 838, holding removal of disability of witness after trial did not entitle defendant to new trial.

89 Cal. 86-89, 26 Pac. 643, COHN v. WRIGHT.

Allegation in Suit to Foreclose Mechanic's Lien that building was completed "on or about" certain date is open to demurrer for uncertainty.

Approved in Chemung Min. Co. v. Hanley, 9 Idaho, 795, 77 Pac. 228, allegation that transaction took place "on or about" certain date where charging material fact is open to demurrer for uncertainty.

In Action to Foreclose Lien of materialman, complaint should allege materials were furnished to be used in building.

Approved in Neihaus v. Morgan (Cal.), 45 Pac. 257, holding complaint sufficiently alleged materials were furnished for building.

89 Cal. 89-97, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, GESSNER v. PALMATEER.

Where Vendor Retains Title Under Executory contract of sale of land, assignee of notes given for purchase money is entitled to such security as incident to debt.

Approved in First Nat. Bank of Falls City v. Edgar, 65 Neb. 344, 91 N. W. 406, following rule.

Distinguished in Vance Redwood Lumber Co. v. Durphy, 8 Cal. App. 671, 97 Pac. 705, holding law implied no lien from mere contract to pay purchase money, and where vendor had title he had it without occasion for lien.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 186, 187, 188.

Where Title of Land is Reserved to secure purchase price, land cannot be attached in suit on purchase notes.

Reaffirmed in In re Harvey (Cal.), 32 Pac. 567.

89 Cal. 98-101, 26 Pac. 641, CURRAN v. KENNEDY.

Erroneous Admission of Evidence as to Fact admitted by pleadings is harmless.

Reaffirmed in Brandt v. Krogh, 14 Cal. App. 57, 111 Pac. 283.

89 Cal. 110-114, 23 Am. St. Rep. 451, 26 Pac. 646, MAYRHOFER v. BOARD OF EDUCATION OF SAN DIEGO.

State is not Bound by General Words in statute which would trench upon its sovereign rights.

Approved in *Clark v. Los Angeles*, 160 Cal. 39, 116 Pac. 725, holding grant of franchise by state to individual should be construed most strongly in favor of state.

Public Building is not Subject to mechanic's lien.

Approved in *Goldtree v. San Diego*, 8 Cal. App. 511, 97 Pac. 218, *Kruse v. Wilson*, 3 Cal. App. 93, 84 Pac. 443, and *Kruse v. Wilson* (Cal. App.), 4 Pac. 443, all following rule; *People v. San Joaquin Valley Agricultural Assn.*, 151 Cal. 806, 91 Pac. 744, holding property of district agricultural association exempt from execution.

Distinguished in *City Street Imp. Co. v. Regents of State University*, 153 Cal. 779, 96 Pac. 802, 18 L. R. A. (n. s.) 451, street assessment may be enforced against lands held in trust for state university.

Mechanic's Lien Against Public Buildings. See notes, 126 Am. St. Rep. 1095; 35 L. R. A. 143.

89 Cal. 115-122, 26 Pac. 627, HEIDT v. MINOR.

Surety on Official Bond cannot be Held beyond express terms of his contract.

Reaffirmed in *Hewlett v. Beede*, 2 Cal. App. 565, 83 Pac. 1087.

Acts for Which Sureties on Official Bonds are liable. See note, 91 Am. St. Rep. 502.

Notary Public and Sureties are Liable only for his official misconduct and neglect.

Approved in *Homan v. Wayer*, 9 Cal. App. 130, 98 Pac. 83, holding notary public liable for damage resulting from false certificate of acknowledgment of deed given by him.

Liability of Notaries. See note, 82 Am. St. Rep. 387, 388.

Miscellaneous.—Cited in *Heidt v. Minor* (Cal.), 26 Pac. 629, companion case.

89 Cal. 122-129, 26 Pac. 644, SMITH v. HILL.

Under Townsite Law There must be Paying mine known to exist at time of townsite grant to deprive townsite owner of his land.

Approved in *Callahan v. James* (Cal.), 71 Pac. 105, "valid mining claim or possession," as used in section 2392, United States Revised Statutes, must be valuable mine.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 797.

89 Cal. 135-140, 26 Pac. 647, ELTZROTH v. RYAN.

Title to Land by United States Patent is title by record, and delivery of patent to patentee is not essential to vesting of title.

Approved in *Warner Valley Stock Co. v. Morrow*, 48 Or. 262, 86 Pac. 370, following rule.

Status Once Established is Presumed by Law to continue until change is shown.

Approved in *Metteer v. Smith*, 156 Cal. 574, 105 Pac. 735, where plaintiff's title was shown by deposition taken some time prior to trial of quiet title suit, it was presumed to continue in same state until trial; *Fair v. Home Gas etc. Co.*, 15 Cal. App. 708, 115 Pac.

755, holding in suit to recover penalty for refusal to furnish gas to building from mains where no evidence was offered as to location of main, it was presumed to be as originally laid; Tate v. Rose, 35 Utah, 235, 99 Pac. 1005, holding when title was in decedent and administrator sued to quiet title, it was presumed to have continued in estate.

Jurisdiction of Justice's Court must be affirmatively shown by party relying on its judgment.

Approved in Harlan v. Gladding, McBean & Co., 7 Cal. App. 53, 93 Pac. 401, following rule.

89 Cal. 144-153, 26 Pac. 759, PEOPLE v. FICK.

"Toy Fong" Held to be Idem Sonans with "Choy Fong."

Approved in People v. Ah Sun, 160 Cal. 791, 118 Pac. 242, holding "Chin Hong" idem sonans with "Chin Yong"; People v. Harrison, 14 Cal. App. 550, 112 Pac. 735, holding variance in names to be immaterial; Roland v. State, 127 Ga. 402, 56 S. E. 413, "Roland," pronounced as "Rolin," held to be idem sonans with "Rawlin."

Idem Sonans. See note, 100 Am. St. Rep. 330, 342, 344.

89 Cal. 154-156, 26 Pac. 650, PACIFIC PAVING CO. v. BOLTON.

Appeal will be Dismissed When Undertaking given thereon does not identify order appealed from.

Reaffirmed in Little v. Thatcher, 151 Cal. 560, 91 Pac. 322, and Field v. Andreda (Cal.), 37 Pac. 180.

89 Cal. 158-170, 26 Pac. 650, PEOPLE v. WALLACE.

Where Witness Denies Making Declaration in regard to subject of action, it is incompetent to prove he made such declaration by other witnesses.

Approved in Kimic v. San Jose-Los Gatos etc. Ry. Co., 156 Cal. 390, 104 Pac. 991, holding statements made by defendant to its servant out of hearing of plaintiff were properly excluded; Bollinger v. Bollinger, 154 Cal. 706, 99 Pac. 201, where witness for respondent called to prove declarations of appellant's grantor failed to give affirmative testimony, it could not be proven by other witnesses he had said grantor had made such declarations; People v. Duncan, 8 Cal. App. 190, 96 Pac. 416, where witness failed to give affirmative testimony, his statements to contrary effect could not be proven.

Admission of Testimony That Accused on trial for murder had sought to have immoral relations with women is erroneous.

Approved in People v. Smith, 9 Cal. App. 650, 99 Pac. 1113, dis-solute habits of defendant in murder trial could not be shown; dissenting opinion in State v. Levy, 9 Idaho, 503, 75 Pac. 233, majority holding evidence admitted in murder trial in regard to diseased condition of women with which accused lived did not warrant new trial.

Distinguished in State v. Levy, 9 Idaho, 516, 75 Pac. 238, holding admissible evidence as to diseased condition of women with whom defendant lived and bearing on cause of crime.

Duty of Court is not Confined to passing on such portions of testimony as may be excepted to, but extends to preservation of rights of litigants.

Approved in Boyer v. Pac. Mutual Life Ins. Co., 1 Cal. App. 56, 81 Pac. 672, following rule; Bean v. Missoula Lumber Co., 40 Mont.

37, 104 Pac. 871, holding court could at discretion strike out incompetent evidence admitted without objection.

89 Cal. 170-178, 23 Am. St. Rep. 455, 26 Pac. 762, **RICHARDS v. TRAVELERS' INS. CO.**

Death Caused by Third Person is "accidental" within terms of accident insurance policy.

Approved in *Phoenix Accident etc. Assn. v. Stiver*, 42 Ind. App. 641, 84 N. E. 774, holding insured's death accidental when he was stabbed by insane person; *Bankers' Mut. Casualty Co. v. First Nat. Bk. of Council Bluffs*, 131 Iowa, 461, 108 N. W. 1048, upholding contract for burglary insurance under code provision authorizing insurance against fire or "other casualty"; *Furbush v. Maryland Casualty Co.*, 131 Mich. 238, 100 Am. St. Rep. 605, 91 N. W. 136, holding intentional homicide an accident within meaning of accident insurance policy; *Stevens v. Continental Casualty Co.*, 12 N. D. 471, 97 N. W. 864, upon proof of insured's death from gunshot wound, it should be presumed accidental when not shown how it was inflicted.

What Constitutes an Accident, Within Meaning of accident policy. See note, 30 L. R. A. 206, 207.

Miscellaneous.—Cited in *Field v. Eastern Bldg. & Loan Assn.*, 117 Iowa, 198, 90 N. W. 721, in construing terms of building and loan insurance contract.

89 Cal. 178-184, 26 Pac. 626, **CHITTENDEN v. PRATT.**

Removal by Purchaser of Crops Subject to recorded mortgage without payment of mortgage lien is conversion of crops, and mortgagee may recover value in assumpsit.

Approved in *Souza v. Lucas* (Cal. App.), 100 Pac. 117, and *Sousa v. Lucas*, 156 Cal. 463, 105 Pac. 414, both holding tortious removal of growing crop from premises did not impair mortgagee's right of foreclosure.

Distinguished in *Gates v. Tom Quong*, 3 Cal. App. 447, 85 Pac. 663, holding mortgagable interest of lessee in crop ceased upon sale by lessor under terms of lease to pay rent.

Where One Person Converts to His Own use goods of another, latter may waive tort and sue in assumpsit.

Approved in *Fountain v. Sacramento*, 1 Cal. App. 462, 82 Pac. 637, following rule; *Bechtel v. Chase*, 156 Cal. 711, 106 Pac. 83, rule does not extend to case where plaintiff voluntarily parted with property in exchange for something received in return.

Mortgagee's Right of Action against third persons for invasion of their rights. See note, 109 Am. St. Rep. 433.

89 Cal. 186-196, 26 Pac. 764, **LANGAN v. LANGAN.**

Oral Evidence Which has Effect to add to terms of written agreement which was consideration for note is not admissible in action on note.

Approved in *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 763, 118 Pac. 95, in action on note, oral evidence was not admissible to prove payee's breach of contemporaneous oral agreement.

Judgment Based on Contradictory Findings is decision against law for which new trial may be had.

Approved in *Brown v. Macey*, 13 Idaho, 455, 90 Pac. 341, holding judgment on findings which did not determine all material issues

was decision against law; *Lufkin v. Hitchcock*, 194 Mass. 233, 80 N. E. 457, holding different parts of verdict not inconsistent, and refusing new trial; *Hamilton v. Murray*, 29 Mont. 86, 74 Pac. 76, holding verdict bad as not responding to all material issues.

Appeal Taken After Statutory Time will be dismissed notwithstanding stipulation of parties extending time to appeal.

Approved in *Estate of Brewer*, 156 Cal. 90, 103 Pac. 487, holding admission of service of notice of appeal after statutory time did not confer jurisdiction of appeal on appellate court; *People v. Walker* (Cal.), 61 Pac. 800, dismissing appeal taken after statutory time.

89 Cal. 196-203, 26 Pac. 801, BROWN v. CLARK.

Duty of Occupant of Land Claiming by adverse possession is to pay taxes assessed during his period of occupancy only.

Approved in *Allen v. McKay & Co.*, 120 Cal. 335, 52 Pac. 829, holding payment of taxes assessed more than five years before commencement of action not essential, nor of tax assessed before end of five years but levied thereafter; *Crane v. Judge*, 30 Utah, 55, 83 Pac. 567, in suit to determine disputed boundary, defendant's admission that plaintiff paid taxes on disputed strip was fatal to his claim by adverse possession; *Larar v. Sandell*, 52 Wash. 56, 100 Pac. 167, holding payment of taxes assessed during period required for adverse possession to be sufficient, though full period had not elapsed after first payment of taxes.

89 Cal. 203-211, 23 Am. St. Rep. 460, 26 Pac. 872, BANKIN v. AMAZON INS. CO.

Ambiguous Insurance Contract is to be construed most strongly against insurer.

Approved in *Dollar v. International Banking Corp.*, 10 Cal. App. 87, 101 Pac. 35, conflicting clauses should be construed most strongly against party responsible who is presumed to be promisor.

Where Insurance Policy Provided Insured should keep watchman on premises when mill was idle, insurer having shown mill was idle when loss occurred, burden of proving compliance with warranty was on plaintiff.

Approved in dissenting opinion in *Davis v. Connecticut Fire Ins. Co.*, 158 Cal. 774, 112 Pac. 553, majority holding fallen building clause did not apply to case where building fell from cause other than fire after fire had begun to burn.

89 Cal. 211-215, 26 Pac. 800, DEDMON v. MOFFITT.

Judgment will not be Reversed for failure to find on issue presented, unless shown that evidence was presented on such issue.

Approved in *Schoonover v. Birnbaum*, 150 Cal. 737, 89 Pac. 1109, want of finding on issue presumed to be from failure to introduce evidence thereon; *Bullion etc. Bank v. Spooner* (Cal.), 36 Pac. 123, holding failure to find on fact immaterial when finding could not have changed judgment.

89 Cal. 215-223, 26 Pac. 785, BARRY v. GOAD.

Resident and Taxpayer has Action to restrain board of education of San Francisco from drawing drafts for payment of services of one whom they had no authority to appoint.

Approved in *Clouse v. San Diego*, 159 Cal. 438, 114 Pac. 575, citizen and taxpayer could maintain action to enjoin illegal expenditure of public funds.

89 Cal. 223-227, 26 Pac. 766, PEOPLE v. ARRAS.

Where Information Charges Larceny of check drawn in favor of "one P.," and evidence showed it drawn in favor of one "A. G. P. or bearer," variance was immaterial.

Approved in *State v. Laechelt*, 18 N. D. 91, 118 N. W. 241, holding variance in names of drawer and drawee of check which was subject of embezzlement to be immaterial.

89 Cal. 237-244, 26 Pac. 902, PUGET SOUND LUMBER CO. v. KRUG.

To constitute Subsequent Ratification of unauthorized act sufficient to create agency, principal must have had previous knowledge of all material facts.

Approved in *Lindow v. Cohn*, 5 Cal. App. 391, 90 Pac. 487, holding acts of agent not ratified by acts of principal; *Showers v. Zanone* (Cal. App.), 85 Pac. 858, holding acts of agent in constructing ditch so ratified by principal as to charge her with cost; *McGlassen v. Tyrrell*, 5 Ariz. 54, 44 Pac. 1088, holding payee of note by accepting interest paid in advance to his agent, without knowledge it was advance interest, did not so ratify act of agent as to discharge surety.

Principal cannot Ratify Act of Agent unless latter avowedly acted as agent.

Reaffirmed in *Ilfeld v. Ziegler*, 40 Colo. 408, 91 Pac. 827.

One Selling Property to Husband in ignorance of fact that he is agent of his wife may, on discovering agency, recover from either.

Approved in *McKee v. Cunningham*, 2 Cal. App. 688, 690, 84 Pac. 262, 263, holding fact that vendor charged goods to wife without authority from her, in absence of contract that she would pay individually, would not preclude recovery from husband as real purchaser after his name as principal was disclosed.

89 Cal. 245-250, 23 Am. St. Rep. 465, 26 Pac. 897, HAIGHT v. VALLET.

Where Instructions on Material Point are contradictory, judgment will be reversed.

Distinguished in *Hayden v. Consolidated Min. Co.*, 3 Cal. App. 139, 84 Pac. 423, holding instructions read together did not mislead jury.

Instruction as to Caution in Receiving expert evidence approved.

Approved in *Wood v. Los Angeles Traction Co.*, 1 Cal. App. 476, 82 Pac. 548, approving similar instructions; *Buckalew v. Quincy, Omaha etc. R. R. Co.*, 107 Mo. App. 587, 81 S. W. 1179, upholding instruction in reference to consideration of expert testimony.

Limitations of Evidence to Handwriting. See note, 64 L. R. A. 318.

Conclusiveness of Testimony of Experts. See note, 42 L. R. A. 760.

89 Cal. 251-258, 26 Pac. 906, BLUMENTHAL v. GOODALL.

Where Broker in Good Faith Finds Purchaser, he cannot be deprived of commission by revocation of authority before sale, which was practically certain and immediate, is effected.

Approved in *Breen v. Roy*, 8 Cal. App. 479, 97 Pac. 172, holding broker entitled to compensation for services performed at principal's request, on promise to pay, though contract was withdrawn before sale by broker's consent; *Branch v. Moore*, 84 Ark. 468, 120 Am. St. Rep. 78, 105 S. W. 1180, holding revocation of broker's authority during negotiations for sale, when owner immediately thereafter sold to purchaser secured by broker did not defeat broker's right to commission; *Sallee v. McMurry*, 113 Mo. App. 268, 88 S. W. 161, holding broker's commission earned when he procured buyer who agreed to buy, though no sale was actually made.

Distinguished in *Milligan v. Owen*, 123 Iowa, 288, 98 N. W. 794, holding revocation of general offer of commission to anyone who should find purchaser gave no action for damages.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal and defective title. See note, 43 L. R. A. 608.

89 Cal. 258-263, 26 Pac. 898, SCOTT v. JACKSON.

Action to Recover Price of Letters Patent sold defendant, which were to be assigned to him when settlement was made with another person, cannot be defeated by delay in making assignment when defendant received all benefit he would have received if assignment had been made at proper time.

Approved in *Galbreath v. Wallrich*, 45 Colo. 546, 102 Pac. 1088, where contracts to furnish ties to railroad were assigned with railroad's consent, action against assignee for price cannot be defeated by fact that railroad refused to permit them to furnish ties on ground court decision prohibited cutting timber on public lands.

Acquiescence is Where Person, Knowing he is entitled to enforce right, neglects to do so for such time that other party may, under circumstances of case, fairly infer he has waived his right.

Approved in *Showers v. Zanone* (Cal. App.), 85 Pac. 858, holding party liable for expense of constructing drainage ditch when she acquiesced in its construction and received benefit therefrom; *Moore v. McGuire*, 142 Fed. 801, holding sovereignty of state over river island lost by prescription and acquiescence; *Connell v. Clifford*, 39 Colo. 125, 88 Pac. 851, where neither plaintiff nor those under whom she claimed had any knowledge defendant's building extended on her land until just prior to commencement of action to recover strip in controversy, right to such strip was not lost by acquiescence.

89 Cal. 264-267, 26 Pac. 828, FOSTER v. MAGINNIS.

Acts Relied on as Part Performance of parol contract to convey land must be clearly shown to have been performed in pursuance of particular contract sought to be enforced.

Approved in *Fritz v. Mills*, 12 Cal. App. 119, 106 Pac. 727, following rule; *Davis v. Judson*, 159 Cal. 132, 113 Pac. 152, holding payment of purchase price without possession not such part performance of oral contract to convey land as to take it from statute of frauds; *Pearsall v. Henry*, 153 Cal. 327, 95 Pac. 158, upholding finding that conveyance by plaintiffs only was in pursuance of oral contract for exchange of lands; *Eshleman v. Henrietta Vineyard Co. (Cal.)*, 36 Pac. 778, holding evidence showed no such part performance as to take contract for sale of land from statute of frauds.

Taking Possession of Realty as Part Performance to satisfy statute of frauds. See note, 3 L. R. A. (n. s.) 807, 816.

89 Cal. 268-270, 26 Pac. 968, HINN v. MANGENBERG.

Complaint in Ejectment Alleging Plaintiff's Estate, defendant's possession, and withholding against plaintiff's will, is sufficient.

Approved in *McFarland v. Matthai*, 7 Cal. App. 600, 95 Pac. 180, and *Victor Power and Mining Co. v. Cole*, 11 Cal. App. 500, 105 Pac. 759, both following rule.

89 Cal. 276-279, 26 Pac. 833, HORN v. HAMILTON.

Objections to Sufficiency of Complaint to support proof cannot be made after verdict if complaint supports judgment.

Approved in *Hoover v. Lester*, 16 Cal. App. 154, 116 Pac. 384, where defendant by answer treated complaint as tendering issue, on which finding was made, he could not on appeal for first time object that complaint stated no cause of action.

89 Cal. 280-286, 26 Pac. 827, DAVIES v. OCEANIC STEAMSHIP CO.

When Evidence is Conflicting, or when reasonable men might draw different inferences from it, question of negligence or contributory negligence is one of fact.

Approved in *Columbia Box etc. Co. v. Drown*, 156 Fed. 461, 84 C. C. A. 269, following rule.

Sufficiency of General Allegations of Negligence. See note, 59 L. R. A. 255.

89 Cal. 286-304, 26 Pac. 873, 13 L. R. A. 576, BULL v. BRAY.

Findings of Probative Facts Only are sufficient if ultimate fact flows as necessary conclusion therefrom.

Approved in *Jules Levy & Bro. v. Mautz*, 16 Cal. App. 669, 117 Pac. 937, and *Barry v. Beamer*, 8 Cal. App. 203, 96 Pac. 374, both following rule; *Holzheier v. Hayes* (Cal.), 52 Pac. 838, holding findings of probative facts insufficient to show conclusion of ultimate fact.

In Action to Set Aside Deed by insolvent as in fraud of creditors, fraudulent intent must be shown.

Approved in *Bekins v. Ditterle*, 5 Cal. App. 694, 91 Pac. 175, setting aside sale by insolvent to wife as in fraud of creditors; *Wolters v. Rossi* (Cal.), 57 Pac. 74, 75, holding fraudulent transfer of property by judgment debtor to wife without consideration on day before hearing on supplementary proceedings; *Clark v. Olsen* (Cal.), 33 Pac. 274, holding fraudulent intent not shown, in transfer alleged in fraud of creditors; *Threlkel v. Scott* (Cal.), 34 Pac. 852, holding conveyance of large portion of property to wife without consideration, knowing debts could not be paid without recourse to such property was in fraud of creditors; *Stevens v. Meyers*, 14 N. D. 403, 104 N. W. 531, absence of valuable consideration for transfer and insolvency of grantor are presumptive evidence only of fraudulent intent.

Attacks by Creditors on Conveyances made by husbands to wives. See note, 90 Am. St. Rep. 505.

89 Cal. 304-310, 26 Pac. 885, McVERRY v. BOYD.

Extension of Time for Completion of contract for street improvement in San Francisco must be granted within life of contract, to be valid.

Reaffirmed in *Palmer v. Burnham* (Cal.), 47 Pac. 600.

89 Cal. 310-315, 26 Pac. 900, NEUEBAUMER v. WOODMAN.

Discovery of Mineral in Mining Claims and rights of locators prior thereto. See note, 139 Am. St. Rep. 186.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 857.

89 Cal. 316-321, 26 Pac. 972, BROCK v. LUNING.

Extension of Time for Completion of contract for street improvement in San Francisco must be granted within life of contract, to be valid.

Reaffirmed in *Palmer v. Burnham* (Cal.), 47 Pac. 600.

89 Cal. 321-324, 26 Pac. 829, SIDDALL v. CLARK.

Void Promise on One Side is not Consideration for valid promise on other.

Distinguished in *Rogers Dev. Co. v. California Real Estate Inv. Co.*, 159 Cal. 740, 115 Pac. 935, holding delivery of deed in escrow by one party and promise of other to pay purchase price, both being valid, constituted sufficient consideration of contract to convey land.

Accord and Satisfaction. See note, 100 Am. St. Rep. 419.

Compromise or Release by Personal Representative of claim due estate. See note, 14 L. R. A. 415.

Admissions and Waivers by Fiduciaries in actions. See note, 32 L. R. A. 688.

89 Cal. 324-327, 26 Pac. 1072, BLAKELY v. BLAKELY.

Cross-complaint may be Filed in action for divorce.

Reaffirmed in *Bickley v. Bickley*, 136 Ala. 553, 34 So. 947.

89 Cal. 327-332, 23 Am. St. Rep. 469, 26 Pac. 830, HARRISON v. McCORMICK.

Where Language of Writing Imports complete legal obligation, other terms cannot be added by parol, when writing is silent as to such terms.

Approved in *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 594, 96 Pac. 322, warranty of quality upon sale by sample could not be added by parol when writing was silent on subject; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 754, 103 Pac. 941, terms of written option could not be varied by parol; *Davis Photo Stock Co. v. Photo Jewelry Mfg. Co.*, 47 Colo. 72, 104 Pac. 390, holding purchaser in action for price of goods shown by invoice could not set up other terms to contract which showed complete legal obligation; *American Canning Co. v. Flat Top Grocery Co.*, 68 W. Va. 704, 70 S. E. 758, where contract was in writing and complete, that it was for sale by sample could not be shown by parol.

Distinguished in *St. Paul Fire etc. Ins. Co. v. Balfour*, 168 Fed. 215, 93 C. C. A. 498, admitting parol evidence to explain latent ambiguity in contract.

Right to Show Parol Warranty in Connection with contract of sale of personalty. See note, 19 L. R. A. (n. s.) 1190.

Abbreviation "etc.," as Used in Contract of sale, held to be meaningless and not to render writing incomplete as contract of sale.

Cited in *Hanford Mercantile Store v. Sowlevere*, 11 Cal. App. 263, 104 Pac. 709, holding "etc." as used in preliminary stock subscription did not include further objects of corporation, and such subscription was unenforceable; *Berry v. Kowalsky* (Cal.), 27 Pac. 287, oral evidence admissible to explain abbreviation used in contract; *Naylor v. McColloch*, 54 Or. 308, 103 Pac. 70, holding "etc." as used in contract included other things of like character.

Beginning of Limitations to Run Against Action to recover money paid by mistake. See note, 11 L. R. A. (n. s.) 1191.

89 Cal. 332-339, 26 Pac. 825, WOLFF v. CANADIAN PAC. RY. CO.

Trial Court Should Resolve Any Doubt in favor of party moving to set aside default.

Approved in *Barling v. Weeks*, 4 Cal. App. 457, 88 Pac. 503, following rule; *Riddle v. Quinn*, 32 Utah, 352, 90 Pac. 896, setting aside default obtained by plaintiff having cause put on calendar without notice to defendant as required by rule of court.

Order Setting Aside Default is Proper after six months' delay when delay was assented to by other party and was not injurious.

Distinguished in *Smith v. Pelton Water Wheel Co.*, 151 Cal. 398, 90 Pac. 935, refusing to set aside default after unexplained delay of four months; *Garr, Scott & Co. v. Collin*, 15 N. D. 626, 110 N. W. 82, order opening default not void because decision was made after time limited by statute.

Acceptance by Plaintiff of Attorneys' Fees imposed as condition for opening default is waiver of right to appeal from order.

Approved in *Bunting v. Haskell*, 152 Cal. 431, 93 Pac. 112, holding where decree gave plaintiff right to redeem after expiration of statutory time by paying certain sums in certain time, acceptance of such payments by defendant would waive their right to appeal.

89 Cal. 339-351, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897, FOX v. TAY.

Assets of Estate Situated in Jurisdiction foreign to that in which executor qualified, which come into his possession in such jurisdiction, must be accounted for in jurisdiction of his domicile.

Approved in *Richards v. Blaisdell*, 12 Cal. App. 111, 106 Pac. 737, judgment establishing claim in another jurisdiction cannot be basis of claim against estate in this state.

Foreign Executors, to Whom, as Trustees, note and mortgage were given by coexecutor for assets of estate received by him, may enforce trust by foreclosure of mortgage without taking out letters of administration in this state.

Approved in *Moore v. Petty*, 135 Fed. 674, 68 C. C. A. 306, executors could sue in foreign state in own name to recover proceeds of sales of property of estate made by agents employed by them.

Liability of a Trustee for Acts of his cotrustee. See note, 128 Am. St. Rep. 736.

Limitation of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 483.

Who may Plead Statute of limitations. See note, 104 Am. St. Rep. 748, 750, 757.

89 Cal. 351-353, 26 Pac. 879, THRELKEL v. SCOTT.

In Action to Set Aside Conveyance alleged to be in fraud of creditors, fraudulent intent must be alleged.

Reaffirmed in *Wolters v. Rossi* (Cal.), 57 Pac. 74.

Miscellaneous.—Cited in *Threlkel v. Scott* (Cal.), 34 Pac. 851, on another appeal.

89 Cal. 354-367, 26 Pac. 880, McLAUGHLIN v. MENOTTI.

Bona Fide Settler Means One Who has done something more than merely occupy land and put a few improvements on it.

Approved in *Town of Red Bluff v. Walbridge*, 15 Cal. App. 780, 115 Pac. 80, holding mere occupancy of part of public domain by one who did not connect himself with government title conferred no right as against government.

89 Cal. 367-373, 26 Pac. 970, STUART v. ADAMS.

Mining Partnerships are Governed by Law of ordinary partnerships, except for such differences as flow from fact there is no *delectus personae*.

Approved in *Kelley v. McNamee*, 164 Fed. 375, 22 L. R. A. (n. s.) 851, 90 C. C. A. 357, mining partner not liable after retirement for subsequent wages of employees who had notice of change; *Rice v. Van Why*, 49 Colo. 35, 111 Pac. 608, holding mining partners jointly liable for injury to employee.

89 Cal. 373-384, 23 Am. St. Rep. 482, 26 Pac. 883, 12 L. R. A. 511, CASHMAN v. ROOT.

Agreement Between Stockbroker and Customer for purchase of stock considered and held to be contract for sale on margin, and void.

Approved in *Pollitz v. Wickersham*, 150 Cal. 246, 88 Pac. 914, and *Macomber v. Conradt* (Cal.), 37 Pac. 902, both following rule; *Conradt v. Lepper*, 13 Wyo. 491, 81 Pac. 311, holding where stock was purchased on margin, and customer afterward paid broker his advances, and received certificates, transaction became valid, and customer could not recover money paid on stock.

Distinguished in *George J. Birkel Co. v. Howze*, 12 Cal. App. 647, 108 Pac. 146, upholding transfer of stock at agreed price with agreement to repurchase within stated time at agreed price.

Customer may Maintain Action to recover from broker property conveyed by him to secure broker for advances made by him under agreement for sale of stocks on margin.

Approved in *Parker v. Otis*, 130 Cal. 329, 62 Pac. 572, 92 Am. St. Rep. 56, holding constitutional provision for recovery of money paid for purchase and sale of stocks on margin is not in conflict with federal Constitution.

Stock Broker is Pledgee of Stock purchased and carried for customers on margin.

Approved in *Richardson v. Shaw*, 209 U. S. 376, 28 Sup. Ct. 515, 52 L. Ed. 841, following rule.

Right of Broker to Recover Commissions or advances in furthering wagering contract. See note, 11 L. R. A. (n. s.) 576.

89 Cal. 387-398, 26 Pac. 891, BATES v. GREGORY.

Enlarging Territory and Changing Name of municipality cannot affect obligation on bonds issued by it.

Approved in *Frankish v. Goodrich*, 157 Cal. 617, 108 Pac. 686, territory excluded from high school district by becoming part of another is subject only to taxation in such other district; *Chalstran v. Board of Education*, 244 Ill. 477, 91 N. E. 716, holding property of high school district which was discontinued was liable for damages for breach of contract to erect building entered into by trustees.

Statute is Presumed to be Constitutional.

Approved in *In re Finley*, 1 Cal. App. 200, 81 Pac. 1042, upholding act providing death penalty for life prisoner guilty of malicious assault.

Municipal Corporation has Same Rights as any other debtor to plead statute of limitations.

Reaffirmed in *Hewel v. Hogin*, 3 Cal. App. 253, 254, 84 Pac. 1006.

89 Cal. 399-410, 26 Pac. 894, FISHER v. SOUTHERN PAC. R. R. CO.

Reading Extracts from Medical Works and asking expert medical witness if he agrees with author is not permissible on cross-examination, where extracts do not contradict evidence of witness.

Approved in *Griffith v. Los Angeles Pacific Co.*, 14 Cal. App. 147, 111 Pac. 107, holding statements of standard medical books on subject can only be shown when expert has based his opinion on reading such books.

Scientific Books and Treatises as Evidence. See note, 40 L. R. A. 569, 570.

89 Cal. 410-421, 26 Pac. 889, RIVERSIDE WATER CO. v. GAGE.

Water Diverted from Natural Stream into ditches becomes personal property of owner thereof.

Approved in *Hesperia Land & Water Co. v. Gardner*, 4 Cal. App. 358, 88 Pac. 287, following rule; *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 525, 89 Pac. 341, holding riparian owner has no title to water before it reaches his land.

In Action to Determine Rights in Waters of stream, answer not alleging extent of irrigable riparian lands and amount of water necessary therefor presents no issue.

Approved in *Wutchumna Water Co. v. Pogue*, 151 Cal. 112, 90 Pac. 365, and *Montecito etc. Water Co. v. Santa Barbara*, 151 Cal. 378, 90 Pac. 936, both following rule.

89 Cal. 427-432, 26 Pac. 834, SMITH v. BELSHAW.

Employer is not Liable for Negligence of independent contractor.

Approved in *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 577, 93 Pac. 378, holding person building road not liable for injury caused by blast set off by independent contractor; *Giacomini v. Pacific Lumber Co.*, 5 Cal. App. 225, 89 Pac. 1062, holding where it was doubtful as to whether party causing injury was servant or independent contractor, verdict for plaintiff would not be disturbed; *Good v. Johnson*, 38 Colo. 451, 88 Pac. 442, 8 L. R. A. (n. s.) 896, holding employer of injured workman was independent contractor, and company contracting with such contractor was not liable; *Laffery v. United States Gypsum Co.*, 83 Kan. 361, 111 Pac. 503, ordering new trial where question whether superintendent of mine in which injury occurred was independent contractor for defendant was not submitted.

to jury; *McClure v. Detroit Southern R. Co.*, 146 Mich. 460, 109 N. W. 848, holding defendant company which had taken over property of another railroad would be liable for wrongful injury of employee.

General Rules as to Absence of Liability of employer for torts of independent contractor. See note, 65 L. R. A. 654.

Which of Two or More Persons is Master of another conceded to be servant of one. See note, 37 L. R. A. 47.

Who are Independent Contractors. See note, 65 L. R. A. 456, 467, 505.

Where Verdict on Conflicting Evidence does not have some meritorious support, it will be set aside.

Approved in *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 578, 93 Pac. 379, setting aside verdict against great weight of evidence; *In re Coburn*, 11 Cal. App. 620, 105 Pac. 931, setting aside finding when only sustained by few general statements and evidence fully established contrary.

89 Cal. 437-439, 26 Pac. 902, LONG v. SAUFLEY.

Decision of Trial Court on Conflicting Evidence is conclusive.

Approved in *Aydelotte v. Bloom*, 13 Cal. App. 57, 108 Pac. 877, refusing to set aside verdict on conflicting evidence.

Where Findings are Waived, it will be presumed on appeal that trial court found all facts necessary to sustain judgment.

Reaffirmed in *Bruce v. Bruce*, 16 Cal. App. 357, 116 Pac. 996.

89 Cal. 440-446, 26 Pac. 965, PORTER v. JENNINGS.

Where Principal Relief Sought is injunction to prevent execution sale, temporary injunction should be granted until hearing, although answer denies equities of complaint.

Approved in *Farnum v. Clarke*, 148 Cal. 621, 84 Pac. 171, holding it error to dissolve injunction pendente lite, when effect was to make relief sought abortive.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 108.

Denials in Answer on Information and belief will not serve as basis for motion to dissolve temporary injunction.

Approved in *Collins v. Stanley*, 15 Wyo. 295, 123 Am. St. Rep. 1022, 88 Pac. 622, following rule; *Dingley v. Buckner*, 11 Cal. App. 187, 104 Pac. 480, holding temporary injunction improperly dissolved on filing of answer containing only denials on information and belief.

Distinguished in *Long v. Newman*, 10 Cal. App. 439, 102 Pac. 538, dissolving temporary injunction restraining sale under deed of trust.

Miscellaneous.—Cited in *Chace v. Jennings* (Cal.), 28 Pac. 681, companion case.

89 Cal. 446-455, 26 Pac. 870, GERLACH v. TURNER.

Nonsuit may be Reviewed as Error of law if excepted to and specified as such in statement on motion for new trial.

Approved in *Martin v. Southern Pacific Co.*, 150 Cal. 131, 88 Pac. 704, following rule.

89 Cal. 456-459, 26 Pac. 968, WALKER v. EMERSON.

Diversion by Intruder of Water of canal by ditch across land of owner will be enjoined as injury to owner's right, though extent of actual money damage is small.

Approved in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 333, 88 Pac. 981, 11 L. R. A. (n. s.) 1062, enjoining diversion of stream waters by upper owner to lands beyond watershed, though no money damage was shown; *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 532, 89 Pac. 343, holding riparian owner not using riparian right entitled to decree quieting title as against later appropriator.

89 Cal. 464-467, 23 Am. St. Rep. 488, 26 Pac. 967, RESPINI v. PORTA.

Where Tenant Abandons Premises, landlord may elect to leave premises vacant and sue for rent for full term, or rent, and recover as damages any diminution in rent.

Approved in *Higgins v. Street*, 19 Okl. 49, 92 Pac. 155, 13 L. R. A. (n. s.) 398, following rule.

Rights of Landlord to Abandonment of premises by tenant. See note, 114 Am. St. Rep. 720.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 105.

Remedy of Landlord upon Abandonment of premises. See note, 13 L. R. A. (n. s.) 402.

89 Cal. 471-473, 26 Pac. 961, EX PARTE HALSTED.

Whitney Act of 1885, Conferring Exclusive Jurisdiction of misdemeanors on police courts of certain class of cities, is not special or local legislation.

Approved in *Johnson v. Gunn*, 148 Cal. 749, 84 Pac. 666, upholding act classifying townships in counties of twenty-seventh class with reference to population for purpose of fixing salaries of justices of peace.

Distinguished in *Ex parte Sohncke*, 148 Cal. 266, 113 Am. St. Rep. 236, 82 Pac. 958, 2 L. R. A. (n. s.) 813, holding act of March 20, 1905, fixing interest on chattel mortgages on specified kinds of property to be void as special legislation.

Under Whitney Act of 1885 Police Court has Jurisdiction of all misdemeanors.

Approved in *Union Ice Co. v. Rose*, 11 Cal. App. 363, 104 Pac. 1008, upholding act conferring exclusive jurisdiction of misdemeanors upon police courts of cities of one and one-half class.

Miscellaneous.—Cited in *In re Montijo* (Cal.), 26 Pac. 961, companion case.

89 Cal. 474-478, 26 Pac. 1073, YATES v. JAMES.

Measure of Vendee's Damages on Breach of contract to convey realty. See note, 106 Am. St. Rep. 974.

89 Cal. 478-491, 23 Am. St. Rep. 491, 26 Pac. 1074, ORIM v. KESSING.

On Foreclosure of Mortgage Plaintiff is entitled to have personal judgment docketed against defendant when he has exhausted security of mortgage.

Reaffirmed in *Howe v. Sears*, 30 Utah, 348, 84 Pac. 1108.

Court of Record has Power to Correct its record at any time to make it accord with facts.

Approved in *Brownell v. Superior Court*, 157 Cal. 708, 109 Pac. 93, court had power to alter judgment entered only upon "rough min-

utes" by clerk; *San Francisco v. Brown*, 153 Cal. 649, 651, 96 Pac. 284, holding court could correct judgment entered by clerk varying from that actually rendered; *Ex parte Monckros Von Vetsera*, 7 Cal. App. 139, 93 Pac. 1037, holding court could vacate oral order discharging prisoner on habeas corpus; *Raine v. Lawlor*, 1 Cal. App. 486, 82 Pac. 689, holding court could set aside order inadvertently made; *Frost v. Idaho Irr. Co.*, 19 Idaho, 382, 114 Pac. 41, holding district court could set aside order inadvertently made bringing in new defendants.

Conclusion of Court That Order was inadvertently made is not subject to collateral attack.

Reaffirmed in *Raine v. Lawlor*, 1 Cal. App. 486, 82 Pac. 689.

Entry of Judgment is Ministerial Duty of clerk.

Approved in *Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 383, following rule; *McMahon v. Hetch-Hetchy etc. Ry. Co.*, 2 Cal. App. 402, 84 Pac. 351, setting aside judgment entered by clerk against one joint defendant on general verdict for plaintiff.

Making and Filing of Findings of fact and conclusions of law constitute rendition of judgment.

Reaffirmed in *Baum v. Roper*, 1 Cal. App. 437, 82 Pac. 391.

Where Findings are Waived or are not required, entry of decision on minutes of court constitutes rendition of judgment.

Approved in *Brownell v. Superior Court*, 157 Cal. 707, 109 Pac. 93, holding entry by clerk on "rough minutes" did not constitute decision when findings and decision were filed later.

Entry of Judgment Nunc Pro Tunc. See note, 20 L. R. A. 144.

Entry or Record Necessary to Complete Judgment or order. See note, 28 L. R. A. 623.

When Statute of Limitations Begins to Run. See note, 86 Am. St. Rep. 294.

89 Cal. 492-500, 26 Pac. 1082, **PEOPLE v. RIBOLSI.**

Name of Thief Need not be Given in indictment charging offense of receiving stolen goods.

Approved in *Curran v. State*, 12 Wyo. 571, 76 Pac. 581, following rule; *Semon v. State*, 158 Ind. 58, 62 N. E. 626, upholding indictment which did not allege name of thief nor person from whom property was received.

89 Cal. 501-506, 26 Pac. 1077, **CLAUDIUS v. AGUIRRE.**

What Constitutes Immediate Delivery or actual change of possession of personal property under section 3440, Civil Code, is question of fact.

Approved in *Rosenberg Bros. & Co. v. Ross*, 6 Cal. App. 760, 93 Pac. 286, *Freeman v. Hensley (Cal.)*, 30 Pac. 792, and *Simons v. Daly*, 9 Idaho, 93, 72 Pac. 508, all following rule; *Roberts v. Burr (Cal.)*, 54 Pac. 852, where no conflict as to facts, question of change of possession was one of law for court.

Where Evidence is Conflicting, and different conclusions might be drawn, finding of trial court is conclusive.

Approved in *Houghton Co. v. Kennedy*, 8 Cal. App. 782, 97 Pac. 907, and *Castle v. Sibley*, 1 Cal. App. 651, 82 Pac. 1068, both following rule.

89 Cal. 522-526, 26 Pac. 1081, CODY v. MURPHEY.

Law Applicable to All Counties of Class authorized by Constitution is neither local nor special law.

Approved in *Johnson v. Gunn*, 148 Cal. 749, 750, 84 Pac. 666, 667, upholding act applying only to counties of thirty-seventh class; *Union Ice Co. v. Rose*, 11 Cal. App. 362, 104 Pac. 1008, upholding act creating Los Angeles police court; *In re Finley*, 1 Cal. App. 210, 81 Pac. 1046, upholding law imposing death penalty on life prisoner for assault with deadly weapon; *Johnson v. Gunn* (Cal. App.), 84 Pac. 373, County Government Act of 1901, section 184, subdivision 13, relating to compensation of justice of peace in counties of twenty-seventh class, is void; *Fleckenstein v. Placer County* (Cal.), 37 Pac. 932, holding Statutes of 1893, page 453, limiting fees of constables, is not local or special legislation.

Distinguished in *Ex parte Sohneke*, 148 Cal. 266, 113 Am. St. Rep. 236, 82 Pac. 958, 2 L. R. A. (n. s.) 813, holding void law fixing interest on chattel mortgage loans on specified kinds of personal property.

89 Cal. 526-535, 26 Pac. 1087, SMITH v. SCHULTZ.

Written Contract for Farming upon Shares, purporting to be lease, and containing mutual covenants, considered and held not to create partnership.

Approved in *Hicks v. Post*, 154 Cal. 27, 96 Pac. 880, holding contract for agency to sell real estate did not create partnership; *Title Insurance & Trust Co. v. Grider*, 152 Cal. 752, 94 Pac. 603, holding agreement whereby one party appointed another his exclusive agent to sell and manage tract of land did not create partnership; *Rogers v. Lawton*, 162 Fed. 207, holding similar contract did not create partnership.

89 Cal. 535-543, 23 Am. St. Rep. 500, 26 Pac. 1097, LEONARD v. FLYNN.

In Ejectment, Mere Fact That Defendant sunk wells with knowledge of plaintiff and without objection does not create estoppel.

Approved in *Verdugo Canyon Water Co. v. Verdugo*, 152 Cal. 674, 93 Pac. 1029, holding sinking wells by defendant with passive acquiescence of plaintiffs did not estop plaintiffs to quiet title to land.

Nature and Elements of Estoppel. See note, 128 Am. St. Rep. 29.

Limitations Commence to Run Against Purchaser at sheriff's sale only when sheriff's deed is delivered to him.

Reaffirmed in *Robinson v. Thornton* (Cal.), 31 Pac. 936.

89 Cal. 543-546, 26 Pac. 1099, LEONARD v. FLYNN.

Prior Possession of Plaintiff is Sufficient Evidence of title to support action of ejectment.

Approved in *Stephens v. Hambleton* (Cal.), 47 Pac. 52, nonsuit in ejectment properly denied where plaintiffs bought property from owner, took bond for deed, and occupied it for two years before defendants ousted them.

Establishment of Prima Facie Title in Ejectment by conveyances not running back to sovereignty, or common source of title. See note, 10 L. R. A. (n. s.) 407.

89 Cal. 547-552, 26 Pac. 1095, LOUIS v. ELFELT.

Termination of Contract of Employment by death of party. See note, 21 L. R. A. (n. s.) 919, 920.

89 Cal. 552-556, 26 Pac. 1084, BAIRD v. MILFORD LAND ETC. CO.

Conveyance of Title to Standing Timber without conveying title to land. See note, 55 L. R. A. 521.

89 Cal. 557-563, 26 Pac. 1103, DYER v. BRADLEY.

Miscellaneous.—Cited in *Dyer v. Martin* (Cal.), 26 Pac. 1105, companion case.

89 Cal. 564-571, 26 Pac. 1093, SWAIN v. BURNETTE.

Conveyance by One Party Under Oral Agreement for exchange of lands is such part performance as takes agreement from statute of frauds.

Reaffirmed in *Pearsall v. Henry*, 153 Cal. 326, 95 Pac. 158.

Undelivered Deed as Memorandum to satisfy statute of frauds. See note, 22 L. R. A. 273.

Order Refusing to Modify Judgment is not appealable.

Distinguished in *Tuffree v. Stearns Ranchos Co.* (Cal.), 54 Pac. 827, holding appealable order denying motion to correct file-mark on judgment when appeal from judgment would not prevent all facts on which motion was based.

89 Cal. 572-574, 26 Pac. 1080, PEOPLE v. WEBSTER.

On Trial for Assault With Deadly Weapon, witness could not testify as to facts of previous disturbance of peace by defendant, of which witness had testified.

Approved in *People v. Smith*, 9 Cal. App. 650, 99 Pac. 1113, holding in murder trial defendant could not be cross-examined as to his habits with lewd women.

Right to Testify to Character from personal knowledge. See note, 22 L. R. A. (n. s.) 656.

89 Cal. 575-583, 26 Pac. 1108, BUTLER v. HYLAND.

Statute of Limitations cannot Run against beneficiary of continuing voluntary trust.

Approved in *Title Insurance etc. Co. v. Ingersoll*, 158 Cal. 486, 111 Pac. 365, holding statute did not run in favor of husband who was trustee of continuing trust to invest wife's money until repudiated by him; *Cooney v. Glynn*, 157 Cal. 587, 589, 108 Pac. 508, holding action to enforce trust continuously recognized by trustee not barred by limitations; *Miller v. Ash*, 156 Cal. 566, 105 Pac. 609, holding delay of forty-five years did not bar action by ward against guardian for conversion of property when ward had no knowledge of facts to put him on inquiry as to repudiation of trust.

Distinguished in *Norton v. Bassett*, 154 Cal. 418, 129 Am. St. Rep. 162, 97 Pac. 897, holding statute runs against beneficiaries of involuntary trust arising upon death of voluntary trustee.

89 Cal. 583-589, 26 Pac. 1070, DENNIS v. STRASSBURGER.

For Purchaser to Recover Back Money paid for real estate, he must allege and prove he has performed all conditions on his part, and that vendor is in default.

Approved in *Foxley v. Rich*, 35 Utah, 178, 99 Pac. 672, following rule; *Gennelle v. Bonlais*, 48 Wash. 313, 93 Pac. 423, holding seller of personalty under conditional sale could not recover property for default of buyer in payment caused by default of seller in refusing to give title free of lien.

Where Covenants of Parties to Agreement are mutual and dependent, neither can put other in default without tender of performance.

Approved in *Hooe v. O'Callahan*, 10 Cal. App. 571, 103 Pac. 176, holding failure to tender deed under contract to convey, containing mutual covenants, barred action thereon.

Memorandum of Contract Whereby Vendor agrees to sell real estate need only be signed by him to render it binding on him.

Reaffirmed in *Silva v. Desky*, 13 Haw. 310.

89 Cal. 590-593, 26 Pac. 1092, HYDE v. BOYLE.

Trial Judge can Amend Bill of Exceptions prepared by parties to make it conform to facts.

Approved in *Harden v. Card*, 14 Wyo. 493, 85 Pac. 249, holding where bill was presented in imperfect state on last day possible, court could permit its correction and sign as though properly presented in required time.

Miscellaneous.—Cited in *Hyde v. Boyle*, 105 Cal. 102, 38 Pac. 643, on another appeal; *Green v. Thornton*, 8 Cal. App. 162, 96 Pac. 383, historically referring to principal case.

89 Cal. 593-597, 26 Pac. 1103, HELM v. WILSON.

In Action for Ejectment, Where It Appears plaintiff owns land, fact that defendant has placed improvements on it does not affect right of recovery.

Approved in *Eshleman v. Malter*, 101 Cal. 235, 35 Pac. 860, applying rule in suit to quiet title.

89 Cal. 597-599, 27 Pac. 66, NEWMAN v. DUANE.

Where Object of Quiet Title Suit is to recover possession, defendant setting up title by adverse possession is entitled to jury trial.

Approved in *Kenny v. McKenzie*, 25 S. D. 489, 127 N. W. 599, and *Burleigh v. Hecht*, 22 S. D. 308, 117 N. W. 370, both following rule; *Stockton v. Oregon Short Line R. Co.*, 170 Fed. 632, holding jury trial was matter of right where legal issue was presented in suit to quiet title; *Atkinson v. Crowe etc. Co.*, 80 Kan. 166, 102 Pac. 52, in action to settle disputed title and recover possession of land, either party had right to jury trial, regardless of form of action.

Distinguished in *McNeil v. Morgan*, 157 Cal. 378, 108 Pac. 70, holding jury trial properly denied to intervener in quiet title suit; *Smith Oyster Co. v. Darbee & Immel Oyster etc. Co.*, 149 Fed. 559, and *Davis v. Judson*, 159 Cal. 126, 113 Pac. 150, both holding jury trial properly denied where action to quiet title presented only equitable issues; *Shields v. Johnson*, 10 Idaho, 482, 79 Pac. 393, where action was brought by party in possession to quiet his title to leasehold estate, neither party was entitled to jury trial; *Costello v. Scott*, 30 Nev. 64, 93 Pac. 4, holding right to jury trial of legal issues in suit to dissolve partnership waived by failure to demand it.

Effect of Legal Remedy upon Equitable Jurisdiction to remove cloud on title. See note, 12 L. R. A. (n. s.) 73.

89 Cal. 599-601, 27 Pac. 158, DEARDORFF v. GUARANTY MUTUAL ACCIDENT ASSOCIATION.

Complaint on Life Insurance Policy issued on mutual assessment plan, which merely alleges absolute insurance in certain sum, does not state cause of action.

Distinguished in *Himmelein v. Supreme Council (Cal.)*, 33 Pac. 1132, complaint on benefit certificate alleging that by its terms and conditions defendant had promised to pay plaintiff certain sum, and that plaintiff had performed all conditions, stated cause of action; *Reed v. Ancient Order of Red Cross*, 8 Idaho, 413, 69 Pac. 128, action at law lay on certificate of membership, providing association would pay out of mortuary assessment amount of one assessment on membership, not exceeding two thousand dollars.

89 Cal. 602-605, 26 Pac. 1071, WATT v. SMITH.

Act Providing Certain Relatives of persons adjudged insane shall support them, if having ability to do so, construed.

Approved in *State Commission in Lunacy v. Eldridge*, 7 Cal. App. 304, 94 Pac. 599, holding act valid; *Richardson v. Stuesser*, 125 Wis. 73, 103 N. W. 264, 69 L. R. A. 829, holding husband not liable for support of wife committed to insane asylum in absence of statute requiring it.

89 Cal. 606-610, 27 Pac. 157, MOWRY v. RAABE.

Where Publication in Regard to Plaintiff is false and malicious and calculated to injure him, he is entitled to damages.

Approved in *Paxton v. Woodward*, 31 Mont. 214, 107 Am. St. Rep. 416, 78 Pac. 219, holding plaintiff entitled to damages for unprivileged publication which tended to injure defendant as teacher.

Defendant Charged With Libel may show by his own testimony he was not actuated by ill-will.

Reaffirmed in *Dorn v. Cooper*, 139 Iowa, 753, 118 N. W. 36.

Right of One to Testify as to His Intent. See note, 23 L. R. A. (n. s.) 392.

Where Newly Discovered Evidence is merely cumulative, and party moving for new trial on such ground makes no showing of diligence, new trial should not be granted.

Approved in *Hall v. Jensen*, 14 Idaho, 174, 93 Pac. 965, holding new trial properly denied.

Cumulative Evidence as Ground for New Trial. See note, 14 L. R. A. 609.

Justification in Slander and Libel. See note, 91 Am. St. Rep. 294.

Truth as Defense to Libel or Slander. See note, 21 L. R. A. 505.

89 Cal. 613-617, 26 Pac. 1094, BURDELL v. TAYLOR.

Competency of Witnesses to Handwriting. See note, 63 L. R. A. 975.

89 Cal. 617-623, 26 Pac. 1101, NICHOLSON v. TARPEY.

Rights of Parties to Written Contract must be ascertained from its terms, and if lost, evidence of intention of parties in making it is inadmissible.

Approved in *Capell v. Fagan*, 30 Mont. 512, 514, 77 Pac. 56, proof of negotiations inadmissible as evidence to establish terms of lost contract; *Scurry v. Seattle*, 56 Wash. 3, 134 Am. St. Rep. 1092, 104

Pac. 1130, holding lost writing not proved when party seeking to prove it could not remember even its substance.

Miscellaneous.—Cited in *Cassin v. Nicholson*, 154 Cal. 499, 98 Pac. 191, referring historically to principal case.

89 Cal. 623-631, 26 Pac. 1106, HARGRO v. HODGDON.

In Action to Abate Nuisance caused by obstruction of public way, complaint which by necessary implication avers special injury to plaintiff is sufficient in absence of special demurrer.

Approved in *City Store v. San Jose-Los Gatos etc. Ry. Co.*, 150 Cal. 279, 88 Pac. 978, holding complaint to abate railroad on street as nuisance did not sufficiently allege special injury to plaintiff; *Brown v. Rea*, 150 Cal. 174, 88 Pac. 714, private owner could maintain suit to abate as nuisance railway occupying street and obstructing access to his property; *Donahue v. Stockton Gas etc. Co.*, 6 Cal. App. 280, 92 Pac. 198, holding complaint to abate public nuisance contained sufficient averment of special injury to plaintiff; *McLean v. Llewellyn Iron Works*, 2 Cal. App. 348, 349, 83 Pac. 1084, 1085, holding private owner could maintain suit to abate obstruction occupying one-half of street opposite his property; *Storm v. City of Butte*, 35 Mont. 395, 89 Pac. 727, upholding complaint against city for injury caused by ice on sidewalk as sufficiently averring city's negligence.

89 Cal. 632-636, 27 Pac. 67, HEALD v. HENDY.

Interest can be Allowed, Under Section 1917, Civil Code, only on ascertained balance on settlement of account from date of settlement.

Approved in *Erickson v. Stockton etc. R. R. Co.*, 148 Cal. 208, 82 Pac. 961, and *Grangers' Union v. Ashe*, 12 Cal. App. 759, 108 Pac. 534, both following rule; *Hooper v. Patterson (Cal.)*, 32 Pac. 515, interest could be allowed on damages in injunction suit only from date they were liquidated.

Liability of Principal for Unauthorized acts of agent. See note, 88 Am. St. Rep. 783.

89 Cal. 636-637, 27 Pac. 56, HUNT v. MALDONADO.

Guardian of Minor is Personally Liable for services of attorney employed by him in course of performance of his duties.

Approved in *Lothrop v. Duffield*, 134 Mich. 487, 96 N. W. 578, following rule; *Davidson v. Wampler*, 29 Mont. 67, 74 Pac. 84, holding void mortgage by guardian of ward's estate when court had no power to give order permitting mortgage.

Criticised in *McCoy v. Lane*, 66 Neb. 851, 92 N. W. 1012, holding guardian could bind estate of ward by contract for services reasonably necessary to preserve ward's estate.

Common-law Powers of Guardians. See note, 89 Am. St. Rep. 282.

89 Cal. 638-642, 27 Pac. 57, KUBLI v. HAWKETT.

Trial Court has Power to Dismiss Action for want of prosecution.

Approved in *Gray v. Times-Mirror Co.*, 11 Cal. App. 160, 104 Pac. 482, following rule.

Burden is on Plaintiff to Urge hearing of demurrer.

Approved in *Gray v. Times-Mirror Co.*, 11 Cal. App. 163, 104 Pac. 484, following rule; *Miller v. Queen Ins. Co.*, 2 Cal. App. 269, 83 Pac.

288, holding burden is on moving party to urge all steps necessary for new trial.

Appeal Does not Lie from Order refusing to set aside appealable judgment or order.

Reaffirmed in *Green v. Thatcher*, 31 Colo. 364, 72 Pac. 1079, and *Huse v. Den* (Cal.), 80 Pac. 1104.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 90 CALIFORNIA.

90 Cal. 1-10, 27 Pac. 52, BRADY v. BURKE.

Until Judgment is Entered, trial court retains complete jurisdiction of action, of which it cannot be divested by unauthorized appeal.

Approved in *Ex parte Monckros Von Vetsera*, 7 Cal. App. 139, 93 Pac. 1037, following rule; *Brownell v. Superior Court*, 157 Cal. 708, 109 Pac. 93, holding court may amend conclusions of law so as to point to different judgment until entry of judgment; *Deere & Weber Co. v. Hinckley*, 20 S. D. 362, 106 N. W. 139, where order attempted to be appealed from is clearly not appealable order, court may so declare, and hold appeal ineffectual for any purpose.

Where Street Work is not Completed within time fixed by contract, and order of supervisors granting extension is not made until after expiration of contract time, contractor acquires no valid lien upon property, and sheriff's deed, upon foreclosure, vests no title in purchaser.

Reaffirmed in *Palmer v. Burnham* (Cal.), 47 Pac. 600.

A Title to Land Under Judgment of foreclosure of street assessment lien relates back to date of original liens foreclosed.

Reaffirmed in *Purser v. Cady* (Cal.), 49 Pac. 181.

Superiority of Lien of Local Assessment over prior lien. See note, 35 L. R. A. 376, 378.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 630.

90 Cal. 10-15, 27 Pac. 159, 296, NILES v. EDWARDS.

Where Judgment for Defendant in Action for damages for conversion is reversed on appeal, judgment for plaintiff for highest market value of property between time of conversion and verdict cannot be ordered, unless findings also find that action was prosecuted with reasonable diligence.

Distinguished in *Clapp v. Vatcher*, 9 Cal. App. 467, 99 Pac. 551, where plaintiff, as beneficiary, sues involuntary trustee for proceeds of sale of trust property, measure of damages is amount of proceeds with interest, under Civil Code, section 2237.

Conversion of Pledged Property by invalid sale. See note, 43 L. R. A. 744.

90 Cal. 15-22, 27 Pac. 22, EGAN v. EGAN.

Clerical Misprisions in a Judgment can be corrected at any time by order of court.

Approved in *Forrester v. Lawler*, 14 Cal. App. 173, 111 Pac. 285, court may allow amendments, regardless of lapse of time, where record as entered by clerk fails to conform to judgment rendered by court.

Distinguished in *San Francisco v. Brown*, 153 Cal. 649, 551, 96 Pac. 283, 284, where clerk entered judgment entirely different from what court had rendered.

Judicial Errors can be Remedied only through motion for new trial, or on appeal.

Approved in *Forrester v. Lawler*, 14 Cal. App. 174, 111 Pac. 285, *Mann v. Mann*, 6 Cal. App. 612, 613, 92 Pac. 741, 742, and *Worth v. Emerson*, 3 Cal. App. 160, 85 Pac. 664, all following rule.

Under Code of Civil Procedure, Section 473, court may relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, provided application therefor is made within reasonable time, not to exceed six months.

Approved in *Hynes v. Barnes*, 30 Mont. 28, 75 Pac. 524, holding that district court, prior to appeal, has power to correct its judgments "in certain particulars."

90 Cal. 22-25, 27 Pac. 60, FIRST BAPTIST CHURCH v. BRANHAM.

Trustees of Corporation De Facto may sue in its corporate name, until its existence is called in question by direct proceeding of attorney general.

Approved in *Cumberland Telegraph etc. Co. v. Louisville Home Telephone Co.*, 114 Ky. 898, 72 S. W. 6, following rule; *Creditors' Union v. Lundy*, 16 Cal. App. 571, 117 Pac. 626, holding secondary evidence of incorporation of assignee of note sufficient to show its de facto incorporation; *Reclamation District v. McPhee*, 13 Cal. App. 388, 109 Pac. 1108, where de facto existence is shown, corporation's right to exist can be determined only upon quo warranto proceedings.

90 Cal. 25-36, 25 Am. St. Rep. 92, 27 Pac. 26, SMITH v. DAVIS.

Where Trust Deed Respecting Land in Another State, executed in this state, provides that if trustee named therein fail or refuse to accept, new trustee may be appointed by court of competent jurisdiction, court of this state acquiring jurisdiction of parties may appoint new trustee where trustee named refuses to act.

Approved in *Estate of Tessier*, 2 Cof. Prob. 368, holding that a trust will not be permitted to fail for want of trustee.

Jurisdiction of Equity Over Suits affecting realty in another state or country. See note, 69 L. R. A. 680, 681.

90 Cal. 37-41, 27 Pac. 61, SCHMIDT v. MARKET ST. R. R. CO.

Published Notice of Street Work, containing whole of resolution for improvement, and date and fact of its passage, is not rendered defective by omission to make formal reference to resolution for further particulars.

Approved in *Owens v. City of Marion*, 127 Iowa, 475, 103 N. W. 383, it is not necessary that notice of special assessment for street improvement specify time when objection thereto will be heard.

90 Cal. 41-43, 27 Pac. 62, PEOPLE v. BARRY.

It is Error to Instruct That Jury might find defendant guilty of lesser crime than that charged, where evidence tends to show he was guilty of crime charged, or of no offense at all.

Approved in *Republic of Hawaii v. Kapea*, 11 Haw. 311, where no evidence upon which jury can find defendant guilty of lesser degree of offense than charged, not error to charge that jury should find him guilty of offense charged or find not guilty; *State v. Kapelino*, 20 S. D. 598, 108 N. W. 339, where offense charged not divided into degrees, court not required to charge as to offense that might be included in charge made, but which evidence will not warrant; *State v. McPhail*, 39 Wash. 204, 81 Pac. 685, where there is evidence proving inferior degree of crime than charged in information, court must submit it by proper instructions, but if no testimony proving lesser crime, court not required to submit it.

90 Cal. 43-48, 27 Pac. 48, JACOBS v. WALKER.

Fact That School Land Mostly Covered with timber and more valuable therefor than for agriculture, and will not produce average crop when cleared, does not render it unsuitable for cultivation within meaning of Constitution, if land or some portion of it is suitable for cultivation.

Approved in *Sanford v. Maxwell*, 3 Cal. App. 246, 84 Pac. 1002, following rule; *Robinson v. Eberhart*, 148 Cal. 499, 83 Pac. 454, holding it is question of fact whether state land applied for is suitable for cultivation within meaning of Constitution.

Land may be Valuable for Timber upon it, and also valuable for agricultural purposes after it is cleared.

Approved in *Robinson v. Eberhart*, 148 Cal. 500, 83 Pac. 454, holding clearing land of timber an ordinary farming process.

In Action to Determine Right to Purchase school lands between adverse claimants, court's judgment is limited to land in contest.

Approved in *Kleinsorge v. Burgbacher*, 6 Cal. App. 353, 92 Pac. 202, jurisdiction exercised by court to which contest is referred is special and limited, and is derived from and restricted to matters embraced in order of reference.

Miscellaneous.—Cited in *Jacobs v. Walker* (Cal.), 33 Pac. 91, on another appeal.

90 Cal. 49-64, 27 Pac. 40, BEDINGTON v. CORNWELL.

Corporation cannot Extend Rights of subrogated stockholder beyond statutory period by paying him promissory note of corporation.

Approved in *O'Neill v. Quarnstrom*, 6 Cal. App. 473, 92 Pac. 392, liability of stockholder relates to original debt of corporation upon which he is chargeable, and giving of a note, as evidence of debt, by which debt is renewed, cannot extend liability of stockholder or prevent statute from running.

Statute of Limitations in Actions against corporate officers and stockholders. See note, 96 Am. St. Rep. 976.

Subrogation is Allowed Whenever One Party, not mere volunteer, for his own protection, pays debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by latter.

Approved in *Alberti v. Moore*, 20 Okl. 89, 93 Pac. 548, 14 L. R. A. (n.s.) 1036, following rule; *Brinckerhoff v. Holland Trust Co.*, 159 Fed. 200, agent who is negligent in management of principal's property and who is compelled to reimburse him will be subrogated to rights of principal against one primarily causing loss, unless he was not merely negligent, but his conduct was such that he was not entitled to consideration of court of equity.

Distinguished in *Yule v. Bishop* (Cal.), 62 Pac. 70, under Civil Code, section 1473, indorser of corporation's note, who paid same and took assignment thereof from payee, cannot maintain action thereon, since debt was extinguished, thus differing from enforcement of statutory liability of stockholder for such debt; *Carstenbrook v. Wedderien*, 7 Cal. App. 469, 94 Pac. 373, where parties attach property secured by chattel mortgage and are compelled to pay mortgage debt, and mortgagee thereupon cancels mortgage, they are not entitled to equitable subrogation to cancel release and foreclose mortgage where no equitable facts appear to warrant it.

Right of Subrogation. See note, 99 Am. St. Rep. 505.

Effect of Payment of Debt by Volunteer or stranger to original undertaking. See note, 23 L. R. A. 125, 127.

90 Cal. 64-67, 25 Am. St. Rep. 100, 27 Pac. 30, **DORE v. THORNBURGH.**

Code of Civil Procedure, Section 343, applies to all suits in equity and law not otherwise provided for, and hence applies to action on foreign judgment.

Cited in *Meigs v. Pinkham*, 159 Cal. 111, 112 Pac. 886, arguendo.

90 Cal. 72-74, 27 Pac. 64, **GILL v. DRIVER.**

Where Ultimate Facts are Found which support judgment, no finding of probative facts which may tend to establish that ultimate facts were found against evidence can overcome finding of ultimate facts.

Approved in *Chaffee-Miller Land Co. v. Barber*, 12 N. D. 485, 97 N. W. 852, following rule; *People v. McCue*, 150 Cal. 199, 88 Pac. 901, if findings of fact are reasonably susceptible of such construction as will support judgment, they must receive that construction rather than one which will not support it; *Jules Levy & Bro. v. Mautz*, 16 Cal. App. 669, 117 Pac. 937, applying rule in action for breach of contract for purchase of goods for period of years; *Vasey v. Campbell*, 4 Cal. App. 454, 88 Pac. 509, findings as to ultimate facts control as against findings of probative facts.

90 Cal. 78-83, 27 Pac. 24, **RAYNER v. JONES.**

Pendency of Appeal from Judgment does not affect jurisdiction of court below to hear and pass upon motion for new trial.

Distinguished in *United Rys. Co. v. Corbin*, 109 Md. 57, 71 Atl. 132, under Maryland law, final judgment cannot be entered until after motion for new trial is determined, if within time allowed for such motion, and hence no such question could arise under Maryland law as that in principal case.

90 Cal. 84-89, 27 Pac. 58, **CARRIE v. CLOVERDALE ETC. COMMERCIAL CO.**

Measure of Damages in Action of trover for conversion of interest of one partner in partnership property is value of his undivided

share in property converted, irrespective of question of solvency of partnership, and of state of partnership accounts.

Approved in *Doll v. Hennessy Mercantile Co.*, 33 Mont. 89, 81 Pac. 627, following rule.

Under Action on Alleged Invalidity of contract of sale, court may allow complaint to be so amended as to state all grounds upon which it is claimed such contract is invalid.

Approved in *Raley v. Raymond Bros. Clarke Co.*, 73 Neb. 504, 103 N. W. 60, amendment is permissible which does not change cause of action, but merely sets forth new assignment or breach springing from original cause.

90 Cal. 95-101, 27 Pac. 29, SMITH v. BUTTNER.

Negligence may be Charged in General Terms, stating that act was negligently done without stating particular omission which rendered act negligent.

Approved in *Forquer v. North*, 42 Mont. 280, 112 Pac. 441, if doing of or failing to do certain acts, under certain circumstances, constitutes negligence, it is sufficient, after specifying acts or omissions, to say that they were negligently done, or that defendant negligently failed to do them.

Distinguished in *Pullen v. City of Butte*, 38 Mont. 195, 99 Pac. 290, 21 L. R. A. (n.s.) 42, pleader must set out acts or omissions of defendant upon which he bases right to recover, and should show that they occurred through negligence of defendant; and allegation that city negligently placed sidewalks in defective condition and permitted them so to remain was bare legal conclusion.

Although Pleading may Charge Negligence in general terms, without stating particular omission, nevertheless it must appear from facts averred that alleged negligence caused or contributed to injury.

Approved in *Stein v. United Railroads*, 159 Cal. 370, 113 Pac. 664, *Fisher v. Western Fuse etc. Co.*, 12 Cal. App. 747, 108 Pac. 663, and *McGehee v. Schiffman*, 4 Cal. App. 53, 87 Pac. 291, all following rule; *Cary v. Los Angeles Ry. Co.*, 157 Cal. 603, 108 Pac. 684, while it is permissible to charge negligence in general terms, it is nevertheless necessary to specify particular acts alleged to have been negligently done.

Distinguished in *Rathbum v. White*, 157 Cal. 254, 107 Pac. 311, although failure to aver causal connection between omission and injury was defect, the pleading could properly be cured by amendment in advance of another trial, upon leave.

Sufficiency of General Allegations of negligence. See note, 59 L. R. A. 212, 213.

In Construing Pleadings Before Judgment, it is presumed that pleader has stated his case in most favorable manner to himself, and where he fails to make more specific statement in certain particular, it will be presumed that such a statement would have weakened his case.

Approved in *Witham v. Blood*, 124 Iowa, 699, 100 N. W. 559, nothing will be assumed in favor of pleader which is not averred, or may not, upon liberal and fair interpretation, be implied from his averments.

Liability of Landlord for Injury to Tenant from defect in premises. See note, 34 L. R. A. 830.

Miscellaneous.—Cited in *Bianchi v. Del Valle*, 117 La. 592, 42 So. 150, construing Civil Code, article 2694, relative to duty of landlord to make repairs.

90 Cal. 101-105, 27 Pac. 49, AGASSIZ v. SUPERIOR COURT.

Prohibition will not Lie to Restrain plaintiff from proceeding with intermediate question, such as validity of attachment or jurisdiction of court, there being a remedy by appeal.

Approved in *Lightner Mining Co. v. Superior Court*, 14 Cal. App. 650, 651, 112 Pac. 912, 913, where property of nonresidents is attached in action on stock subscription, prohibition will not lie to restrain plaintiff from proceeding, upon ground that action is one in which no attachment will lie; *Lange v. Superior Court*, 11 Cal. App. 6, 103 Pac. 910, in case of execution of judgment for contempt for violation of injunction, where court acted within jurisdiction; *Hubbard v. Justice's Court*, 5 Cal. App. 91, 92, 89 Pac. 865, denying prohibition where inferior court committed error in taking jurisdiction; *Johnston v. Superior Court*, 4 Cal. App. 92, 87 Pac. 212, where erroneous holding of trial court as to whether certain matters of heirship and degree of kinship in probate case were relevant to main inquiry, either as pleading or proof, was held mere error reviewable and correctible through ordinary remedy of appeal; *Cross v. Superior Court*, 2 Cal. App. 344, 83 Pac. 814, in case of proceedings to enforce collateral inheritance tax; *State v. Morse*, 27 Utah, 340, 75 Pac. 741, where action was sought to restrain criminal proceedings upon questions arising under statutory rule providing that magistrate, when complaint is before him, charging crime, must examine complaint under oath.

Writ of Prohibition. See note, 111 Am. St. Rep. 960.

90 Cal. 105-109, 27 Pac. 55, GARNIER v. PORTER.

One Setting Fire to Brush on His Own Land, solely for purpose of preparing same for plow, and intending to control fire, and who uses due care and diligence to control it, not guilty of illegal act under Penal Code, section 384, and Political Code, section 3344.

Approved in *McVay v. Central California Ins. Co.*, 6 Cal. App. 187, 91 Pac. 746, where evidence conflicts as to whether wind was blowing toward plaintiff's land when fire started, it cannot be said, as matter of law, that defendant was not negligent in starting fire.

Liability for Setting Fires which spread to property of others. See note, 21 L. R. A. 262.

90 Cal. 110-121, 25 Am. St. Rep. 102, 27 Pac. 36, PACIFIC FACTOR CO. v. ADLER.

Where It can be Shown That Contract, not on its face void as being in restraint of trade, formed part of scheme to establish monopoly; it is void.

Approved in *Grogan v. Chaffee*, 156 Cal. 613, 105 Pac. 747, 27 L. R. A. (n. s.) 395, *Benicia Agricultural Works v. Estes* (Cal.), 32 Pac. 940, *State v. Standard Oil Co.*, 218 Mo. 350, 116 S. W. 1009, and *Anderson v. Shawnee Com. Co.*, 17 Okl. 245, 87 Pac. 319, all following rule; *Hunt v. Riverside Co-operative Club*, 140 Mich. 543, 112 Am. St. Rep. 420, 104 N. W. 42, though contracts, considered by themselves, are legal, they may be merely steps to effect accomplishment of illegal object, and for that reason illegal.

Distinguished in *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 608, 117 Pac. 771, discussing question as to whether raisin growers' association was monopoly.

Validity of Contract Giving Exclusive local right to handle goods. See note, 9 L. R. A. (n. s.) 503.

Validity of Agreement not to Compete, ancillary to sale or lease, as affected by covenantee's purpose to procure monopoly. See note, 15 L. R. A. (n. s.) 849.

Validity of Contracts of Sale in restraint of trade without limitation of place. See note, 22 L. R. A. 675.

Clause in Contract Fixing Amount to be paid as liquidated damages does not preclude court from determining whether it would be impracticable or extremely difficult to fix actual damage.

Reaffirmed in *Sherman v. Gray*, 11 Cal. App. 352, 104 Pac. 1005.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 52, 63.

90 Cal. 122-126, 27 Pac. 21, **RAYMOND v. McMULLEN.**

Miscellaneous.—Cited in *Hartshorne v. McMullen* (Cal.), 27 Pac. 22, companion case.

90 Cal. 126-131, 25 Am. St. Rep. 110, 27 Pac. 33, 13 L. R. A. 605, **SWIM v. WILSON.**

It is No Defense to Action for Conversion that defendant acted as agent for third person claiming to own it, although he acted in good faith and in ignorance of such third person's want of title.

Reaffirmed in *Johnson v. Martin*, 87 Minn. 375, 92 N. W. 222.

Liability of Servant or Agent for Conversion, trespass, or other positive tort against third parties under orders. See note, 50 L. R. A. 655.

Liability of Agent Toward Principal and third person respectively for money or property received in course of agency. See note, 2 L. R. A. (n. s.) 660.

Title Acquired by Bona Fide Purchaser of stolen property. See note, 103 Am. St. Rep. 982.

Sales of Property by persons without title. See note, 94 Am. St. Rep. 709.

Law of Auction Sales. See note, 131 Am. St. Rep. 500.

90 Cal. 131-146, 27 Pac. 44, **EXCELSIOR WATER & MIN. CO. v. PIERCE.**

Directors of Mining Corporation not Liable to corporation merely because they declare and pay dividends out of net proceeds without first paying whole of debts.

Distinguished in *Siegman v. Maloney*, 63 N. J. Eq. 438, 51 Atl. 1009, under statutory provision that no corporation shall make dividends except from surplus or net profits of business, and that directors shall be liable to corporation for full amount of dividend paid, with interest, stockholders to whom directors paid such prohibited dividends cannot maintain suit on behalf of company to compel directors to repay, without regard to company's financial condition, or whether money is needed to pay creditors, since such section is limited to cases where corporation's assets are insufficient to pay its creditors.

Liability of Directors to Corporation. See note, 55 L. R. A. 763.

"Capital Stock" of Corporation which directors are forbidden to divide under Civil Code, section 309, is actual property of corporation contributed by shareholders of nominal or share capital.

Approved in *Tapscott v. Mexican-Colorado River Land Co.*, 153 Cal. 668, 96 Pac. 273, following rule; *Burne v. Lee*, 156 Cal. 229, 104 Pac. 441, "capital stock," under Civil Code, section 309, means actual capital used in conduct of business as distinguished from shares of nominal capital of corporation.

90 Cal. 157-163, 27 Pac. 71, **BARNHART v. FULKERTH.**

Levy Made in Sole Reliance upon plaintiff's statement that he held possession as pledgee of execution debtor, who was owner, sufficient defense by estoppel as against plaintiff.

Distinguished in *Paden v. Goldbaum (Cal.)*, 37 Pac. 762, where husband pastures stock of wife in return for their use for dairy purposes, she reserving increase, this use by him, accompanied by his representations that they were his, cannot, in absence of such representation on her part, estop her from setting up ownership to defeat execution levied on stock under judgment against husband.

90 Cal. 163-168, 27 Pac. 69, **NUTTALL v. LOVEJOY.**

Where Findings Do not Determine all material issues raised by pleadings with respect to which evidence was introduced, new trial may be granted on ground that decision was against law.

Approved in *Aydelotte v. Billing*, 8 Cal. App. 674, 97 Pac. 699, *Brown v. Macey*, 13 Idaho, 455, 90 Pac. 341, and *Hamilton v. Murray*, 29 Mont. 86, 74 Pac. 76, all following rule; *Hayden v. Collins*, 1 Cal. App. 262, 81 Pac. 1122, where defendant took issue upon plaintiff's ownership and right of possession, issues were properly involved and tried in action of ejectment, court being compelled to admit evidence and find on issues presented.

90 Cal. 168-169, 27 Pac. 21, **PALMER v. MARYSVILLE ETC. PUB. CO.**

Trial Court cannot Grant Nonsuit, unless grounds therefor are called to attention of trial judge and plaintiff when motion is made.

Approved in *Smalley v. Rio Grande Western Ry. Co.*, 34 Utah, 442, 98 Pac. 316, following rule; *Estate of Higgins*, 156 Cal. 261, 104 Pac. 8, where defect urged to support nonsuit is one which plaintiff could have cured, if called to his attention, defendant cannot urge it for first time on appeal.

Distinguished in *Pacific Mill. Co. v. Inman*, 50 Or. 27, 90 Pac. 1101, where, on second trial, issues are charged, and much evidence on former trial now excluded, decision of supreme court on appeal from judgment on former trial on question of nonsuit not law of case on second appeal.

90 Cal. 169-172, 27 Pac. 68, **ESTATE OF MISAMORE.**

Right to Rents on Lease of Intestate's Property. See note, 40 L. R. A. 324.

90 Cal. 172-174, 27 Pac. 157, **NOTMAN v. GREEN.**

Complaint in Action upon Promissory Note which contains no allegation of nonpayment of note is fatally defective.

Approved in *Dessart v. Bonyng*, 10 Ariz. 39, 85 Pac. 724, in action to reform deed of trust, trustee was not allowed to reform it to include other lands, without showing that debt secured had not been paid.

90 Cal. 177-179, 27 Pac. 19, **WHITE v. BUELL.**

In *Installment Contract for Sale of Property*, with initial cash payment as forfeit, deed to be executed at fixed date upon payment of third deferred installment, time being of essence, if vendee pays first deferred installment and then elects to forfeit original cash payment, and refuses to proceed further under contract, he may recover back first installment of price.

Approved in *Foxley v. Rich*, 35 Utah, 176, 99 Pac. 671, in contract to convey with provision for payment of price at stipulated periods, and upon default, escrow deed to be returned to vendor and previous payments to be applied as rent, upon breach by vendee, he was entitled to have unpaid purchase money notes returned.

90 Cal. 181-186, 27 Pac. 39, **ONTARIO LAND & IMP. CO. v. BEDFORD.**

Ordinary Meaning of Word "Lot," when used with reference to city property, is subdivision of block according to map or survey of such city.

Approved in *Town of Greendale v. Suit*, 163 Ind. 284, 71 N. E. 659, following rule.

Under Civil Code, Section 694, where judgment of foreclosure is silent as to manner or order of sale of property, judgment debtor may direct same.

Cited in dissenting opinion in *Estudillo v. Security Loan etc. Co.*, 149 Cal. 568, 87 Pac. 24, *arguendo*.

90 Cal. 190-195, 27 Pac. 201, **FAIRCHILD v. MULLAN.**

Under Contract Whereby Vendor Gave Bond for deed, and received part of price, holding legal title as security for remainder, if vendee fails to complete purchase, vendor's remedy is to institute proceedings to foreclose rights of vendee to purchase under contract.

Approved in *Southern Pac. R. Co. v. Allen (Cal.)*, 40 Pac. 753, where vendor agreed to convey within five years, if title were obtained from government, and vendee paid part cash, balance being secured by mortgage, with interest, vendor was entitled to use of money to be paid annually as interest.

90 Cal. 195-201, 27 Pac. 204, **PEOPLE v. BAWDEN.**

Objection That There was No Preliminary Examination and commitment of defendant by magistrate before filing of information not ground for motion for new trial, by Penal Code, section 1181.

Approved in *People v. Amer*, 151 Cal. 306, 90 Pac. 699, in criminal case, by Penal Code, section 1181, motion for new trial can be granted only in cases therein mentioned.

Burden is on Defendant Asserting insanity to establish it by preponderance of evidence.

Reaffirmed in *People v. Willard*, 150 Cal. 552, 89 Pac. 128.

Disapproved in *State v. Shuff*, 9 Idaho, 131, 72 Pac. 670, it is error to instruct that, to establish defense on ground of insanity, defendant must clearly prove it by preponderance of evidence.

Presumption and Burden of Proof as to sanity. See note, 36 L. R. A. 727.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 739, 740.

Insanity After Commission of Criminal Act. See note, 38 L. R. A. 585.

90 Cal. 208-212, 27 Pac. 209, 13 L. R. A. 574, **EX PARTE VANCE.**

Unauthorized Release of Prisoner Under Sentence, without having been discharged in due course of law, is technical escape, and cannot be computed as any part of term of imprisonment.

Approved in *In re Collins*, 8 Cal. App. 370, 97 Pac. 190, *Ex parte Eldridge*, 3 Okl. Cr. 503, 139 Am. St. Rep. 967, 106 Pac. 981, and *In re McCauley*, 123 Wis. 33, 100 N. W. 1032, all following rule; *Miller v. Evans*, 115 Iowa, 105, 91 Am. St. Rep. 143, 88 N. W. 200, 56 L. R. A. 101, where sheriff neglected to execute order until after defendant's incarceration would have expired if begun on day of judgment, expiration of such time without imprisonment not to be considered in satisfaction of judgment.

90 Cal. 212-213, 27 Pac. 200, **PEOPLE v. STEWART.**

Who is an Accomplice. See note, 138 Am. St. Rep. 284.

90 Cal. 215-220, 27 Pac. 193, **ACOCK v. HALSEY.**

Action is not Dismissed Until Judgment of dismissal is entered by clerk.

Approved in *Truett v. Onderdonk* (Cal.), 50 Pac. 396, *Lunnum v. Morris*, 7 Cal. App. 712, 95 Pac. 910, and *Lunnum v. Morris*, 7 Cal. App. 715, 95 Pac. 909, all following rule; *Wolters v. Rossi* (Cal.), 57 Pac. 76, upon such entry of judgment on order of plaintiff dismissing action before answer filed, court loses jurisdiction, and cannot thereafter vacate judgment.

Want of Written Notice to Vacate Judgment is waived if counsel for each party is present at hearing of motion and participates therein.

Approved in *Bohn v. Bohn*, 16 Cal. App. 181, 116 Pac. 569, applying rule to motion to change place of trial.

90 Cal. 221-230, 27 Pac. 198, **SPARGUE v. HEARD.**

One Acquiring Right to Appropriate Waters of stream as against another riparian owner is entitled to perpetual injunction, without proof of damages, where latter obstructs his flow and threatens to continue so doing.

Approved in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 333, 88 Pac. 981, 11 L. R. A. (n.s.) 1062, and *Hubbs etc. Ditch Co. v. Pioneer Water Co.*, 148 Cal. 417, 83 Pac. 257, both following rule.

Grantee of Person Appropriating Water by ditch who continues right adversely, for full statutory period, obtains prescriptive right as against grantor and others.

Approved in *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 532, 89 Pac. 343, following rule.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 712.

90 Cal. 231-238, 27 Pac. 194, **MOTT v. EWING.**

Finding is Sufficient if Material ultimate facts necessarily result from probative facts found.

Reaffirmed in *O'Niell v. Quarnstrom*, 6 Cal. App. 471, 92 Pac. 392.

90 Cal. 240-245, 27 Pac. 191, **PEYRE v. MUTUAL RELIEF SOCIETY.**

Member of Incorporated Benevolent Association cannot maintain action against same to recover damages because of his suspension under provision of by-laws.

Distinguished in *Thompson v. Grand International etc. of Engineers*, 41 Tex. Civ. 190, 91 S. W. 840, where expulsion from fraternal association carried with it loss of pecuniary benefits, member wrongfully expelled entitled to sue for damages.

Effect of Expulsion from Society on right to insurance connected therewith. See note, 25 L. R. A. 150.

Conclusiveness of Decisions of Tribunals of associations or corporations. See note, 49 L. R. A. 356.

90 Cal. 245-256, 25 Am. St. Rep. 114, 27 Pac. 211, **CURTISS v. AETNA LIFE INS. CO.**

A Debt, Even Though not Legally Collectible by reason of bar of statute of limitations, gives insurable interest.

Approved in *Insurance Co. v. Dunscomb*, 108 Tenn. 730, 91 Am. St. Rep. 769, 69 S. W. 346, 58 L. R. A. 694, where policy on life of debtor is issued payable to his creditor, to amount of his debt to him, creditor has right to insurance, to amount of debt, as against debtor's representatives, though debt is barred by limitations.

Life Insurance of Creditor by His Debtor. See note, 91 Am. St. Rep. 777.

Life Insurance in Favor of Persons having no insurable interest. See note, 128 Am. St. Rep. 319.

Assignment of Life Insurance Policy as collateral security is not within meaning of proviso in policy that any claim made by any assignee shall be subject to proof of interest.

Approved in *Rylander v. Allen*, 125 Ga. 215, 53 S. E. 1037, 6 L. R. A. (n.s.) 128, one has right to procure insurance on his own life, and assign policy to another, who has no insurable interest in life insured, provided it be not done by way of cover for wager policy; *Farmers & Traders' Bank v. Johnson*, 118 Iowa, 286, 91 N. W. 1075, assignment of policy to secure loan to beneficiary valid, though assignee had no insurable interest in life of assured or of beneficiary.

Assignment of Life Insurance Policies. See note, 87 Am. St. Rep. 509, 510.

If Agreement, to be Valid, must have Been in writing, then allegation that it was so agreed implies that it was so agreed in writing.

Approved in *Levy v. Ryland*, 32 Nev. 469, 109 Pac. 908, where complaint is silent as to whether contract sued on is oral or written, to invoke statute to defeat action it must be pleaded by answer and cannot be raised by demurrer.

Conflict of Laws as to Insurance Contracts. See note, 63 L. R. A. 840, 860.

90 Cal. 257-260, 27 Pac. 195, IN RE GATES.

Under Code of Civil Procedure, Section 652, appellate court cannot review question whether matter proposed by way of amendment to bill of exceptions shall be allowed except in single instance where trial judge refuses to allow exception.

Reaffirmed in *Springer v. Springer* (Cal.), 64 Pac. 472.

90 Cal. 266-276, 27 Pac. 215, 13 L. R. A. 711, COHEN v. KNOX.

Omission of Material Fact in Complaint is cured by its averment in defendant's cross-complaint, and admission of such averment in answer to cross-complaint.

Approved in *Mahoney v. American Land etc. Co.*, 2 Cal. App. 189, 83 Pac. 269, and *Donegan v. Houston*, 5 Cal. 632, 90 Pac. 1075, both following rule; *Donegan v. Houston*, 5 Cal. App. 632, 90 Pac. 1075, where all issues which were claimed should have been tendered were set forth by answer, counterclaim and cross-complaint of defendant, and issues joined thereon by plaintiff's answer thereto, any objections to insufficiency of complaint are thereby waived and cured.

Marriage is Sufficient Consideration to support conveyance.

Reaffirmed in *Welch v. Mann*, 193 Mo. 316, 92 S. W. 101.

90 Cal. 276-279, 27 Pac. 197, DYER v. PLACER COUNTY.

Violation of Act Providing for Punishment, by fine, of anyone fraudulently evading payment of railroad fare, constitutes public offense.

Approved in *State v. Central Lumber Co.*, 24 S. D. 149, 123 N. W. 508, where violation of law prohibiting unfair discrimination was punishable by fine.

90 Cal. 279-289, 27 Pac. 216, DORRIS v. SULLIVAN.

Defendant not Entitled to Specifically Enforce Contract, where no showing that plaintiff could not perform, in absence of proof of tender of full performance by defendant, and request from him of full performance by plaintiff.

Approved in *Swanston v. Clark*, 153 Cal. 303, 95 Pac. 1119, plea of rescission of contract insufficient where it admitted making of valuable improvements by plaintiff and did not offer to compensate plaintiff therefor.

Verbal Contract for Use of Certain quantity of water from ditch, to be used perpetually for irrigating, is within statute of frauds and cannot create servitude or easement upon ditch property.

Approved in *Stanislaus Water Co. v. Bachman*, 152 Cal. 727, 93 Pac. 863, 15 L. R. A. (n.s.) 359, right to water diverted from canal for conducting to lands for irrigation real and not personal property.

Transfer of Right to Use Water for irrigation. See note, 65 L. R. A. 413.

Revocability of License to Maintain Burden on land, after licensee has incurred expense. See note, 49 L. R. A. 503.

90 Cal. 289-296, 27 Pac. 208, 376, HICK v. THOMAS.

Rule That All Verbal Precedent Negotiations were merged in writings does not apply in action to set aside conveyances based upon fraud.

Reaffirmed in *Shelton v. Healy*, 74 Conn. 271, 50 Atl. 742, 744.

90 Cal. 297-306, 27 Pac. 283, CASHMAN v. HARRISON.

Parol Evidence Inadmissible to Vary Bill of exchange except to prove want of consideration, fraud, accident, or mistake, which might nullify instrument.

Approved in dissenting opinion in *Wright v. Beeson*, 159 Cal. 141, 112 Pac. 1094, majority holding that written contract was subject to modification by subsequent executed oral agreement, for payment on terms different from those contained in original contract.

Where Plaintiff Entitled to Rebut Certain Evidence, fact that he offered same in chief and no objection made that such was out of proper order is harmless irregularity.

Approved in *Nuckollis v. College of Physicians and Surgeons*, 7 Cal. App. 235, 94 Pac. 81, following rule.

90 Cal. 307-318, 25 Am. St. Rep. 123, 27 Pac. 280, EASTON v. MONTGOMERY.

Vendor Need not be Absolute Owner of property at date of agreement of sale.

Approved in *Backman v. Park*, 157 Cal. 609, 137 Am. St. Rep. 153, 108 Pac. 687, and *Donovan v. Hanauer*, 32 Utah, 326, 90 Pac. 572, both following rule; *Backman v. Park*, 157 Cal. 611, 137 Am. St. Rep. 153, 108 Pac. 687, where vendor was without any title at time of contract; *Wolff v. Cloyne*, 156 Cal. 749, 106 Pac. 106, contract for sale of land not lacking in mutuality, so as to prevent specific performance by vendor, by fact that he did not own title at time of contract, provided he owned it at time of tender of performance under contract; *Farnum v. Clarke*, 148 Cal. 618, 84 Pac. 170, owner of incomplete title may make land subject to contract of sale, which may be specifically enforced in equity; *Royal v. Dennison* (Cal.), 38 Pac. 41, where, in contract of exchange of land, values of respective parcels have been fixed, party to contract who had no title, and who placed himself in such position that he cannot acquire title, cannot object to tender of deed by other party because made on condition that he pay amount fixed by contract as value of land to be conveyed by him; *Day v. Mountin*, 137 Fed. 762, 763, 70 C. C. A. 190, contract made in good faith specifically enforceable by vendor, even though he had no title when it was made, where such fact was stated and known to both parties, and he acquired title before time for performance arrived; *Provident Loan & Trust Co. v. McIntosh*, 68 Kan. 463, 75 Pac. 501, one having interest in land, and having such control of title that he may require conveyance of it, may rightfully make contract in his own name to convey it by warranty deed, without disclosing actual state of title to purchaser; *McNeny v. Campbell*, 81 Neb. 758, 116 N. W. 672, where one is so situated that he can acquire title to tract of land, either by voluntary act of parties holding title or by proceedings in law or equity, he is in position to make valid agreement for sale thereof.

In Every Executory Contract for Sale of land, there is implied condition that vendor will transfer to purchaser by his deed title without defect.

Approved in *Crim v. Umbesen*, 155 Cal. 701, 132 Am. St. Rep. 127, 103 Pac. 179, and *Owen v. Pomona Land & Water Co.* (Cal.), 61 Pac. 474, both following rule; *Gervaise v. Brookins*, 156 Cal. 105, 103

Pac. 330, vendor who agrees to execute deed free and clear of all encumbrances is bound to convey good title in fee; Hooe v. O'Callahan, 10 Cal. App. 570, 103 Pac. 175, where destruction by fire made it impossible to convey perfect title, vendee was entitled to return of deposit.

Acts of Payment and Conveyance being mutual and dependent, neither party is in default until tender and demand by other.

Approved in Los Angeles Gas etc. Co. v. Amal. Oil Co., 156 Cal. 778, 106 Pac. 57, in entire and mutually dependent contract to sell and purchase, purchaser cannot maintain action for failure to deliver without showing or alleging performance or sufficient excuse for nonperformance of obligation to receive.

Where No Provision That Vendor shall furnish abstract of title, it is incumbent on purchaser to provide it.

Approved in State v. Grimes, 29 Nev. 85, 124 Am. St. Rep. 883, 84 Pac. 1073, 5 L. R. A. (n.s.) 545, following rule; Hunt v. Tuttle, 133 Iowa, 649, 110 N. W. 1027, real estate broker, under contract to procure purchaser, which only fixes price, has no right to impose on owner, as condition of sale, obligation to furnish abstract of title.

In Absence of Any Provision, it is incumbent upon purchaser to satisfy himself as to condition of title.

Approved in Goodell v. Sanford, 31 Mont. 173, 77 Pac. 525, in ordinary contract of purchase and sale, in absence of any special agreement, it is incumbent on vendee to examine title for himself, and to point out any objections he may have to title tendered by vendor.

Who must Sign Memorandum of Executory Sale contract within statute of frauds. See note, 28 L. R. A. (n.s.) 697.

90 Cal. 323-337, 27 Pac. 186, BRISON v. BRISON.

Proceedings for New Trial are Independent of judgment.

Approved in Houser & Haines Mfg. Co. v. Hargrove (Cal.), 59 Pac. 948, appeal may be taken from order denying new trial when made within proper time after denial, though time limited for appeal from final judgment has expired.

Upon Appeal from Order Denying New Trial, appellate court cannot consider sufficiency of either complaint or of findings to support judgment, but only its sufficiency to sustain findings of fact.

Approved in Schroeder v. Mauzy, 16 Cal. App. 448, 118 Pac. 461, Helfrich v. Romer, 16 Cal. App. 436, 118 Pac. 459, Fagan v. Lentz, 156 Cal. 685, 105 Pac. 953, Crescent Feather Co. v. United Upholsters, 153 Cal. 434, 95 Pac. 872, Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 327, 94 Pac. 390, Rockwell v. Light, 6 Cal. App. 566, 92 Pac. 650, People's Home Sav. Bank v. Rauer, 2 Cal. App. 451, 84 Pac. 332, Swift v. Occidental M. & P. Co. (Cal.), 70 Pac. 471, Hayford v. Wallace (Cal.), 46 Pac. 302, Miller v. Price (Cal.), 39 Pac. 781, and Kelley v. Owens (Cal.), 30 Pac. 601, all following rule; People v. Bank of San Luis Obispo, 159 Cal. 82, 112 Pac. 873, where judgment has become final, repeal of statute supporting judgment, pending appeal from order denying new trial in action in which judgment was rendered, without supersedeas or stay bond, does not have effect to destroy judgment; Great Western Gold Co. v. Chambers, 153 Cal. 310, 95 Pac. 152, upon appeal from order denying new trial, appellate court is limited in its review to grounds upon which

such motion may be based and upon which new trial was asked; *Frutig v. Trafton*, 2 Cal. App. 51, 83 Pac. 72, where evidence is conflicting, its sufficiency to support finding cannot be interfered with by appellate court; *Bone v. Hayes*, 154 Cal. 763, 99 Pac. 174, where complaint in action to enforce transfer of corporation stock is that defendant purchased bonds thereof as agent of plaintiff with his money, and received, as commission, a bonus of shares for which he did not account, but had same issued to himself, complaint shows him chargeable as trustee, and tenders material issues, upon which sufficiency of evidence to support findings may be reviewed upon appeal from order denying new trial; *Southern Cal. R. Co. v. Slau-son* (Cal.), 68 Pac. 108, judgment itself can be reviewed only by direct appeal taken after its entry; *Owen v. Pomona Land & Water Co.* (Cal.), 61 Pac. 473, appellate court can only consider questions as to sufficiency of evidence to support findings and errors of law occurring during trial, and excepted to by defendant; *Frank v. Chatfield* (Cal.), 60 Pac. 525, though pleadings and findings of trial court do not support judgment for rent, such question cannot be raised on appeal from motion denying new trial; *Houser & Haines Mfg. Co. v. Hargrove* (Cal.), 59 Pac. 948, upon appeal from order denying new trial, appellate court may consider sufficiency of evidence to support findings, and errors of law, if any, occurring during trial.

When Court Fails to Make Findings upon all material issues presented by pleadings, such decision is reviewable upon motion for new trial.

Approved in *Hamilton v. Murray*, 29 Mont. 86, 74 Pac. 76, following rule; *Dillon Implement Co. v. Cleaveland*, 32 Utah, 5, 88 Pac. 671, an assignment of error that decision is against law is sufficient to present failure of court to find on all material issues for review on appeal.

Although Failure to Find upon Material Issues produces mistrial, and renders judgment against law, this rule is applicable only where finding upon omitted issues might have effect to countervail or destroy effect of other findings.

Approved in *Pratt v. Welcome*, 6 Cal. App. 478, 92 Pac. 501, motion for new trial on ground that it is against law because court fails to make findings upon all material issues is applicable only to issues which are material, and to those directly made by pleadings.

If Findings are Made Which Determine issues sufficient to uphold judgment, it is not against law to fail to make findings upon other issues, which, if made, would not invalidate judgment.

Approved in *Hayden v. Collins*, 1 Cal. App. 262, 81 Pac. 1121, if complaint states action in ejectment and relief may be granted in such action, it is immaterial, in absence of any ambiguity or uncertainty, that facts stated may also show cause of action in unlawful detainer; *Roberts v. Ball* (Cal.), 38 Pac. 950, failure to find on certain issues raised by pleadings, and making findings outside issues, is harmless error, where findings made on material issues warrant judgment whatever findings on other issues; *Bowers v. Cottrell*, 15 Idaho, 240, 96 Pac. 943, where findings of court upon affirmative case are necessarily complete negative of case pleaded by answer, such findings are sufficient.

Distinguished in *Colby v. Title Ins. & Trust Co.*, 160 Cal. 639, 117 Pac. 916, in action to cancel deeds alleged to have been executed

to compound felony and procured through duress, in which answer sets up estoppel, findings for defendant on estoppel do not render immaterial findings on issues of complaint.

Where Deed is Made Between Parties in confidential relation, in reliance upon promise to reconvey upon demand upon certain event, subsequent refusal to convey is not merely breach of agreement, but is violation of trust, constituting constructive fraud which court of equity will remedy.

Approved in *Cardiff v. Marquis*, 17 N. D. 119, 114 N. W. 1091, following rule; *Cooney v. Glynn*, 157 Cal. 587, 108 Pac. 508, where confidential relations exist between parties, conveyance by one to other upon parol promise either to hold for benefit of grantor or third person in whom grantor is interested, there being no other consideration, trust arises by operation of law in favor of one for whom property is held; *Bollinger v. Bollinger*, 154 Cal. 699, 99 Pac. 198, where land taken by father upon express trust to be divided at his death among certain beneficiaries, trust may be enforced in favor of one of such as beneficiary of proportionate share; *Chamberlain v. Chamberlain*, 7 Cal. App. 639, 95 Pac. 661, where plaintiff induced by fraud to convey to son's wife, upon promise to reconvey upon demand, her refusal to perform made her constructive trustee, and, notwithstanding her subsequent transfer to brother without consideration and his later transfer to plaintiff's son without consideration, trust was enforceable against final grantee in equity, regardless of whether he had notice of fraud practiced by his wife on plaintiff; *Heinrich v. Heinrich*, 2 Cal. App. 483, 84 Pac. 328, husband fraudulently obtaining wife's money and with it making purchases for himself is involuntary trustee thereof for her benefit, under Civil Code, section 2224; *Hanson v. Svarverud*, 18 N. D. 554, 120 N. W. 552, where land is conveyed from father to sons upon promise to hold in trust for grantor during life and at death to convey to children equally, court of equity will enforce promise, as refusal is constructively fraudulent.

Distinguished in *Loomis v. Loomis*, 148 Cal. 151, 82 Pac. 680, 1 L. R. A. (n. s.) 312, holding rule inapplicable where husband attempted to convey homestead to wife upon promise that after she was through with it she would convey to another.

Whether Evidence of Verbal Agreement is sufficiently conclusive to create constructive trust in property transferred is question for trial court, whose conclusion thereon is conclusive.

Approved in *Fagan v. Lentz*, 156 Cal. 686, 105 Pac. 953, and *Barry v. Beamer*, 8 Cal. App. 213, 96 Pac. 378, both following rule; *Title Insurance etc. Co. v. Ingersoll*, 158 Cal. 484, 111 Pac. 364, applying rule in case of express trust; *Couts v. Winston*, 153 Cal. 689, 96 Pac. 358, holding in action to prove, by parol, that deed, absolute on face, was mortgage; *Main v. Main*, 7 Ariz. 156, 60 Pac. 891, where husband deeded community property to wife, although presumption was that character of title was thereby changed to separate property of wife, where there was evidence to support finding of fact, court will not disturb it on appeal; *Stuart v. Hauser*, 9 Idaho, 71, 72 Pac. 725, in equity suit by grantor to have deed absolute on face declared mortgage, where there is substantial conflict in evidence, findings of trial court that such deed was not intended as mortgage will not be disturbed.

Influence of One Spouse Over Other is presumed undue whenever confidence, superinduced by relationship and fidelity of other is subsequently violated.

Approved in *Heinrich v. Heinrich*, 2 Cal. App. 484, 84 Pac. 328, equity will not allow husband to obtain advantage to self by breach of fiduciary relation to wife.

Distinguished in *Broaddus v. James*, 13 Cal. App. 473, 110 Pac. 162, gift from parent to child cannot be presumed invalid, but turns on exercise of actual undue influence, the relationship being only a circumstance inviting careful consideration of transaction, in absence of such fraud, imposition or importunity.

Miscellaneous.—Cited in *Warnock v. Harlow*, 96 Cal. 301, 31 Am. St. Rep. 209, 31 Pac. 167, reciting history of litigation.

90 Cal. 337-338, 27 Pac. 185, YORBA v. DOBNER.

Order Striking Out Cost Bill Made after rendition and entry of final judgment can be reviewed without appeal from judgment.

Approved in *Keane v. Pittsburg Lead Min. Co.*, 17 Idaho, 195, 105 Pac. 66, order of court made after final judgment taxing costs is order from which separate appeal is allowed.

90 Cal. 342-346, 27 Pac. 299, ANZAR v. MILLER.

Statute of Limitations Does not Commence to run against claimant under imperfect Mexican grant, until patent is issued to him by United States.

Reaffirmed in *Adams v. Hopkins (Cal.)*, 69 Pac. 230.

90 Cal. 346-362, 27 Pac. 289, GORHAM v. HEIMAN.

Contract Between Brokers to Co-operate in buying and selling real estate for share of commissions is not within statute of frauds.

Approved in *Baker v. Thompson*, 14 Cal. App. 176, 111 Pac. 373, and *Saunders v. Yoakum*, 12 Cal. App. 544, 107 Pac. 1008, both following rule; *Casey v. Richards*, 10 Cal. App. 61, 101 Pac. 38, where it clearly appeared that broker making contract with plaintiff to share commissions was employed by owner of property, and terms referred to in contract between them rested in parol, parol evidence for plaintiff is admissible to show what terms were required to be complied with by him under contract; *Jones v. Patrick*, 140 Fed. 406, agreement to share in profits of contemplated speculations of real estate does not involve estate or interest in real estate within statute of frauds.

Distinguished in *Aldis v. Schleicher*, 9 Cal. App. 373, 99 Pac. 526, where relation between seller and defendant is only executory, in absence of any allegation of written authority to sell, or other enforceable obligation upon part of owner to pay commission to defendant, plaintiff not entitled to recover; *Crowell v. Ewing*, 4 Cal. App. 359, 88 Pac. 286, oral agreement by one having option to purchase mine, and having interest therein to divide with another, for services in procuring sale of mine, one-half what he received as commission, is within Civil Code, section 1624, subdivision 6.

90 Cal. 364-367, 27 Pac. 298, GODDARD v. SUPERIOR COURT.

Writ of Prohibition will not Lie to prevent or interfere with insolvency proceedings over which court has jurisdiction.

Approved in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1017, writ of prohibition will not lie to review regularity of proceedings of court within its jurisdiction.

90 Cal. 368-373, 27 Pac. 296, MOFFAT v. GREENWALT.

Jurisdiction of Superior Court, on Appeal from justice's court, attaches upon perfecting of appeal by filing undertaking.

Approved in *State v. Brown*, 30 Nev. 499, 98 Pac. 873, under Compiled Laws, section 3676, providing that appeal from justice court shall be taken by filing notice with justice and serving copy on adverse party, order in which notice filed and served is immaterial.

Sureties upon Appeal Bond cannot Avoid liability thereon by failing to justify after exception to their sufficiency by adverse party.

Distinguished in *San Francisco v. Hartnett*, 1 Cal. App. 654, 82 Pac. 1065, when amount of bail bond in criminal case has been fixed, or bail bond accepted or approved, by officer not authorized by law so to do, bond is absolutely void.

90 Cal. 377-379, 27 Pac. 295, PEOPLE v. LOUI TUNG.

Where Only Office of Motion for New Trial on ground of newly discovered evidence is to impeach adverse witness, it is insufficient for purposes of new trial.

Reaffirmed in *James v. Oakland Traction Co.*, 10 Cal. App. 803, 103 Pac. 1090, and *People v. Lapique* (Cal.), 67 Pac. 16.

One Seeing Defendant Shortly After Crime committed may testify that blood upon his coat was fresh, without showing himself to be expert.

Approved in *Miller v. State*, 94 Ark. 544, 128 S. W. 356, opinions of ordinary witnesses may be given where, from nature of subject, facts cannot be otherwise properly presented to jury, or such evidence is only evidence obtainable.

Distinguished in *State v. Alton*, 105 Minn. 419, 117 N. W. 620, single fact that stain upon defendant's shirt sleeve was blood, it not being shown to be human blood, and it appearing that it might have been deposited there for six months or a year, was too remote, and of no probative force in establishing defendant as guilty party.

90 Cal. 381-384, 27 Pac. 300, PEOPLE v. OSENA.

Fact That There Were Discrepancies in Testimony of children witnesses against defendant convicted of assault with intent to commit rape does not warrant reversal of judgment where discrepancies were such as could be expected from their tender age, and there is other evidence to corroborate their account, including defendant's own testimony.

Approved in *People v. Ah Lung*, 2 Cal. App. 282, 83 Pac. 298, under charge of rape, though testimony of prosecutrix be contradictory and corroboration slight, appellate courts will not interfere, unless preponderance of evidence against verdict makes reversal a duty.

90 Cal. 386-389, 27 Pac. 305, JONES v. TALLANT.

Where Written Contract is Placed in Evidence, and controls in decision, admission of improper evidence as to oral negotiations of

parties which led up to written contract is not ground for reversal of judgment, no injury having resulted therefrom.

Approved in *Union Transportation Co. v. Bassett* (Cal.), 46 Pac. 911, in action to restrain harbor commissioners from enforcing order requiring plaintiff company to change its landing place, admission of hearsay evidence tending to impugn defendant's good faith in passing order of removal is harmless, where court finds order unreasonable.

90 Cal. 397-402, 27 Pac. 304, DYKE v. BANK OF ORANGE.

Statement of Amounts of Judgment written in manner usual in account-books, in columns, with vertical line separating last two figures from rest in each amount, but without dollar-mark, is sufficient statement of amount to create lien under section 672 of Code of Civil Procedure.

Approved in *Newlove v. Mercantile Trust Co.*, 156 Cal. 664, 105 Pac. 975, in case where schedule in voluntary insolvency gave names of creditors and under column headed "Sum due" placed figures, with decimal separating last two figures from rest in each sum.

Docketing Judgments. See note, 87 Am. St. Rep. 668.

90 Cal. 402-410, 25 Am. St. Rep. 133, 27 Pac. 309, MURRAY v. HOME BENEFIT LIFE ASSN.

If Insurance Company, After Knowledge of any default for which it might terminate contract of insurance, enters into transactions with assured which recognize continued validity of policy, and treat it as still in force, right to claim forfeiture for such previous default is waived.

Approved in *Denver Life Ins. Co. v. Crane*, 19 Colo. App. 201, 73 Pac. 879, following rule; *Arnold v. American Ins. Co.*, 148 Cal. 667, 84 Pac. 185, 25 L. R. A. (n. s.) 6, although there was breach of condition of which company's proper officer knew, conduct of such officer in causing assured to rely upon his policy as valid policy is waiver or estoppel, based upon such knowledge, from alleging such breach against claim for subsequent loss.

Forfeitures are not Favored, and will not be enforced unless specifically and definitely provided for in contract.

Approved in *Queen Ins. Co. of America v. Excelsior Milling Co.*, 69 Kan. 116, 76 Pac. 424, following rule.

Effect of Acceptance of Delinquent Assessments. See note, 136 Am. St. Rep. 428.

90 Cal. 410-427, 25 Am. St. Rep. 138, 27 Pac. 306, INGERMAN v. MOORE.

Where Servant Put to Work upon dangerous machine is known to be without experience and without knowledge of particular dangers attending work, master is bound to give him such instructions as to cause him to fully understand necessity for care.

Approved in *Pigeon v. Fuller*, 156 Cal. 699, 105 Pac. 979, *Quinn v. Electric Laundry Co.*, 155 Cal. 506, 101 Pac. 796, *Jenson v. Will & Finck Co.*, 150 Cal. 404, 89 Pac. 116, *Larsen v. Magne-Silica Co.*, 14 Cal. App. 73, 111 Pac. 121, *Arizona Lumber etc. Co. v. Mooney*, 4 Ariz. 101, 33 Pac. 592, *Schoner v. Allen*, 25 Okl. 26, 105 Pac. 192, and *Elliff v. Oregon R. & N. Co.*, 53 Or. 73, 99 Pac. 79, all following

rule; *Vohs v. Shorthill & Co.*, 130 Iowa, 541, 107 N. W. 418, duty to warn and instruct inexperienced servant of dangers is positive obligation which master cannot escape on plea that he was himself ignorant of such danger, as law will hold him to have known what exercise of reasonable care and caution would have brought to his attention.

Duty of Master to Instruct and Warn Servants as to perils of employment. See note, 44 L. R. A. 37, 57, 61.

Fact Whether Servant had Knowledge of defect and of danger one for jury.

Approved in *Fisher v. Prairie*, 26 Okl. 349, 109 Pac. 519, issue of facts as to negligence relating to master's duty to warn, and sufficiency of same, should be determined by jury; *Waggoner v. Porterfield*, 55 Tex. Civ. App. 174, 118 S. W. 1096, whether defendant was guilty of negligence in allowing defect to continue a question for jury.

Upon Appeal from Order Denying New Trial, previous order of trial court granting new trial, and its subsequent order vacating that order, and reinstating motion for new trial, which are not embodied in any bill of exceptions, do not properly form part of record on appeal.

Approved in *In re Estate of Bouyssou*, 3 Cal. App. 41, 84 Pac. 460, in absence from record of any showing of error, it will be presumed on appeal that action of trial court in vacating its prior order in same cause was regularly performed and is correct.

Right of Servant to Recover for Injuries caused by projecting screws in moving machinery. See note, 48 L. R. A. 97.

90 Cal. 427-444, 27 Pac. 275, MURDOCK v. OLARKE.

Where Question is Treated by Both Parties at trial as issue in case, plaintiff cannot object for first time on appeal that by defendant's answer no such issue was raised in trial court.

Approved in *Schroeder v. Mauzy*, 16 Cal. App. 447, 118 Pac. 461, reaffirming rule; *Milwaukee etc. Ins. Co. v. Warren*, 150 Cal. 353, 89 Pac. 96, where, in action to recover from agents money collected but not paid over, mutilated books of agents were referred to referee, who made qualified report, and case was tried without objection on theory that referee was properly before court, defendants, having permitted trial to proceed on this theory, are bound by it, and cannot raise for first time on appeal objection which could have been obviated if made in court below.

Conveyance of Land Made Merely to secure payment of money is not enlarged from mere mortgage by fact that grantee has right to retain possession until debt is paid.

Approved in *Wadleigh v. Phelps*, 149 Cal. 641, 87 Pac. 99, finding against plea of statute of limitations cannot be disturbed, where evidence shows that defendant was mortgagee in possession, and that his holding was not adverse to mortgagors at any time prior to his death.

90 Cal. 444-486, 27 Pac. 356, EMERIC v. ALVARADO.

Allowing of Amendments to Pleadings being within discretion of trial court, its action will not be interfered with, unless its discretion has been clearly abused.

Approved in *Idaho Placer etc. Co. v. Green*, 14 Idaho, 299, 94 Pac. 162, amendments to pleadings rest largely in discretion of court, and unless exercise of such discretion deprives complaining party of some substantial right, it is not error; *Clarkson v. Hoyt* (Cal.), 36 Pac. 384, in action on note given to settle balance due on statement of accounts, overruling of defendant's motion to amend answer so as to attack statement on ground of fraud is not abuse of discretion where proposed amendment alleges fraud only in general terms, without pointing out facts which constitute it.

Where There is No Dollar-mark, word, abbreviation, or other character in assessment-roll to show what was meant or intended by figures in columns headed "Value" or "Taxes," assessment is fatally defective.

Reaffirmed in *Fox v. Townsend*, 152 Cal. 53, 91 Pac. 1007.

Distinguished in *Carter v. Osborn*, 150 Cal. 622, 89 Pac. 609, failure to put dollar-mark before figures in delinquent tax list, under heading "Amount," does not invalidate assessment or tax sale.

Where Cotenant Undertakes to Convey whole title to specific tract, his conveyance is not void, but conveys all his interest in that tract.

Approved in *Kenoye v. Brown*, 82 Miss. 615, 100 Am. St. Rep. 645, 35 So. 165, where one of several tenants in common conveys part of common estate by specific metes and bounds, and other tenants cause partition, grantee takes by estoppel interest of grantor in parcel specifically conveyed, but does not take any interest of grantor beyond portions so specifically conveyed by metes and bounds.

Conveyance by One Cotenant of specific part of common property. See note, 100 Am. St. Rep. 652, 653.

Description in Deed from Cotenant and wife, containing no other designation of land than "all our right, title and interest in and to all the land inherited by us," is insufficient to embrace land subject to partition, where any interest therein passed to them by devise rather than by descent.

Distinguished in *Crozer v. White*, 9 Cal. App. 620, 100 Pac. 134, one who grants a thing is presumed to grant also what is essential to beneficial use and enjoyment of property designated, in absence of language indicating different intention on part of grantor.

Certificate of Acknowledgment of Deed taken by justice of peace, which does not state venue or jurisdiction of justice, is fatally defective, even though name of certain state and county were written at commencement of deed.

Distinguished in *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 534, 89 Pac. 344, certificate of acknowledgment which recites name and official character as notary in and for certain county named, in usual form, and is signed by him merely with words "Notary Public" after name, sufficiently states name of office, within Civil Code, section 1193, to entitle deed to record.

When Defects in Certificates of Acknowledgment are fatal. See note, 106 Am. St. Rep. 550.

Section 90 of Revenue Act of May 15, 1854, being expressly repealed by section 55 of Revenue Act of April 29, 1857, mere introduction of tax deed acquired under former act, without other evidence, does not make out prima facie title, but preliminary steps necessary to vest power of sale are essential.

Cited in *Johnson v. Taylor*, 150 Cal. 206, 119 Am. St. Rep. 181, 88 Pac. 906, 10 L. R. A. (n. s.) 818, arguendo.

Cotenants' Right to Acquire and Enforce Tax Titles. See note, 116 Am. St. Rep. 367.

Idem Sonans. See note, 100 Am. St. Rep. 336.

90 Cal. 487-496, 27 Pac. 429, NEWTON v. HULL.

Mere Clerical Error Rendering Judgment Uncertain should be corrected by motion in trial court.

Approved in *First Nat. Bank of Santa Monica v. Kowalsky* (Cal.), 31 Pac. 1134, where judgment shows mere clerical error and contains data necessary to correct it, error should be corrected by trial court on motion of any party to judgment.

Under Installment Contract for Sale of Land, time being of essence, deed upon last payment, and upon default by purchaser money already paid to be forfeited and vendor released thereupon from all obligation to convey, vendor is not in default until his refusal to convey upon tender of purchase price.

Approved in *Naftzger v. Gregg* (Cal.), 31 Pac. 613, following rule; *Freeman v. Griswold* (Cal.), 34 Pac. 329, under covenant which provides that upon noncompliance by purchasers with terms as to payment seller shall be free from any obligation to convey, time being of essence, seller may avoid contract or not at his option, and is not bound to tender deed except on payment of purchase price.

Stipulation in Contract That Time is of essence applicable only to agreement by purchaser to pay and is for benefit of vendor alone, who may elect to rescind or enforce contract.

Distinguished in *Cleary v. Folger* (Cal.), 33 Pac. 878, where vendee of land notifies vendor that he will not complete purchase, vendor need not offer to perform, and by failing to do so does not authorize vendee to consider contract as rescinded, so that he can recover payments made by him.

Time as of Essence of Contract for sale of land. See note, 104 Am. St. Rep. 270.

90 Cal. 496-499, 27 Pac. 371, BRYMER v. SOUTHERN PAC. CO.

Law Imposes on Employer Only Obligation to use reasonable care and diligence in procuring suitable and safe machinery and appliances for servant to perform duties for which he is engaged.

Approved in *Thompson v. Cal. Construction Co.*, 148 Cal. 37, 82 Pac. 368, duty of employer to furnish employee reasonably safe place in which to work not absolute, but his duty is fulfilled when he exercises ordinary care for that purpose; *Watts v. Murphy*, 9 Cal. App. 568, 99 Pac. 1106, it is prejudicial error, in instructing jury, to classify elevator operator with passengers, so as to require from owners utmost care and diligence of very cautious persons in providing safe machinery as far as human foresight can go.

Employer Liable Only When He had Knowledge of defect, or failed to exercise reasonable diligence in inspecting to discover defect.

Approved in *Bundy v. Sierra Lumber Co.*, 149 Cal. 777, 87 Pac. 624, refusing to set aside jury's finding, on conflicting evidence, that trestle had been defectively constructed, and that, at time of accident its timber had rotted to such extent as to render trestle unfit for purpose built for and used.

Knowledge as Element of Employer's Liability. See note, 41 L. R. A. 78.

Mere Fact of Breaking of Appliance is not sufficient to authorize any inference or presumption that master had failed to exercise reasonable care in its selection.

Approved in *McDonald v. California Timber Co.*, 7 Cal. App. 378, 94 Pac. 377, mere happening of injury raised no presumption that employer was at fault in providing appliance; *National Biscuit Co. v. Wilson*, 169 Ind. 447, 82 N. E. 918, where accident due to breaking of large cogwheel connected with elevator, which would not result from mere use or wear, happening of accident not prima facie proof of negligence, under doctrine of *res ipsa loquitur*; *South Baltimore Car Works v. Schaefer*, 96 Md. 105, 94 Am. St. Rep. 560, 53 Atl. 667, where detachable knife flew from machine, and accident was unprecedented, and employee, who had adjusted knife, stated that machine was in perfect condition, and there was no unusual strain at time, doctrine of *res ipsa loquitur* is inapplicable; *Wells v. Utah Const. Co.*, 27 Utah, 525, 76 Pac. 560, it is error to refuse to instruct that mere fact that accident happened is not sufficient proof to charge defendant with negligence.

Presumption of Negligence from Happening of accident causing personal injuries. See notes, 113 Am. St. Rep. 1008.

Presumption of Negligence of Master from unexplained starting of machinery injuring servant. See note, 1 L. R. A. (n. s.) 300.

Liability to Servant for Injuries due to defective machinery and appliances. See note, 98 Am. St. Rep. 291, 303, 322.

Res Ipsa Loquitur, as Between Master and Servant. See note, 6 L. R. A. (n. s.) 352.

90 Cal. 500-504, 27 Pac. 372, **BALLERINO v. BIGELOW.**

Where Complaint in Action Between Landlord and tenant alleged that rental did not exceed twenty-five dollars monthly, but evidence showed it did exceed that sum, judgment rendered thereon in justice's court is void.

Approved in *Fitchett v. Henley*, 31 Nev. 338, 104 Pac. 1065, under constitutional limitation on justices' courts of amount, in case of money demand, of three hundred dollars, exclusive of interest, judgment in justice's court for three hundred and ninety-six dollars treble damages and for one hundred dollars rent due is void.

Voluntary Credits to Bring Debt within jurisdiction of court. See note, 28 L. R. A. 224.

90 Cal. 504-507, 27 Pac. 375, **CLARK v. PALMER.**

Notice in Summons, in Action to foreclose mortgage, that upon failure to appear plaintiff "will take judgment against you" is substantial compliance with wording, "will apply to the court for the relief demanded," under subdivision 5 of section 407 of Code of Civil Procedure.

Approved in *Snake River etc. District v. Stevens*, 18 Idaho, 547, 110 Pac. 1034, in action by land owner within irrigation district against district for failure to supply water, plaintiff was allowed to apply to court for judgment demanded instead of taking default judgment by clerk; *Harpold v. Doyle*, 16 Idaho, 686, 102 Pac. 161, applying rule in action for breach of promise; *Stanley v. Rachofsky*,

50 Or. 475, 93 Pac. 355, where summons properly issued contained sufficient information to warn defendant that judicial proceeding was pending against him in particular court, and that if he did not appear and answer judgment would be taken for specified sum, it is not fatally defective for failure to state rate of interest demanded and date from which computed.

90 Cal. 507-515, 25 Am. St. Rep. 145, 27 Pac. 369, **WELCOME v. HESS.**

Landlord, by Releasing Tenant from remainder of term, is estopped from claiming any further rent.

Approved in *American Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 31, 80 C. C. A. 97, such a surrender releases lessee from liability for rents to accrue and from immature obligations, but leaves him liable for all rent accrued and for all obligations whose performance is due.

Where Lessee Abandons and Sends Keys to landlord, acts of latter in taking possession and reletting for longer term than remainder of existing one, without notifying original lessees of intention to continue to hold them for rent or that the reletting is on their account, shows acceptance of surrender by landlord.

Distinguished in *Rucker v. Tabor*, 127 Ga. 103, 56 S. E. 125, where debtor agrees to rent land to creditor on shares, debtor's share to go in satisfaction of debt, if creditor surrenders, and debtor, without notice to creditor of intention to hold him, rents portion of land, such acts constitute surrender and acceptance, and nonsuit is proper in action by land owner against creditor.

Right of Landlord on Abandonment of premises by tenant. See note, 114 Am. St. Rep. 720.

Remedy of Landlord upon Abandonment of Premises. See note, 13 L. R. A. (n. s.) 400.

Surrender of Lease by Way of Estoppel results from acts which imply mutual consent to surrender.

Distinguished in *Silveira v. Ahlo*, 16 Haw. 317, lessor, by declining rent for two months after burning of leased buildings, and telling tenant that he would give new lease for longer period, about five years remaining on existing lease, but without mentioning length of term, is not estopped from denying that leases have been surrendered or from claiming rental under existing leases after tenant refused new lease offered.

90 Cal. 515-522, 27 Pac. 373, **O'CONNELL v. MAIN ETC. HOTEL CO.**

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 66.

Recovering for Services and Expenses under running contract with corporation ended by its insolvency and dissolution. See note, 69 L. R. A. 128.

90 Cal. 522-532, 25 Am. St. Rep. 151, 27 Pac. 527, **MILLS v. LOS ANGELES.**

Possession is of No Value as evidence of title to pueblo land as against patent to city unless it constitutes bar under statute of limitations, which does not begin to run until patent is issued.

Approved in *People v. Kerber*, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 879, private persons cannot obtain title, inconsistent with

its use as property devoted to public use, to tide lands, by prescription, founded on adverse occupancy for statutory period.

Right to Acquire Title by Adverse Possession to lands devoted to public use. See note, 87 Am. St. Rep. 777.

90 Cal. 532-543, 25 Am. St. Rep. 151, 27 Pac. 527, 13 L. R. A. 707,
BURKETT v. GRIFFITH.

In Action for Slander of Title, if Words were uttered after sale completed or contracted for, so as to give plaintiff contract specifically enforceable, he does not suffer any actionable damage from their utterance.

Reaffirmed in *Butts v. Long*, 94 Mo. App. 699, 68 S. W. 758.

In Action for Slander of Title, it is necessary to allege in complaint, distinctly and particularly, facts which show wherein plaintiff has sustained special damage as direct and natural result of utterance of words.

Approved in *Continental Realty Co. v. Little*, 135 Ky. 623, 117 S. W. 311, petition in action for slander of title to property because of alleged declarations of defendant must set out words constituting slander and special damage resulting therefrom.

Pleadings are to be Construed Contra Proferentem.

Approved in *Witham v. Blood*, 124 Iowa, 698, 100 N. W. 559, though, under code, pleadings are to be construed liberally, and pleader given benefit of every allegation made or reasonably implied, he is presumed to have stated his case as strongly as facts will justify.

Complaint Alleging Defamatory Statements that plaintiff had broken covenants of leases attached to complaint as exhibits, but failing to show what were covenants in leases or nature of his rights thereunder, except by inference from exhibits, fails to show that statements could have caused any damage or injury to plaintiff.

Approved in *S. F. Sulphur Co. v. Aetna Indem. Co.*, 11 Cal. App. 698, 106 Pac. 112, where objection to variance between exhibit and allegations of complaint was raised for first time upon appeal, and then only in oral argument, allegations in body of complaint should be held to control recitals in exhibit.

Matters of Substance Which are Essential Elements in cause of action must be presented by direct averment, and not by way of recital, or merely as exhibits attached to complaint.

Approved in *Ahlers v. Smiley*, 11 Cal. App. 345, 104 Pac. 998, in action for damages for breach of contract, want of distinct substantive averment of contract in complaint cannot be supplied by inference or argument from exhibit attached to and made part of complaint, setting forth record in former suit between parties in which it is found that a contract was entered into between them therein set out; *Lee v. McCarthy* (Cal.), 35 Pac. 1034, attorney's fees, in suit to foreclose mortgage containing provision for such, cannot be recovered where agreement to pay them is not directly averred in complaint, but is merely inferable from exhibit annexed thereto; *McPherson v. Hattich*, 10 Ariz. 109, 85 Pac. 733, breach of contract for construction of building is nonpayment of compensation, which fact must be alleged in complaint in action to recover on contract, and statement in exhibit filed with and made part of complaint cannot supply such necessary allegation omitted from complaint.

Distinguished in *Santa Rosa Bank v. Paxton*, 149 Cal. 199, 86 Pac. 194, where complaint in action on note alleged that maker executed and delivered note to plaintiff, and also that maker executed power of attorney, which power was attached to and made part of complaint, conceding that any reference to power was necessary, allegation as to authority of grantee in power of attorney to execute note was at most defective in form only, which was removed by reference to power of attorney attached as exhibit; *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 307, 90 Pac. 205, where complaint merely alleged that under order in estate of decedent certain note and mortgage of estate was assigned to plaintiff, who was owner and holder thereof, but had no allegation of confirmation of sale, complaint sufficient as against general demurrer, in view of Code of Civil Procedure, section 475.

Injunction Against False Statements as to plaintiff's property or business. See note, 16 L. R. A. 244.

90 Cal. 543-548, 27 Pac. 538, BATES v. SANTA BARBARA CO.

A Mechanics' Lien cannot be Acquired against a public building.

Approved in *Clark v. Beyrle*, 160 Cal. 311, 116 Pac. 741, mechanic's lien cannot be asserted against water tunnel being constructed by city as public improvement.

Mechanic's Liens on Public Property. See note, 35 L. R. A. 141.

Personal Liability to Pay Assessment for local improvement. See notes, 133 Am. St. Rep. 931, 932; 35 L. R. A. 61.

Materialman Who Furnishes Materials or work to contractor for erection of county building acquires, as against contractor, prior right of payment of his claim from unpaid portion of contract price, upon giving written notice to county of his claim, as provided in section 1184 of Code of Civil Procedure.

Approved in *Butler v. Ng Chung*, 160 Cal. 439, 117 Pac. 514, reaffirming rule; *Goldtree v. San Diego*, 8 Cal. App. 509, 510, 97 Pac. 217, 218, exclusive method of enforcing lien upon public structure is by notice to holder of fund provided to pay therefor, under section 1184 of Code of Civil Procedure; *Board of Education v. Blake (Cal.)*, 38 Pac. 537, under section 1184 of Code of Civil Procedure, notices may be served after expiration of the thirty-five days, provided there are funds due contractor still in hands of owner; *Russ Lumber etc. Co. v. Roggenkamp (Cal.)*, 35 Pac. 643, upon authority of principal case, materialman who has served notice on owner as required by Code of Civil Procedure, section 1184, acquires prior right to fund in owner's hands, due contractor, though contractor subsequently abandons contract.

Distinguished in *Kruse v. Wilson*, 3 Cal. App. 93, 84 Pac. 443, under section 1184 of Code of Civil Procedure, materialman who furnishes materials to subcontractor for use in building cannot, by serving notice of his claim on contractor, intercept moneys which may be due from contractor to subcontractor.

Right of Materialman to Money Judgment against person who employs mechanic or purchases materials is not lost or waived by proceeding to enforce lien, or recover from owner balance of contract price remaining in his hands.

Approved in *Hunt v. Darling*, 26 R. I. 483, 59 Atl. 400, 69 L. R. A. 497, subcontractor is entitled to prosecute petition for mechanic's

lien simultaneously with action at law against contractor, in which part of contract price still in owner's hands for satisfaction of lien is attached.

90 Cal. 553-558, 27 Pac. 411, EX PARTE CLANCOY.

Under Section 1222 of Code of Civil Procedure, judgment or orders of court in cases of contempt are final and conclusive.

Approved in *Mott v. Clarke* (Cal.), 56 Pac. 545, 546, following rule; *Natoma Water etc. Co. v. Hancock* (Cal.), 36 Pac. 100, no appeal lies from order adjudging one guilty of contempt for violating restraining order.

Appeal by Insolvent from Order adjudging him guilty of contempt for failure to comply with order to turn over certain assets to receiver is, in effect, appeal from order directing delivery of personal property, within meaning of section 943 of Code of Civil Procedure.

Distinguished in *Estate of McGinn*, 3 Cal. Prob. 129, decree revoking probate of will and awarding costs to contestants is not judgment or order directing payment of money.

90 Cal. 559-561, 27 Pac. 411, CARUTHERS v. HENSLEY.

Upon Appeal from Judgment upon judgment-roll alone, all intendments will be made in support of judgment.

Approved in *Kreling v. McMullen*, 158 Cal. 434, 111 Pac. 252, upon appeal by defendant from default judgment, appellate court must indulge in all reasonable presumptions and intendments in favor of judgment.

90 Cal. 562-564, 27 Pac. 409, DOW v. ROSS.

If Party Entitled to Costs Fails to serve and file memorandum thereof until more than five days have elapsed after he had knowledge of court's decision, filing is too late, and costs will be stricken from judgment on motion.

Approved in *State v. District Court*, 33 Mont. 533, 85 Pac. 368, costs, being allowed only by statute, can be collected only by method pointed out by statute.

90 Cal. 565-569, 27 Pac. 422, GOW v. MARSHALL.

Attachment Proceedings are Special and Statutory, and provisions of statute must be strictly followed, or no rights will be acquired thereunder.

Approved in *Sousa v. Lucas*, 156 Cal. 463, 105 Pac. 415, *Clyne v. Easton, Eldridge & Co.*, 148 Cal. 293, 113 Am. St. Rep. 253, 83 Pac. 38, and *Souza v. Lucas* (Cal. App.), 100 Pac. 117, all following rule; *Kern Valley Bank v. Kolhn*, 157 Cal. 240, 107 Pac. 112, writ of attachment is improperly issued and void, unless it is supported by undertaking conforming substantially with requirements of statute.

90 Cal. 569-573, 27 Pac. 427, PEOPLE v. LOPEZ.

Indictment Charging Defendant With Crime of felony in stealing, taking and driving away horses is sufficient to charge grand larceny, although failing to charge that offense was committed "feloniously."

Approved in *State v. Minnick*, 54 Or. 91, 102 Pac. 607, allegation that defendant took, carried, stole, etc., two heifers, contrary to

statutes, is sufficient to charge simple larceny, without allegation that taking was felonious; *State v. Halpin*, 16 S. D. 172, 91 N. W. 606, indictment alleging that one did unlawfully and feloniously, and by stealth, steal, take, and carry away certain property of another without his consent sufficiently charges offense of larceny.

Information Which Contains Either "Feloniously" or word "steal" will be held valid as charging criminal intent with which act was committed, if sufficient in other respects.

Approved in *State v. Hughes*, 31 Nev. 274, 102 Pac. 563, in indictment alleging that defendant assaulted prosecutor and attempted to feloniously rob him, word "feloniously" means "done with intent to commit" the crime.

90 Cal. 574-580, 27 Pac. 431, SAN DIEGO LAND CO. v. WOOL-DREDGE.

Recorded Contract Between Contractor and Owner of building to be erected for price of over one thousand dollars is not required by statute to contain description of property to be affected thereby.

Approved in *Stearns-Roger Co. v. Aztec Co.*, 14 N. M. 321, 93 Pac. 710, written contract not being basis of action for lien, it may be shown by any competent proof that material was furnished for construction of property on which lien was claimed, description of land not being needed in contract unless statute requires.

Substitution of Thirty Days After Completion of building instead of thirty-five days, for time of final payment, is not such substantial nonconformity with statute as will impose liability upon owner for materials and labor furnished, under section 1183 of Code of Civil Procedure.

Approved in *Burnett v. Glas*, 154 Cal. 256, 97 Pac. 426, provision in building contract reserving payment of only twenty per cent of contract price for thirty-five days after completion is such departure from statutory requirement as to subject property to liens in favor of those furnishing labor and materials; *Merced Lumber Co. v. Bruschi*, 152 Cal. 374, 92 Pac. 845, provision making whole of contract price payable at completion of building is substantial departure from provisions of section 1184, Code of Civil Procedure; *Stimson Mill Co. v. Riley (Cal.)*, 42 Pac. 1074, fact that building contract, in providing for payments, retains until thirty-five days after completion of work slightly less (only fifteen dollars) than twenty-five per cent of contract price required by statute, does not render owner personally liable for all labor and materials furnished; *Dunlop v. Kennedy (Cal.)*, 34 Pac. 94, failure to comply substantially with section 1184 of Code of Civil Procedure does not render contract void.

90 Cal. 583-585, 27 Pac. 428, HERBERGER v. HUSMAN.

Under Contract of Purchase Allowing Vendee to tender back deed and receive money if dissatisfied at end of year, where vendee, at end of year, and repeatedly thereafter, gave notice and demand and vendor led him to believe money would be returned as soon as raised, vendor is estopped by his conduct from objecting that no technical tender of release of title was made by vendee at end of year.

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90 Cal. 590-603, 26 Pac. 767, 27 Pac. 426, **REED v. NORTON.**

Under Section 1187 of Code of Civil Procedure, notice of lien must state terms, time given and conditions of contract.

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It is No Material Variance That Notice of lien treated contract between owner and contractor as valid and stated that contractor purchase materials both as contractor and as agent of owner, while complaint alleged that contract was void for want of filing, and that contractor purchased materials as agent only for owner.

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Verified Answer in Action Which Contains declaration of defendant that real property in controversy was conveyed to him, in trust for certain purposes, is declaration in writing to declare trust in real property sufficient to satisfy requirements of section 852 of Civil Code.

Approved in *Baker v. Baker* (Cal.), 31 Pac. 357, under Civil Code, section 852, subdivision 1, trust in real property is sufficiently declared by deposition of trustee, made in action wherein question of creation of such trust was involved, and by which it appears that he so held property in question.

90 Cal. 610-617, 27 Pac. 435, MANNING v. DEN.

Provision That No Assessment for Street improvements shall be held invalid except upon appeal to city council does not apply to case where appeal is not authorized, or where, if taken, council could not have remedied defect, by reason of incurable defects rendering assessment void.

Approved in *Wey v. Salt Lake City*, 35 Utah, 507, 101 Pac. 382, provision for payment under protest and recovery back of assessment, in consequence of irregularity appearing in any of proceedings, does not apply to attempted assessment of exempt property.

90 Cal. 617-622, 27 Pac. 436, EX PARTE CHENEY.

Ordinance Prohibiting Carrying of Concealed Weapons by anyone other than public officers and travelers, without permit from police commissioners and prescribing penalty for its violation, is constitutional.

Approved in *Matter of Yun Quong*, 159 Cal. 512, 513, 114 Pac. 837, act providing that it shall be unlawful for any person to have in his possession opium, or preparation thereof containing more than two grains to fluid ounce, except on prescription of physician, except in certain cases, not unconstitutional; *Ex parte Luening*, 3 Cal. App. 78, 84 Pac. 446, county supervisors may prohibit carrying of concealed weapons in any public place, and such ordinance is not unreasonable because it authorizes sheriff to grant permits to carry such to officers and other persons he may deem fit.

Constitutionality of Laws Restricting Right to carry weapons. See note, 14 L. R. A. 601.

Stricter Regulations are Essential to Good Order of metropolis than are required in sparsely settled portions of country.

Approved in *City of St. Louis v. Galt*, 179 Mo. 19, 77 S. W. 879, 63 L. R. A. 778, city may pass ordinance prohibiting anyone from allowing growth of weeds on his premises over one foot high, and providing that "weeds" shall include all rank vegetable growth which exhales unpleasant odors or that may conceal filthy deposits.

Legislative Body of City is Vested with discretion in reference to police regulations intended for prevention of crime and preservation of public peace which is not reviewable by courts.

Approved in *In re Jones*, 4 Okl. Cr. 82, 109 Pac. 573, where thing may or may not be nuisance, depending upon its location, management or use, and conditions existing in municipality, thus requiring judgment and discretion in determining matter, determination of question by municipality having power to declare what shall be nuisance is conclusive upon courts.

90 Cal. 622-627, 27 Pac. 419, WIXON v. GOODCELL.

Questions Responsive to Matters Testified to in direct examination of witness should be allowed, for purpose of testing value of his testimony upon subject in relation to which he testified in his examination in chief.

Approved in *Taggart v. Bosch* (Cal.), 48 Pac. 1094, on issue of genuineness of note, where plaintiff stated, in chief, that defendant signed and delivered it, as part consideration for interest of plaintiff and his partner in mine, and, on cross-examination, stated that he did not tell his partner on day of sale of taking note, though

they executed deed together, but told him some time later, held that further cross-examination as to how soon after sale he saw his partner was erroneously excluded.

90 Cal. 627-634, 27 Pac. 525, PACIFIC ROLLING MILL CO. v. RIVERSIDE ETC. RY. CO.

Correspondence Between Vendor and Proposed Vendee, from which it appeared that neither party intended to be bound until formal written contract expressing all terms should be executed, does not, in absence of such formal written contract, prove such a concluded agreement as may be specifically enforced.

Approved in Philip Wolf & Co. v. King, 1 Cal. App. 751, 82 Pac. 1055, in question whether letters constitute contract between parties, there is no contract where there is lack of mutual consent by agreement upon same thing in same sense.

90 Cal. 635-643, 27 Pac. 439, SHEWARD v. CITIZENS' WATER CO.

Act of City Council in Fixing Water Rates is legislative act which, when performed, is to receive all presumptions and sanctions which belong to acts of legislative bodies generally.

Approved in Woodruff v. East Orange, 71 N. J. Eq. 432, 64 Atl. 471, establishment of water rates by municipal authorities in exercise of their judgment under statutory authorization could not be controlled in courts except for inequality or some similar reason.

Water Company has Right to Shut Off Water from consumer when latter refuses to pay for water supplied.

Approved in Burke v. Water Valley, 87 Miss. 737, 112 Am. St. Rep. 468, 40 So. 821, rule of city, owning its waterworks, that if water charges against premises, by another rule charged to owner and not to tenant, are not paid, water is to be turned off until charges are paid, thus preventing tenant from tendering charges and getting water without paying charges due from former tenant, is void for unreasonableness; City of Mansfield v. Humphreys Mfg. Co., 82 Ohio St. 223, 92 N. E. 235, under power to make such regulations as they deem necessary in managing waterworks owned by them, municipal corporations may make regulation that if any party refuse or neglect to pay water rent when due, water shall be shut off until payment of all back rent and damages, and also further sum of one dollar for turning water on and off, and such is reasonable regulation; Poole v. Paris Mt. Water Co., 81 S. C. 443, 128 Am. St. Rep. 923, 62 S. E. 876, regulation allowing water supply to be cut off without notice, if bill remains unpaid thirty days from date of bill, is unreasonable, so far as it may be construed to authorize cutting off water, if tenant refuse to pay delinquency due by landlord or former occupant, but is not unreasonable with respect to consumer who is under express or implied contract to pay rents.

Distinguished in Linne v. Bredes, 43 Wash. 544, 117 Am. St. Rep. 1068, 86 Pac. 860, 6 L. R. A. (n. s.) 707, in absence of express statutory authority, city cannot compel subsequent owner or occupant of premises to pay delinquent water charges which he did not contract or incur as condition to further use of water, and thereby virtually create lien or encumbrance on property.

Where Ordinance Fixing Water Rates Does not Show on its face that rates, ascertained by meter, are different from those when

rated by use to which persons apply water, fact that house rates for specific uses are fixed, in absence of exact measurement, so as to be equivalent to meter rates as general rule, and that they may result in inequality in individual cases, will not justify court in inquiring into propriety of terms of ordinance.

Approved in *Powell v. Duluth*, 91 Minn. 60, 97 N. W. 452, where flat rates were made as nearly uniform as possible and to conform to meter rates, fact that appellants would be required to pay monthly from fifty to fifty-five cents more by meter than by flat rate system does not tend to show meter rates unreasonable, or that any discrimination was made between appellants and other consumers.

Establishment and Regulation of Municipal Water Supply. See note, 61 L. R. A. 112, 114, 115.

Preliminary Order of Injunction is Provisional Remedy, which is merged in perpetual injunction granted in final decree, and its functions and operative effect are thereby terminated.

Approved in *Doudell v. Shoo*, 159 Cal. 455, 114 Pac. 582, where temporary injunction is granted, and court then proceeds to final judgment, embodying in decree permanent injunction covering same interference as former injunction, injunction pendente lite expired by such decree, and nothing further can be claimed by virtue thereof; *County of Tehama v. Sisson*, 152 Cal. 179, 92 Pac. 69, although order refusing to dissolve preliminary injunction is reviewable on appeal from final judgment granting permanent injunction, if such final judgment was correctly rendered, any error in granting or refusing to dissolve preliminary injunction becomes immaterial.

NOTES

ON THE

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91 Cal. 5-14, 27 Pac. 423, HEWITT v. DEAN.

Commencement of Action is Sufficient Notice of exercise of option to foreclose on default in payment of interest reserved in mortgage.

Approved in *Trinity County Bank v. Haas*, 151 Cal. 556, 91 Pac. 386, following rule; *Julien v. Model B. L. & I. Assn.*, 116 Wis. 83, 92 N. W. 562, 61 L. R. A. 668, holding mortgagee waived equitable right to notice by leaving usual place of residence without leaving new address.

Holder of Mortgage is Entitled to Reasonable Time in which to exercise option to foreclose upon default in payment of interest.

Approved in *Trinity County Bank v. Haas*, 161 Cal. 556, 91 Pac. 386, following rule; *Kinsel v. Ballou*, 151 Cal. 758, 91 Pac. 622, holder of note entitled to reasonable time to exercise option to declare principal due upon default in payment of interest.

Unambiguous Agreement is to be Construed by court, and testimony as to intention of parties is inadmissible.

Reaffirmed in *Bullock v. Consumers' Lumber Co. (Cal.)*, 31 Pac. 369.

91 Cal. 15-23, 27 Pac. 599, CARTY v. CONNOLLY.

Constructive Fraud is Any Breach of Duty which, without actual fraudulent intent, gains advantage to person in fault by misleading another to his prejudice.

Approved in *Parsons v. Balson*, 129 Wis. 317, 109 N. W. 138, holding failure of guardian to call attention of court to rights of infant in proceeding for probate of will was constructive fraud on infant.

Person in Perfect Mental Capacity, though in mortal illness, is competent to make valid gift of real property.

Approved in *McDonnell v. McDonnell*, 10 Cal. App. 66, 101 Pac. 41, quieting title held under gift deed; *Becker v. Schwerdtle*, 6 Cal. App. 466, 92 Pac. 399, holding deed to property executed during serious illness could not be revoked on recovery.

Gifts Causa Mortis. See note, 99 Am. St. Rep. 917.

Parol Evidence as to Consideration of Deed. See note, 20 L. R. A. 109.

91 Cal. 23-30, 27 Pac. 523, PEOPLE v. STAPLES.

Where Complaint Against Defendant Charging Crime is positive and direct in its allegation of every fact necessary to support charge, it is sufficient deposition to support warrant for arrest.

Approved in *Modern Loan Co. v. Police Court*, 12 Cal. App. 584, 108 Pac. 57, reaffirming rule.

Where Prisoner Charged With Felony has been examined and is held to answer, commitment is sufficient to authorize filing of information, and want of jurisdiction in warrant of arrest is immaterial.

Reaffirmed in *People v. Gregory*, 8 Cal. App. 741, 97 Pac. 913.

Where Defendant is Charged With Larceny in bringing goods into state stolen in another state, laws of state control as to what constitutes larceny.

Approved in *State v. White*, 76 Kan. 662, 92 Pac. 832, 14 L. R. A. (n.s.) 556, and *Barclay v. United States*, 11 Okl. 513, 69 Pac. 801, both following rule.

What Law Defines Larceny Under Statute against bringing stolen property into state. See note, 15 L. R. A. 723.

Where Defendant is Charged With Larceny in bringing stolen goods into county, variance between complaint and information as to place where stolen is immaterial.

Approved in *State v. De Wolfe*, 29 Mont. 421, 74 Pac. 1086, holding no variance between information charging larceny in one county and proof goods were stolen in Canada and brought to county; In *re Loomis (Ex parte Sullivan)*, 84 Neb. 497, 121 N. W. 458, holding charge of buying stolen horses in state with intent to defraud owner states offense, though charge further recites horses were stolen in another state.

Delay of Prosecution as Ground for Discharge. See note, 56 L. R. A. 518.

91 Cal. 30-35, 27 Pac. 534, PERRI v. BEAUMONT.

Actual Settler on Unsurveyed Swamp Land who has made valuable improvements and possesses personal qualifications necessary to entitle him to purchase land if surveyed, and who desires to purchase, can contest right to patent of prior applicant who has invalid certificate of purchase.

Distinguished in *Polk v. Sleeper*, 158 Cal. 636, 112 Pac. 181, holding where applicant to purchase state land, who had not received certificate of purchase, commenced action to determine right to purchase, and died, his administrator could not continue action to determine validity of certificate of purchase held by defendant; *Ewbank v. Mikel*, 6 Cal. App. 143, 91 Pac. 673, holding such settler would have been entitled to contest had he commenced action in proper time.

Jurisdiction of Superior Court to Determine contest of right to purchase state land is special, and when invoked, court should determine entire controversy referred to it for decision.

Approved in *Kleinsorge v. Burgbacher*, 6 Cal. App. 353, 92 Pac. 202, holding jurisdiction of contest to determine right to purchase timber lands, though confined to matters contained in reference, was not confined to dates of apparent filing of applications by surveyor general.

Actual Settler on Unsurveyed Swamp Lands, otherwise qualified and desiring to purchase, but who cannot make valid application prior to survey, is entitled to judgment, upon contest against applicant for patent claiming under invalid certificate of purchase, determining invalidity of application.

Approved in *Jacobs v. Walker* (Cal.), 33 Pac. 91, holding fact that plaintiff's application to purchase state land, of which he was in possession, had been adjudged invalid, and that he had no right to purchase, made him none the less proper party to proceedings to determine contest of defendant's right to purchase.

91 Cal. 37-41, 27 Pac. 588, **MARSTON v. WHITE.**

Provision of Section 694, Code of Civil Procedure, applies to sale under judgment of foreclosure only when judgment is silent as to sale.

Approved in dissenting opinion in *Estudillo v. Security Loan etc. Co.*, 149 Cal. 568, 87 Pac. 24, majority deciding case on other grounds.

Where Distinct Parcels of Land are First Offered separately on foreclosure sale, but without bids, they may then be sold together.

Approved in *Bechtel v. Wier*, 152 Cal. 448, 93 Pac. 78, 15 L. R. A. (n. s.) 459, following rule.

91 Cal. 41-48, 27 Pac. 521, **ALANIZ v. CASENAVE.**

Where General Fiduciary Relation Exists, it is not necessary to allege or prove trustee took conveyance with fraudulent intention of claiming it as his own, in order to establish constructive trust.

Approved in *Coombes v. Barker*, 31 Mont. 554, 79 Pac. 10, holding allegation and proof of breach of official duty on part of directors of corporation is sufficient to entitle stockholders to relief, though no fraud is shown.

If, by Means of Parol Promise to Reconvey, one obtains absolute deed, without consideration from one who stands in fiduciary relation, he holds property in constructive trust for grantor.

Approved in *Cooney v. Glynn*, 157 Cal. 587, 108 Pac. 508, holding property conveyed by mother to son on his promise to hold in trust for sister was in constructive trust; *Chamberlain v. Chamberlain*, 7 Cal. App. 639, 95 Pac. 661, holding property conveyed to daughter in law without consideration, on false representation grantor was liable for certain corporate debts, was held in constructive trust; *Tourtillotte v. Tourtillotte*, 205 Mass. 552, 91 N. E. 910, deed to family burial lot taken by mistake in name of one member of family who promised orally to hold for family use created constructive trust; *Cardiff v. Marquis*, 17 N. D. 119, 114 N. W. 1091, holding deed by daughter to father on parol promise to hold in trust for her, which he failed to do, created trust enforceable in equity.

Courts will not Allow Trust to be proven by party to fraud, if trust was created for fraudulent purpose.

Reaffirmed in *Allstead v. Laumeister*, 16 Cal. App. 66, 116 Pac. 298.

91 Cal. 48-63, 27 Pac. 590, **SAPPENFIELD v. MAIN ST. ETC. R. CO.**

Burden is on Servant to Show Appliance of master causing his injury was defective, and master could have discovered defect by reasonable inspection.

statutes, is sufficient to charge simple larceny, without allegation that taking was felonious; *State v. Halpin*, 16 S. D. 172, 91 N. W. 606, indictment alleging that one did unlawfully and feloniously, and by stealth, steal, take, and carry away certain property of another without his consent sufficiently charges offense of larceny.

Information Which Contains Either "Feloniously" or word "steal" will be held valid as charging criminal intent with which act was committed, if sufficient in other respects.

Approved in *State v. Hughes*, 31 Nev. 274, 102 Pac. 563, in indictment alleging that defendant assaulted prosecutor and attempted to feloniously rob him, word "feloniously" means "done with intent to commit" the crime.

90 Cal. 574-580, 27 Pac. 431, SAN DIEGO LAND CO. v. WOOL-DREDGE.

Recorded Contract Between Contractor and Owner of building to be erected for price of over one thousand dollars is not required by statute to contain description of property to be affected thereby.

Approved in *Stearns-Roger Co. v. Aztec Co.*, 14 N. M. 321, 93 Pac. 710, written contract not being basis of action for lien, it may be shown by any competent proof that material was furnished for construction of property on which lien was claimed, description of land not being needed in contract unless statute requires.

Substitution of Thirty Days After Completion of building instead of thirty-five days, for time of final payment, is not such substantial nonconformity with statute as will impose liability upon owner for materials and labor furnished, under section 1183 of Code of Civil Procedure.

Approved in *Burnett v. Glas*, 154 Cal. 256, 97 Pac. 426, provision in building contract reserving payment of only twenty per cent of contract price for thirty-five days after completion is such departure from statutory requirement as to subject property to liens in favor of those furnishing labor and materials; *Merced Lumber Co. v. Bruschi*, 152 Cal. 374, 92 Pac. 845, provision making whole of contract price payable at completion of building is substantial departure from provisions of section 1184, Code of Civil Procedure; *Stimson Mill Co. v. Riley (Cal.)*, 42 Pac. 1074, fact that building contract, in providing for payments, retains until thirty-five days after completion of work slightly less (only fifteen dollars) than twenty-five per cent of contract price required by statute, does not render owner personally liable for all labor and materials furnished; *Dunlop v. Kennedy (Cal.)*, 34 Pac. 94, failure to comply substantially with section 1184 of Code of Civil Procedure does not render contract void.

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91 Cal. 98-101, 27 Pac. 595, PEOPLE v. AH JAKE.

Where Instructions as a Whole Correctly, State Law, verdict will not be set aside because of vague expressions therein.

Approved in *People v. Besold*, 154 Cal. 370, 97 Pac. 874, holding restrictions as a whole fairly stated law; *People v. Garnett*, 9 Cal. App. 205, 98 Pac. 252, refusing to set aside verdict of guilty because of too general statements contained in vague and meaningless instruction, when instructions, as a whole, were fair.

91 Cal. 101-103, 27 Pac. 532, MINES D'OR DE QUARTZ MT. SOCIETY v. SUPERIOR COURT.

Prohibition Does not Lie to Restrain Court from proceeding in action when question is raised as to jurisdiction acquired by publication, remedy being by appeal.

Approved in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 247, 91 Pac. 1017, holding writ did not lie to restrain condemnation proceeding because court reserved question of necessity of taking particular piece after verdict which determined value of whole tract; *Hubbard v. Justice's Court*, 5 Cal. App. 91, 89 Pac. 865, writ did not lie to prevent trial of action in justice's court where summons was not served in three years, remedy being by appeal; *Johnston v. Superior Court*, 4 Cal. App. 92, 87 Pac. 212, writ did not lie to prevent court from determining contest between rival applicants for letters of administration of estate over which court had jurisdiction; *State v. Morse*, 27 Utah, 339, 75 Pac. 740, writ did not lie to restrain criminal proceedings on ground provisions of statute requiring examination before magistrate were not complied with.

Writ of Prohibition. See note, 111 Am. St. Rep. 960.

91 Cal. 103-106, 27 Pac. 536, MILLER v. HIGHLAND DITCH CO.

Memorandum of Costs, When Properly Verified, should, unless controverted, control decision of court in taxing costs.

Approved in *Gaffey v. Mann*, 3 Cal. App. 127, 84 Pac. 425, holding affidavit of counsel proved incurring expense for counsel fees.

Only Such Costs as are Necessary should be allowed successful party.

Approved in *Estate of Bell*, 157 Cal. 532, 108 Pac. 498, holding cost of printing transcript properly charged to unsuccessful party.

91 Cal. 107-112, 27 Pac. 533, PRESTON v. FREY.

In Action for Slander, Evidence that slanderous statements of defendant were of common report is inadmissible.

Reaffirmed in *Davis v. Hearst*, 160 Cal. 182, 116 Pac. 547.

91 Cal. 112-118, 27 Pac. 735, KREAMER v. EARL.

Agreement, Object of Which is to Secure from state large tracts of land through applications of other persons in manner unauthorized by law, is contrary to public policy and void.

Approved in *Benicia Agricultural Works v. Estes* (Cal.), 32 Pac. 940, holding void note and mortgage given to secure withdrawal of opposition to discharge in bankruptcy.

Distinguished in *Murray v. White*, 42 Mont. 441, 113 Pac. 759, holding valid contract by entryman to convey title to portion of land when patent issued as agricultural land, when other party was not disqualified to secure patent to agricultural land.

Although No Objection is Made by Either Party, court will refuse to enforce illegal contract.

Approved in *McCowen v. Pew*, 153 Cal. 741, 96 Pac. 896, 21 L. R. A. (n. s.) 800, *Union Collection Co. v. Buckman*, 150 Cal. 164, 165, 119 Am. St. Rep. 164, 88 Pac. 710, 9 L. R. A. (n. s.) 568, and *Jackson v. Baker*, 48 Or. 158, 85 Pac. 513, all following rule; *Dunn v. Stegemann*, 10 Cal. App. 40, 101 Pac. 26, denying relief to either party in suit on contract for location of saloon near church in violation of law.

91 Cal. 119-124, 27 Pac. 601, IRWIN v. McDOWELL.

Levy of Attachment on Mortgaged Personal Property without tender of mortgaged debt is conversion by sheriff.

Approved in *Sousa v. Lucas*, 156 Cal. 465, 105 Pac. 415, and *Bacon v. Bacon*, 150 Cal. 483, 89 Pac. 319, both reaffirming rule.

Mortgagee's Right of Action Against Third Persons for invasion of their rights. See note, 109 Am. St. Rep. 450.

Miscellaneous.—Cited in *Irwin v. McDowell* (Cal.), 34 Pac. 709, on another appeal.

91 Cal. 129-135, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, PICO v. COHN.

Judgment will be Vacated in Equity only upon showing of extrinsic fraud which prevented determination of issues on merits.

Approved in *Doyle v. Hampton*, 159 Cal. 734, 116 Pac. 41, vacating judgment obtained on service by publication, when plaintiff made false showing to secure order for publication of summons; *Campbell-Kawannanako v. Campbell*, 152 Cal. 209, 92 Pac. 187, setting aside probate sale of estate in fraud of heirs effected by false representations to court; *Flood v. Templeton*, 152 Cal. 155, 92 Pac. 81, 13 L. R. A. (n. s.) 579, setting aside judgment obtained through fraudulent act of party in preventing adversary from presenting meritorious defense; *Tracy v. Muir*, 151 Cal. 373, 121 Am. St. Rep. 117, 90 Pac. 835, holding intrinsic fraud in procuring judgment not changed to extrinsic fraud by fact that it was result of conspiracy; *Bacon v. Bacon*, 150 Cal. 491, 89 Pac. 322, where plaintiff, relying upon statement of husband and executors, who were legatees of will, that her legacy was two thousand dollars, failed to appear at distribution, when in fact they were mistaken and legacy was ten thousand dollars, was entitled to have such legatees declared trustees for her; *Cragie v. Roberts*, 6 Cal. App. 314, 317, 92 Pac. 100, 101, agricultural claimant could not enforce trust against mineral patentee on ground patent was fraudulently obtained by perjured testimony as to character of land before land department; *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 276, 90 Pac. 44, refusing to set aside judgment on ground of mistake in law by attorney; *In re Burton*, 5 Cal. Prob. 242, holding bill to set aside judgment did not sufficiently allege extrinsic fraud; *Estate of Welch*, 3 Cal. Prob. 305, holding fraud not shown on motion to set aside judgment making family allowance; *Electric Plaster Co. v. Blue Rapids Township*, 81 Kan. 735, 739, 106 Pac. 1080, 1081, *Graves v. Graves*, 132 Iowa, 203, 109 N. W. 708, *Bleakley v. Barclay*, 75 Kan. 470, 89 Pac. 909, *Donovan v. Miller*, 12 Idaho, 607, 612, 88 Pac. 83, 85, 9 L. R. A. (n. s.) 524, *Kennedy v. Dickie*, 34 Mont. 223, 85 Pac. 987, *Boring v. Ott*, 138 Wis. 268, 119 N. W. 868, 19 L. R. A. (n. s.) 1080, *Cagle v. Dunham*, 14 Okl. 621,

78 Pac. 564, El Capitan Land etc. Co. v. Lees, 13 N. M. 415, 86 Pac. 926, and Nelson v. Meehan, 155 Fed. 9, 12 L. R. A. (n. s.) 374, 83 C. C. A. 597, all refusing to set aside judgment on ground it was obtained by means of perjured testimony; Thomason v. Thompson, 129 Ga. 447, 59 S. E. 240, refusing to set aside judgment on ground prevailing party practiced fraud on court in concealing evidence of particular fraud, which was issue being determined; Pepin v. Lautman, 28 Ind. App. 78, 62 N. E. 61, refusing to set aside judgment on ground it was obtained by perjured testimony; Bradbury v. Wells, 138 Iowa, 678, 115 N. W. 882, 16 L. R. A. (n. s.) 240, holding failure of executors to account for certain corporate stock of testator did not warrant setting aside order discharging them; Tollefson v. Tollefson, 137 Iowa, 154, 114 N. W. 632, setting aside, after two years, divorce decree obtained on publication of summons when plaintiff had fraudulently induced wife to return to old home in Europe; Mahoney v. State Ins. Co., 133 Iowa, 575, 110 N. W. 1043, 9 L. R. A. (n. s.) 490, holding fraud alleged was not extrinsic; Horner v. Schin-stock, 80 Kan. 140, 101 Pac. 997, 23 L. R. A. (n. s.) 134, holding party, against whom judgment was obtained by perjury of adverse party, could not, while judgment was in force, maintain action against adverse party for damages alleged to have been suffered because of such perjury; Zeitlin v. Zeitlin, 202 Mass. 208, 132 Am. St. Rep. 490, 88 N. E. 763, 23 L. R. A. (n. s.) 569, refusing to set aside divorce decree obtained by perjured testimony; Steele v. Culver, 157 Mich. 350, 122 N. W. 97, 23 L. R. A. (n. s.) 564, holding collection of judgment would not be enjoined on ground it was obtained by perjury; Michael v. National Bank, 84 Ohio, 382, 95 N. E. 907, holding extrinsic fraud not shown; Reeves v. Reeves, 24 S. D. 441, 123 N. W. 871, refusing to set aside divorce decree upon allegation that fraud in residence was shown by plaintiff's immediately leaving state after obtaining divorce and marrying another man; Keith v. Alger, 114 Tenn. 21, 22, 23, 25, 85 S. W. 76, 77, refusing to set aside judgment setting aside sale of land for vendor's fraud, under which land was sold as part of vendor's estate, when vendee had, pending suit, conveyed land and concealed conveyance; Necker v. Thiedt, 133 Wis. 152, 113 N. W. 448, holding where wife obtained divorce on ground of five years' voluntary separation, fact she was induced by husband's fraud to accept specified sum in satisfaction of her share of property was not ground for setting aside decree.

Distinguished in Carpenter v. Sibley, 153 Cal. 218, 126 Am. St. Rep. 77, 94 Pac. 880, 15 L. R. A. (n. s.) 1143, setting aside judgment in malicious prosecution obtained by perjured testimony; Keyes v. Brackett, 187 Mass. 308, 72 N. E. 987, where owner of property chargeable with mechanic's lien conveyed it to irresponsible person, who with aid of irresponsible sureties executed bond to dissolve lien, lienor was entitled to have bond declared void.

Perjury as Ground for Relief Against Judgment. See note, 10 L. R. A. (n. s.) 230.

91 Cal. 136-141, 27 Pac. 594, **HINCKLEY v. FIELD'S BISCUIT ETC. CO.**

Persons Employed by Owner of Factory to make in their own shop and install steam plant for price over one thousand dollars are materialmen, and not contractors, and contract need not be written or recorded to make it valid basis for lien.

Approved in California etc. Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 704, 118 Pac. 108, rule applies to contract to install elevators.

Miscellaneous.—Cited in Salt Lake Hardware Co. v. Chainman Mining etc. Co., 128 Fed. 510, to point that mechanic's lien law should be interpreted to carry out intention of legislature, and give lien claimants benefits they are entitled to.

91 Cal. 141-146, 27 Pac. 546, BEHLOW v. SHORB.

Summons Considered and Held to sufficiently comply with statute.

Approved in Stanley v. Rachofsky, 50 Or. 475, 93 Pac. 355, holding summons not defective for failing to state interest rate when copy of complaint was attached.

91 Cal. 146-157, 27 Pac. 543, GOULD v. STAFFORD.

Right of Riparian Owner to Flow of Stream over his land is part and parcel of it, but may be severed from land by grant, condemnation, or prescription.

Approved in Duckworth v. Watsonville Water & Light Co., 158 Cal. 218, 110 Pac. 932, holding grantee estopped to claim water right severed from land and conveyed to another by his grantor; Northern Light etc. Co. v. Stacher, 13 Cal. App. 423, 109 Pac. 901, holding riparian rights in stream could be condemned for public use for electric power by electric light company.

Liability to Third Persons of Lessors of personal property. See note, 92 Am. St. Rep. 525, 535.

Landlord's Liability for Injury to adjoining property from cause arising during tenancy. See note, 5 L. R. A. (n. s.) 318.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 56.

Miscellaneous.—Cited in Carnes v. Dalton, 56 Or. 606, 110 Pac. 174, to point that riparian owner may enjoin wrongful diversion of water by defendant without joining others who also wrongfully divert water.

91 Cal. 158-164, 27 Pac. 596, 861, GRANT v. OLIVER.

Record of Deed is Improperly Admitted in evidence in absence of proof of loss of original.

Approved in People v. Le Doux, 155 Cal. 550, 102 Pac. 526, holding record of marriage license was not proof of recitals contained therein.

Admissibility of Record, or Copy of Record, to prove deed under which party offering it claims. See note, 19 L. R. A. (n. s.) 442.

When Defects in Certificates of acknowledgment are fatal. See note, 108 Am. St. Rep. 545.

Right to Attach or Correct Certificate of acknowledgment after its date. See note, 22 L. R. A. (n. s.) 218.

Reversal of Judgments. See note, 96 Am. St. Rep. 142.

91 Cal. 170-187, 27 Pac. 658, WINTERBURN v. CHAMBERS.

Notice of Ouster of One Cotenant by another may be given by open and notorious acts showing hostile intent.

Approved in Tabler v. Peverill, 4 Cal. App. 677, 88 Pac. 997, holding divorced wife did not hold community property adversely in absence of notice of hostile intent; Ames v. Howes, 13 Idaho, 766, 93 Pac. 38, where one cotenant took deed to part of real estate owned

in common and recorded it, such recordation was notice to cotenants of adverse claim to real estate.

Creation of Prescriptive Title by adverse possession of one cotenant. See note, 109 Am. St. Rep. 612, 613.

It will be Assumed on Appeal that all findings of fact against which bill of exceptions contains no specification of insufficiency of evidence to sustain them are sustained by evidence.

Reaffirmed in *Matter of Baker*, 153 Cal. 542, 96 Pac. 14.

Color of Title. See note, 88 Am. St. Rep. 725.

91 Cal. 187-191, 27 Pac. 587, ELY v. FERGUSON.

Water Flowing from Springs on Public Land is subject to appropriation.

Approved in *De Wolfskill v. Smith*, 5 Cal. App. 180, 89 Pac. 1003, holding water flowing from abandoned oil wells on public land to be subject to appropriation.

Appropriation of Percolating Waters on Public Lands. See note, 30 L. R. A. 186.

Transfer of Right to Use Water for Irrigation. See note, 65 L. R. A. 411.

Miscellaneous.—Cited in *Quinlan v. Calvert*, 31 Mont. 119, 77 Pac. 430.

91 Cal. 191-194, 25 Am. St. Rep. 171, 27 Pac. 598, DYER v. LEACH.

Upon Death of Trustee, trust vests in court.

Approved in *Blake v. O'Neal*, 63 W. Va. 490, 61 S. E. 413, 16 L. R. A. (n. s.) 1147, holding grant, bargain and sale deed to one for use of another vested legal title in trustee, which on his death goes in trust to his heirs.

Objection to Rejection of Documentary Evidence cannot be considered on appeal when nothing appears of record to show character of such documents.

Approved in *San Francisco Com. Agency v. Hogan Co.*, 6 Cal. App. 409, 92 Pac. 312, following rule.

Collateral Attack upon Judgments. See notes, 87 Am. St. Rep. 429; 85 Am. St. Rep. 68.

91 Cal. 206-213, 27 Pac. 648, MONTGOMERY v. SAYRE.

Maker of Note Given to Secure Payment of note of corporation, indorsed by third person, and secured by mortgage on corporation's property, is surety.

Approved in *Townsend v. Sullivan*, 3 Cal. 119, 84 Pac. 436, holding where note was given for benefit of one maker and mortgage given on property of two comakers as security, such comakers were sureties only.

Where Record is Silent as to Demand for jury trial, it is deemed to have been waived.

Approved in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1018, following rule.

91 Cal. 213-222, 27 Pac. 610, PEOPLE v. BEAUDRY.

Attorney General has Authority to Institute action in name of people to abate public nuisance.

Approved in *State v. Vandalia*, 119 Mo. App. 418, 421, 94 S. W. 1011, 1013, and *State v. Franklin*, 133 Mo. App. 492, 493, 113 S. W. 653, 654, both following rule.

Obstruction to Public Street may be Abated as public nuisance.

Distinguished in *State v. Ehrlick*, 65 W. Va. 709, 64 S. E. 939, 23 L. R. A. (n. s.) 691, dissolving injunction to restrain operation of gaming establishment obtained on ground it was public nuisance.

91 Cal. 223-231, 27 Pac. 612, 14 L. R. A. 151, **BONETTI v. TREAT.**

Assignment of Lease by Lessee and acceptance of part of rent by landlord from assignee does not relieve lessee from liability on lease to pay rent.

Approved in *Jordan v. Indianapolis Water Co.*, 159 Ind. 350, 64 N. E. 684, following rule; *Chaney v. Ohio & Ind. Oil Co.*, 32 Ind. App. 198, 69 N. E. 479, where gas lease was assigned, assignee was not liable for penalties for failure to drill wells under terms of lease.

Rights of Landlord on Abandonment of premises by tenant. See note, 114 Am. St. Rep. 717.

Assignment of Lease. See note, 15 L. R. A. 755.

Effect of Assignment of Oil and Gas Lease. See note, 34 L. R. A. 62.

Right to Set Up by Cross-bill inequitable conduct in respect to subject matter not involved in original bill. See note, 13 L. R. A. (n. s.) 408.

91 Cal. 231-238, 27 Pac. 655, 13 L. R. A. 418, **KIESSIG v. ALLSPAUGH.**

Where Principal has Left Sufficient Funds in hands of obligee to meet obligation, and instead of retaining it he pays it back to principal, surety is discharged from liability.

Approved in *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 497, 99 Pac. 864, holding surety on contractor's bond released by material changes in plans; *County of Glenn v. Jones*, 146 Cal. 523, 80 Pac. 697, holding sureties on contractor's bond released by premature payment, without their consent, of first installment before all materials were furnished, as required by contract.

Release of Surety on Building Contractor's Bond by making payments not authorized by contract. See note, 5 L. R. A. (n. s.) 418.

91 Cal. 238-260, 27 Pac. 604, **PASADENA v. STIMSON.**

Act Limiting Right of Eminent Domain in cities of certain class is void as imposing burdensome condition on exercise of common right.

Approved in *Los Angeles v. Lankershim*, 160 Cal. 802, 804, 118 Pac. 216, 217, holding void ordinance imposing license tax on persons maintaining buildings to let for stores or offices containing more than thirty rooms.

Under Article XI, Section 6, Constitution, legislature may classify cities and towns in proportion to population for purpose of incorporation and organization, and law limited to such purpose is general law.

Distinguished in dissenting opinion in *Ex parte Fedderwitz* (Cal.), 62 Pac. 942, majority deciding case on other grounds.

A Law is General When It Applies equally to all persons embraced in class founded upon some natural, or intrinsic, or constitutional distinction.

Approved in *Ex parte King*, 157 Cal. 164, 106 Pac. 579, upholding act prohibiting sale of intoxicants within certain distance of camp

or assembly of twenty-five or more men engaged on public work as not making improper classification; *In re Martin*, 157 Cal. 55, 106 Pac. 237, act of March 10, 1909, limiting hours of employment in underground mines and smelters, is not special legislation; *People v. Finley*, 153 Cal. 61, 94 Pac. 249, upholding act imposing death penalty on life prisoner for assault with deadly weapon, as being based on proper classification of persons; *Wheeler v. Herbert*, 152 Cal. 233, 92 Pac. 357, holding act providing for change of boundary line between Kings and Fresno counties did not grant special privileges to certain classes of electors; *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 323, 119 Am. St. Rep. 199, 88 Pac. 366, 8 L. R. A. (n. s.) 682, fact that McEnerney Act regulates practice in actions therein provided for does not make it special legislation; *Johnson v. Gunn*, 148 Cal. 749, 752, 84 Pac. 666, 667, upholding act classifying townships in counties of twenty-seventh class with reference to population for purpose of fixing salaries of justices of peace; *Ex parte Sohncke*, 148 Cal. 267, 113 Am. St. Rep. 236, 82 Pac. 959, 2 L. R. A. (n. s.) 813, holding void act fixing interest rates on chattel mortgages of certain specified kinds of personal property; *Woman's Relief etc. Assn. v. Nye*, 8 Cal. App. 535, 538, 97 Pac. 211, 212, holding "veteran of Civil War" constituted class founded on natural distinction; *Ex parte Elam*, 6 Cal. App. 240, 91 Pac. 814, holding distinction between wells having natural flow and wells not having such flow is natural, and indicates propriety of legislation limiting former class; *In re Finley*, 1 Cal. App. 207, 81 Pac. 1045, upholding act imposing death penalty on life prisoner for assault with deadly weapon as not creating improper classification; *Stratman v. Commonwealth*, 137 Ky. 508, 136 Am. St. Rep. 299, 125 S. W. 1097, holding void act imposing higher penalties on barbers for doing Sunday work than on others following usual occupations on Sunday; *State v. Dolan*, 13 Idaho, 717, 92 Pac. 1003, 14 L. R. A. (n. s.) 1259, upholding Sunday act of 1907 as being general law; dissenting opinion in *State v. Smith*, 158 Ind. 571, 63 N. E. 218, majority upholding act providing owner of real estate could have mortgage debt thereon, not to exceed seven hundred dollars, and one-half value, deducted from valuation for purposes of taxation.

Constitutional Inhibition Against Special Legislation where general law can be made applicable. See note, 93 Am. St. Rep. 111.

In Suit to Condemn Land for City Sewer, city need only prove necessity of land condemned for purpose of sewer, and not that sewer itself is desirable.

Approved in *Laguna Drain Dist. v. Charles Martin Co.*, 5 Cal. App. 174, 89 Pac. 996, holding drainage district need only prove need of land desired for aqueduct, and not necessity for existence of district; *Grafton v. St. Paul etc. R. R. Co.*, 16 N. D. 317, 113 N. W. 599, 22 L. R. A. (n. s.) 1, and *City of Santa Ana v. Harlin*, 99 Cal. 541, 34 Pac. 225, both holding defendant in suit to condemn land for street could not raise question of necessity of street; *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1018, holding in condemnation suit where issue was joined as to necessity of taking land for plaintiff's use, it was duty of court to decide whether any and, if so, what portion, of land was necessary.

Necessity of Taking Particular Land by eminent domain, as a judicial question. See note, 11 L. R. A. (n. s.) 942.

Acts of Agents of State in Selecting Route for public sewer are presumed correct, and that such location is unnecessarily injurious must be clearly shown by objectors thereto, to warrant relocation.

Approved in *Tuolumne Water etc. Co. v. Frederick*, 13 Cal. App. 505, 110 Pac. 137, applying rule to location of electric line.

Procedure for Establishment of Drains and Sewers. See note, 60 L. R. A. 165, 178, 196, 197.

Duty and Liability of Municipality with respect to drainage. See note, 61 L. R. A. 678.

Court will Take Judicial Notice that city is incorporated.

Approved in *Stoner v. Los Angeles*, 8 Cal. App. 610, 97 Pac. 694, court will take judicial notice of city charter.

Highway may be Condemned for City Sewer when new use does not interfere with use as highway.

Approved in *Portneuf Irr. Co. v. Budge*, 16 Idaho, 132, 100 Pac. 1052, holding one canal company could condemn unused part of right of way of another canal company for purpose of enlarging canal to carry water needed for use of latter company.

Corporation is Person Within Meaning of state laws.

Approved in *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 695, 115 Pac. 1098, following rule.

Private Property may be Taken for any use specified in section 1238, Code of Civil Procedure.

Approved in *Northern Light etc. Co. v. Stacher*, 13 Cal. App. 412, 109 Pac. 904, riparian rights subject to condemnation for use of electric power company for public use; *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 695, 115 Pac. 1098, holding foreign corporation could condemn property for any use specified in section 1238, Code of Civil Procedure.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n.s.) 69, 83, 168.

Constitutionality of Statutes Restricting Contracts and business. See note, 21 L. R. A. 791.

91 Cal. 260-264, 27 Pac. 650, **VISHER v. SMITH.**

Complaint in Claim and Delivery which states particular facts entitling plaintiff to possession of property sufficiently pleads his title, though not alleging he is owner and entitled to possession.

Approved in *Thompson v. Caddo County Bank*, 15 Okl. 618, 82 Pac. 928, following rule.

Right to Maintain Action to Recover Property in specie against one not in possession. See note, 18 L. R. A. (n.s.) 1266.

91 Cal. 265-274, 27 Pac. 663, **PEOPLE v. JOHNSON.**

Embezzlement. See note, 87 Am. St. Rep. 32.

91 Cal. 274-278, 25 Am. St. Rep. 174, 27 Pac. 657, **STANTON v. FRENCH.**

Record on Former Appeal may be Examined for purpose of ascertaining facts so as to determine to what extent rule of law of case applies.

Reaffirmed in *Westfall v. Wait*, 165 Ind. 359, 73 N. E. 1091.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 332.

It will be Presumed on Appeal that jury followed instructions of court.

Reaffirmed in *American Car & Foundry Co. v. Clark*, 32 Ind. App. 563, 70 N. E. 832, and *Schultz v. State*, 135 Wis. 654, 116 N. W. 259.

91 Cal. 282-285, 25 Am. St. Rep. 176, 27 Pac. 589, **MILLER v. SEARS.**

Deposit of Deed With Third Person by one party to contract for exchange of lands to be delivered to other party as soon as question of title should be settled to satisfaction of parties is not delivery in escrow.

Approved in *Davis v. Brigham*, 56 Or. 49, 107 Pac. 963, where offer to sell land at specified price within certain time was not accepted within that time, deposit of deed by owner in bank with instructions to collect price named was not an escrow; *Van Valkenburg v. Allen*, 111 Minn. 336, 137 Am. St. Rep. 561, 126 N. W. 1093, deposit of deed with bank for delivery on payment of named sum considered and held not to be an escrow.

Escrows. See note, 130 Am. St. Rep. 958.

91 Cal. 285-288, 25 Am. St. Rep. 178, 27 Pac. 656, **BLAISDELL v. McDOWELL.**

Section 2955, Civil Code, Providing upon what articles chattel mortgages may be made, should be reasonably and liberally construed.

Approved in *Old Settlers' Investment Co. v. White*, 158 Cal. 241, 110 Pac. 925, holding restaurant furniture subject of chattel mortgage.

91 Cal. 288-296, 25 Am. St. Rep. 180, 27 Pac. 668, 929, **ETCHEPARE v. AGUIRRE.**

In Claim and Delivery Where Defendant demands return of property, and verdict in his favor is special as to value and general as to all other issues, it will sustain judgment in alternative.

Approved in *Cain v. Cody* (Cal.), 29 Pac. 779, holding verdict for damages and value of property sustained judgment for return of property; *Hynes v. Barnes*, 30 Mont. 26, 27, 75 Pac. 523, holding verdict finding value of property but not providing for its return would support judgment in alternative.

Judgment in Replevin Should be for Return of property, or in case return cannot be had, for its value.

Approved in *Johnson v. Gallegos*, 10 N. M. 5, 60 Pac. 72, holding return of property before levy of execution on alternative money judgment was satisfaction thereof.

Miscellaneous.—Cited in *Hynes v. Barnes*, 30 Mont. 28, 75 Pac. 524, to point that district court, prior to appeal, has power to correct its judgments in certain particulars.

91 Cal. 296-304, 25 Am. St. Rep. 186, 27 Pac. 666, **BARRETT v. SOUTHERN PACIFIC CO.**

Fact That Turntable was Set in Motion by negligent act of other boys, causing injury to plaintiff, does not affect liability of defendant, who negligently permitted boys to play about turntable.

Approved in *Merrill v. Los Angeles Gas etc. Co.*, 158 Cal. 506, 139 Am. St. Rep. 134, 111 Pac. 537, holding gas company liable for

injury caused by explosion of gas escaping from its pipes, though ignited by another person; *Spear v. United Railroads*, 16 Cal. App. 661, 117 Pac. 967, holding negligence of injured person ceases to be proximate cause of injury when another has opportunity to prevent it and neglects to do so.

Railroad is Liable for Injury caused to boy while playing on unguarded turntable.

Approved in *York v. Pacific etc. Ry. Co.*, 8 Idaho, 585, 69 Pac. 1045, *Chicago Ind. etc. R. Co. v. Fox*, 38 Ind. App. 277, 70 N. E. 85, and *Edgington v. Burlington etc. R. Co.*, 116 Iowa, 430, 90 N. W. 102, 57 L. R. A. 561, all following rule; *Cahill v. Stone*, 153 Cal. 574, 96 Pac. 85, 19 L. R. A. (n. s.) 1094, holding railroad liable for injury to boy caused while playing about unlocked and unguarded push-car; *Brown v. Salt Lake City*, 33 Utah, 236, 126 Am. St. Rep. 828, 93 Pac. 574, 14 L. R. A. (n. s.) 619, holding city liable for death of child in unguarded conduit of water system; dissenting opinion in *Ryan v. Tower*, 128 Mich. 483, 92 Am. St. Rep. 481, 87 N. W. 651, 55 L. R. A. 310, majority holding corporation not liable for injury to child while playing about unused pump-house.

Disapproved in *Wilmot v. McPadden*, 79 Conn. 378, 65 Atl. 161, 19 L. R. A. (n. s.) 1101, holding owners of building not liable for injury to trespassing child caused by fall of chimney during demolition of building; *Chicago etc. R. R. Co. v. Krayenbuhl*, 65 Neb. 900, 91 N. W. 881, 59 L. R. A. 920, and *Wheeling & Lake Erie R. v. Harvey*, 77 Ohio St. 243, 122 Am. St. Rep. 503, 83 N. E. 69, 19 L. R. A. (n. s.) 1136, both holding in such case railroad was not liable; *Ryan v. Tower*, 128 Mich. 471, 92 Am. St. Rep. 481, 87 N. W. 647, 55 L. R. A. 310, holding corporation not liable for injury to child while playing about unused pump-house.

Liability of Railroad for Injury to children playing on turntable. See notes, 14 L. R. A. 782, 783, 784; 4 L. R. A. (n. s.) 81, 82.

Attractive Nuisance. See note, 19 L. R. A. (n. s.) 1119, 1124, 1133, 1164.

91 Cal. 309-313, 27 Pac. 737, **WARNER v. DARROW.**

Question Presented on Motion for Nonsuit is question of law.

Approved in *Nelmes v. Wilson* (Cal.), 34 Pac. 341, *Non-Refillable Bottle Co. v. Robertson*, 8 Cal. App. 105, 96 Pac. 325, and *Archibald Estate v. Matteson*, 5 Cal. App. 445, 90 Pac. 725, all following rule; *Smith v. Superior Court*, 2 Cal. App. 531, 84 Pac. 55, holding appeal from judgment of justice's court granting nonsuit presents question of law only.

Exception must be Reserved to Order on motion for nonsuit to protect right on appeal.

Overruled in *Saul v. Moscone*, 16 Cal. App. 509, 118 Pac. 454, such exception not necessary by reason of amendment of 1909 to section 647, Code of Civil Procedure.

On Motion for Nonsuit, Evidence should be interpreted most strongly against defendant.

Approved in *Doyle v. Eschen*, 5 Cal. App. 57, 89 Pac. 837, following rule; *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 25, 116 Pac. 302, holding where error prejudicial to plaintiff, appellant, appeared in instruction on burden of proof, and sufficiency of evidence to sustain verdict for him, if given, is challenged, in passing on

question of new trial, evidence should be interpreted most strongly in favor of plaintiff.

91 Cal. 313-323, 27 Pac. 752, **THOMPSON v. LAUGHLIN**.

Enforcement of Judgment will be Restrained when by fraud of plaintiff defendant was prevented from presenting meritorious defense.

Approved in Heim v. Butin (Cal.), 40 Pac. 42, complaint alleging fraud of plaintiffs in obtaining deficiency judgment on foreclosure and sale under mortgage considered and held to state cause of action for damages; Everett v. Tabor, 119 Ga. 130, 46 S. E. 73, refusing injunction to prevent execution on judgment when allegation of fraud in obtaining it was denied.

Fraudulent Conduct of Attorney of Party recovering judgment may afford ground for enjoining judgment.

Approved in Memphis etc. Elec. Co. v. Simpson, 118 Tenn. 545, 103 S. W. 791, holding client could not object that transcript of testimony was not properly incorporated in bill of exceptions, when inserted under agreement between court and counsel for both parties.

Injunctions Against Judgments Obtained by fraud, accident, mistake, surprise and duress. See note, 30 L. R. A. 790.

Injunction Against Judgments for Defenses existing prior to rendition. See note, 31 L. R. A. 771.

91 Cal. 323-338, 25 Am. St. Rep. 191, 27 Pac. 738, 13 L. R. A. 475, **SMITH v. PHOENIX INS. CO.**

Where Lessee has Executory Contract to purchase and building is burned before day fixed for payment, vendor cannot recover purchase price.

Distinguished in Potts Drug Co. v. Benedict, 156 Cal. 334, 104 Pac. 437, 25 L. R. A. (n. s.) 609, holding where assignment operated as present transfer of leasehold interest, and future date was fixed for payment and delivery of premises, fact that buildings burned in meantime did not excuse assignee from payment of price; Bowdle v. Jencks, 18 S. D. 94, 95, 99 N. W. 102, where parties agreed to exchange lands for hotel property and personalty therein, transaction to be complete upon deposit of deeds with bank, and owner of lands deposited his deed, but hotel was burned before deed therefor was deposited, loss fell upon its owner, who was still in possession.

Taking Possession of Building by Tenant under lease with agreement to purchase, when insurance company knew building was to be leased, is not such change of title or possession as to avoid policy.

Approved in Allen v. Phoenix Assur. Co., 12 Idaho, 665, 88 Pac. 247, 8 L. R. A. (n. s.) 903, holding fact that insured building was situated on government homestead, final proof on which was not made until after loss, was not such failure of title as to defeat recovery under stipulation of ownership; Swank v. Farmers' Ins. Co., 126 Iowa, 552, 102 N. W. 431, contract for sale of insured property considered and held not to constitute sale or such contract therefor as avoided policy by reason of change of interest of insured; dissenting opinion in Queen of Arkansas Ins. Co. v. Pendola, 94 Ark. 598, 128 S. W. 560, majority holding hiring of property insured by purchaser from insured to another avoided policy.

Distinguished in *Brickell v. Atlas Assurance Co.*, 10 Cal. App. 27, 101 Pac. 20, holding where possession was given to purchaser as against insured as vendor so long as terms of purchase were complied with, there was such change of possession as to avoid policy; *Finkbohner v. Glens Falls Ins. Co.*, 6 Cal. App. 384, 92 Pac. 320, holding contract to sell insured property giving possession and control of income, without agreement therefor being affixed to policy, avoided policy.

Insurable Interest in Property under contract of sale. See note, 102 Am. St. Rep. 356.

Essentials to Valid Sale of Goods. See note, 17 L. R. A. 179.

Miscellaneous.—Cited in *Smith v. Pennsylvania Fire Ins. Co. (Cal.)*, 27 Pac. 742, companion case.

91 Cal. 338-342, 27 Pac. 673, PEOPLE v. LOS ANGELES ELEC. RY. CO.

When Franchise of Street Railroad Provides for forfeiture in case work is not completed in time limited, if time limited expires before commencement of action to declare forfeiture, franchise will be forfeited.

Approved in *Los Angeles Ry. Co. v. Los Angeles*, 152 Cal. 245, 125 Am. St. Rep. 54, 92 Pac. 491, 15 L. R. A. (n. s.) 1269, holding section 502, Civil Code, providing for forfeiture in case of failure of company to complete work within time limited by franchise, is self-executing.

Acts Sufficient to Cause forfeiture of franchise do not per se produce forfeiture without proper proceedings in proper court.

Approved in *Santa Rosa etc. R. Co. v. Central St. Ry. Co. (Cal.)*, 38 Pac. 990, holding where city railroad franchise was liable to forfeiture for breach of condition subsequent, forfeiture was not effected by granting same rights to another company.

Time for Completion of Street Railway provided for in franchise runs from date of commencement of work.

Approved in *Palmer v. Burnham (Cal.)*, 47 Pac. 600, holding time for completion fixed in street contract ran from date of commencement of work.

91 Cal. 342-354, 27 Pac. 747, HOWELL v. BUDD.

Where Grant of Letters of Administration turns upon relationship to deceased, decision thereon is conclusive as to such relationship for all time and in all courts.

Approved in *Estate of Hancock*, 156 Cal. 813, 134 Am. St. Rep. 177, 106 Pac. 62, holding grant of letters to woman who subsequently claimed to be surviving wife was not adjudication she was such when claim for letters did not appear to have been based on such ground; *Estate of Warner*, 6 Cal. App. 368, 92 Pac. 194, holding determination of heirship upon application for letters would be final and conclusive of rights upon distribution; *Simmons v. Rowe*, 4 Cal. App. 758, 89 Pac. 624, holding judgment in foreclosure conclusive as to all matters which might have been litigated, though findings were waived; *Estate of Welch*, 3 Cal. Prob. 304, holding order making family allowance was conclusive adjudication of existence of every fact requisite to support order; *Estate of King*, 4 Cal. Prob. 17, *arguendo*.

Distinguished in *Mossman v. Hawaiian Government*, 10 Haw. 427, holding adjudication of question of descent in probate proceedings for distribution of personalty not conclusive upon that question in ejectment for realty as to one who was not party or in privity with party in probate proceedings.

Conclusiveness of Probate as Res Judicata. See note, 21 L. R. A. 685, 687.

Judge is Disqualified if Related to any person whose interest is represented by parties of record, though such persons are not themselves parties of record.

Approved in *Johnson v. State*, 87 Ark. 50, 112 S. W. 145, 18 L. R. A. (n. s.) 619, holding judge disqualified because related to attorney whose fee depended on outcome of writ.

91 Cal. 355-358, 27 Pac. 670, **ROCHAT v. GEE.**

Filing of Dismissal of Action and Entry by clerk on register do not operate as dismissal if no judgment of dismissal is ever entered.

Reaffirmed in *Truett v. Onderdonk* (Cal.), 50 Pac. 396.

Direct Appeal cannot be Taken from order before judgment approving account of receiver.

Approved in *Title Ins. etc. Co. v. California Development Co.*, 159 Cal. 486, 490, 491, 114 Pac. 839, 840, 841, dismissing appeals from orders authorizing issuance of receiver's certificates taken by intervenor against whom they were not directly made.

91 Cal. 358-362, 27 Pac. 742, **FREDERICK v. DIOKEY.**

"Land," as Used in Section 325, Code of Civil Procedure, is not coextensive with "real property," but means "the soil, or a portion of the earth's crust."

Approved in *In re Taxes Pineapple Co.*, 19 Haw. 196, holding "land" as used in statute exempting pineapple lands from taxation did not include cannery.

91 Cal. 362-366, 27 Pac. 743, **SCHALLERT-GANAHL LUMBER CO. v. NEAL.**

Under Section 1202, Code of Civil Procedure, providing for forfeiture of mechanics' liens, evidence to produce forfeiture must be clear and convincing.

Approved in *Hampton v. Christensen*, 148 Cal. 739, 84 Pac. 204, holding notice to withhold payments to be sufficient, under section 1184, Code of Civil Procedure, though inartificially drawn; *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 704, 118 Pac. 108, holding claim of lien not forfeited by failure to offset credit on contract price.

Effect of Filing Excessive Mechanic's Lien. See note, 29 L. R. A. (n. s.) 317.

Miscellaneous.—Cited in *Petersen v. Shain* (Cal.), 33 Pac. 1088.

91 Cal. 367-371, 27 Pac. 733, **EX PARTE WIDBER.**

Demand Ordered Paid by Judge for Expense of providing courtroom is not within limits of consolidation act.

Approved in *Trower v. San Francisco*, 157 Cal. 767, 109 Pac. 619, holding consolidation act did not apply to demand for return of moneys illegally exacted from plaintiff's assignors.

Mandamus Lies to Compel Judge to audit claim for expenses of providing courtroom under section 144, Code of Civil Procedure.

Distinguished in *Falconer v. Hughes*, 8 Cal. App. 57, 96 Pac. 20, holding where order was directed by judges of superior court to another person to repair courtroom, such person was not entitled to mandamus to compel judges to audit demand therefor.

Court has No Power to Command County Treasurer to pay demand for providing courtroom, audited by judge, and judgment of contempt for refusing to pay such claim is void.

Approved in *Bauter v. Superior Court*, 6 Cal. App. 196, 91 Pac. 750, holding void judgment of contempt against secretary of corporation for refusal to produce books, when order to produce was directed to his predecessor in office.

Power of Courts to Provide Necessary Places and equipment for their business. See note, 22 L. R. A. 399.

Disobedience of Void Order as Contempt. See note, 16 L. R. A. (n. s.) 1065, 1067.

91 Cal. 371-377, 27 Pac. 671, DE TORO v. ROBINSON.

Motion for Judgment on Pleadings admits for its purposes all facts alleged in complaint.

Approved in *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 434, 114 Pac. 1030, following rule.

Miscellaneous.—Cited in *People v. Gibbs* (Cal.), 33 Pac. 631, referring historically to principal case.

91 Cal. 377-382, 27 Pac. 750, 13 L. R. A. 680, MILLER v. WADDINGHAM.

Vendor Who Holds Legal Title as Security for purchase price must show his security will be impaired to maintain action to prevent waste.

Approved in *Swanston v. Clark*, 153 Cal. 306, 95 Pac. 1121, holding lessee in possession under option to purchase bound to pay tax liens on land accruing after date of his possession.

Distinguished in *Conde v. Sweeney*, 14 Cal. App. 24, 110 Pac. 974, and *Conde v. Sweeney*, 16 Cal. App. 163, 116 Pac. 321, both holding creditors of vendee of mine could not remove fixtures placed by him in mine when vendor had retained title as security for purchase price, though mine was equally valuable without fixtures; *Anderson v. Englehart*, 18 Wyo. 424, 108 Pac. 980, holding mortgagee could maintain action to restrain mortgagor from removing fixtures from mortgaged premises when removal would impair security.

Miscellaneous.—Cited in *McCrillis v. Cole*, 25 R. I. 161, 105 Am. St. Rep. 875, 55 Atl. 198, to point that machinery, sold under condition title should not pass until paid for and affixed to building, passes to subsequent mortgagee who had no notice of reservation of title in vendor.

91 Cal. 383-385, 27 Pac. 746, McGOVERN v. MOWEY.

Actual Possession of Land Under Claim of ownership for any period is sufficient to enable party in possession to maintain action to quiet title as against trespasser.

Approved in *Morris v. Clarkin*, 156 Cal. 18, 103 Pac. 181, following rule; *Evans Ditch Co. v. Lakeside Ditch Co.*, 13 Cal. App. 132, 108

Pac. 1032, holding plaintiffs in possession of ditches when flow was obstructed by defendants were presumed to own ditches in absence of showing to contrary; Kraus v. Congdon, 161 Fed. 29, 88 C. C. A. 182, holding one who took possession for purpose of bringing action to quiet title against tax deed could maintain such action.

91 Cal. 385-390, 27 Pac. 642, HUGHES v. DUNLAP.

Fact That Injunction is Asked in Action of ejectment does not deprive plaintiff of right to have legal issues tried by jury.

Approved in Cassin v. Cole, 153 Cal. 680, 96 Pac. 278, upholding complaint asking damages for trespasses and injunction to prevent future trespasses; Waskey v. McNaught, 163 Fed. 934, 90 C. C. A. 289, holding injunction asked in ejectment was merely ancillary to main action; Mogollon Gold etc. Co. v. Stout, 14 N. M. 254, 91 Pac. 726, holding action brought primarily for money damages but also asking injunction was triable by jury; Chessman v. Hale, 31 Mont. 586, 79 Pac. 257, 68 L. R. A. 410, holding plaintiff in action for damages for nuisance entitled to jury trial, though injunction to abate nuisance was also asked; Kenny v. McKenzie, 25 S. D. 489, 127 N. W. 599, and Burleigh v. Hecht, 22 S. D. 308, 117 N. W. 370, both holding in action brought to quiet title by party out of possession either party entitled to jury trial as matter of right.

Distinguished in Shields v. Johnson, 10 Idaho, 482, 79 Pac. 393, holding jury trial not matter of right in suit to quiet title to leasehold estate brought by party in possession.

91 Cal. 391-400, 27 Pac. 772, HAYES v. FINE.

Absolute Interest as Tenants in Common of water right is estate in real property.

Approved in Stanislaus Water Co. v. Bachman, 152 Cal. 727, 93 Pac. 863, 15 L. R. A. (n. s.) 359, following rule; Oliver v. Burnett, 10 Cal. App. 409, 102 Pac. 225, holding oral agreement on partition of land for right of way for ditch over land allotted to one party for benefit of another was void under statute of frauds; Bashore v. Mooney, 4 Cal. App. 283, 87 Pac. 556, holding right of way for ditch could only be conveyed by instrument in writing.

Distinguished in Churchill v. Russell, 148 Cal. 4, 82 Pac. 441, holding statute of frauds could not be interposed as bar to specific performance of parol contract to convey water right fully performed by transferees, on faith of which they had made valuable improvements; Bree v. Wheeler, 4 Cal. App. 112, 87 Pac. 255, holding executed oral agreement to divide disputed water right not within statute of frauds.

Where Claim to Water Right is Made under written instrument, proof of labor done on ditch is inadmissible on parol proof.

Distinguished in Bashore v. Mooney, 4 Cal. App. 287, 87 Pac. 558, admitting documentary evidence to show plaintiff's claim of title to ditch from original builders, although there was yet no evidence to show nature of his title thereto.

Transfer of Right to Use Water for irrigation. See note, 65 L. R. A. 413.

91 Cal. 400-405, 27 Pac. 761, DE GUYER v. BANNING.

Title to Islands. See note, 58 L. R. A. 677.

Miscellaneous.—Cited in *Valentine v. Sloss* (Cal.), 37 Pac. 329, companion case.

91 Cal. 405-428, 27 Pac. 1082, LUCO v. DE TORO.

Where Equitable Owner of Land Employs Attorney to procure patent in consideration of undivided interest in land, contract is valid, and creates express trust in land when title is received by such owner.

Approved in *Levy v. Ryland*, 32 Nev. 466, 109 Pac. 907, purchase of land by two persons and taking title in name of one only creates resulting trust in time for benefit of other.

Limitations Begin to Run against resulting trust only from time of its repudiation.

Approved in *Levy v. Ryland*, 32 Nev. 471, 109 Pac. 909, following rule; *Edwards v. Beck*, 57 Wash. 83, 106 Pac. 493, *arguendo*.

Distinguished in *Estate of Gordon*, 2 Cof. Prob. 143, holding limitations was defense to proceeding to collect collateral inheritance tax from executors when three years had elapsed from accrual of liability.

No Particular Form of Words is Necessary to create express trust.

Approved in *Estate of Tessier*, 2 Cof. Prob. 367, will construed and held to create trust though not using words "trust" or "trustee."

Finding That Cause of Action is Barred by certain sections of statute of limitations by reference to number as pleaded in answer is of ultimate fact, and not conclusion of law.

Reaffirmed in *Ybarra v. Sylvany* (Cal.), 31 Pac. 1115.

In Partition Suit Parties may Assert Any Title they have, legal or equitable.

Approved in *Varni v. Devoto*, 10 Cal. App. 306, 101 Pac. 934, holding equitable owner of undivided interest could maintain action for partition.

Miscellaneous.—Cited in *Miller v. Ash*, 156 Cal. 566, 105 Pac. 609, on question of laches; *Luco v. De Toro* (Cal.), 34 Pac. 517, on another appeal.

91 Cal. 428-432, 27 Pac. 732, BOHNERT v. BOHNERT.

Power of Trial Court to Allow Alimony and counsel fees to wife may be exercised at any time pending appeal.

Reaffirmed in *Bruce v. Bruce*, 160 Cal. 30, 116 Pac. 67, *Roby v. Roby*, 9 Idaho, 375, 74 Pac. 958, *Bordeaux v. Bordeaux*, 29 Mont. 482, 75 Pac. 360, and *Maxwell v. Maxwell*, 67 W. Va. 126, 67 S. E. 382.

Jurisdiction to Award Temporary Alimony, suit money, and counsel fees pending appeal. See note, 27 L. R. A. (n. s.) 713.

91 Cal. 432-439, 24 Pac. 864, 27 Pac. 756, COUNTY OF SAN LUIS OBISPO v. WHITE.

Action of Supervisors in Ordering Publication of election proclamation may be proved by oral evidence, if clerk has neglected to record action.

Approved in *Gill v. Dunham* (Cal.), 34 Pac. 70, admitting parol evidence of service of notice of meeting of city council upon its members, when such notice did not appear of record.

Failure to Ask Instruction to Limit Effect of evidence admitted generally waives objection thereto.

Reaffirmed in *State v. Greene*, 33 Utah, 499, 94 Pac. 988.

Constitutionality of "Australian Ballot" Statutes. See note, 16 L. R. A. 755.

91 Cal. 440-441, 27 Pac. 757, **EX PARTE SOLOMON.**

Ordinance Fixing Greater Penalty for Offense of having lottery tickets in possession than imposed by state for kindred and more serious offenses is void.

Approved in *In re Desanta*, 8 Cal. App. 303, 96 Pac. 1030, holding unenforceable ordinance of city fixing higher standard for pure milk than fixed afterward by state law.

91 Cal. 442-448, 27 Pac. 744, **MEUX v. HOGUE.**

Authority of Agent to Sell Real Property must be strictly pursued.

Approved in *Johnson v. Fecht*, 94 Mo. 619, 68 S. W. 619, holding void sale effected by agent upon authority of letter containing insufficient description of property.

91 Cal. 449-457, 25 Am. St. Rep. 201, 27 Pac. 768, 13 L. R. A. 754, **PACIFIC RY. CO. v. WADE.**

Claim for Damages Against Corporation in hands of receiver should be made by petition to court by which receiver is appointed.

Approved in *De Forrest v. Coffey*, 154 Cal. 452, 98 Pac. 31, holding court appointing receiver had discretion to refuse to allow independent suit against corporation.

Appeal Lies from Judgment of Court appointing receiver determining claim against corporation.

Reaffirmed in *De Forrest v. Coffey*, 154 Cal. 453, 98 Pac. 31.

Jurisdiction of Equity to Try Claims against its receiver involving purely legal questions. See note, 13 L. R. A. (n. s.) 712.

91 Cal. 458-463, 27 Pac. 763, **BRANDT v. THOMPSON.**

Mortgagor Under Deed Absolute in Form cannot quiet title without paying mortgage debt, though barred by limitations.

Approved in *Tracy v. Wheeler*, 15 N. D. 250, 107 N. W. 69, 6 L. R. A. (n. s.) 516, following rule; *Raggio v. Palmtag*, 155 Cal. 802, 103 Pac. 314, holding surviving wife could not recover homestead sold on probate sale to mortgagee without paying mortgage debt though barred by limitations; *Payne v. Neuval*, 155 Cal. 51, 99 Pac. 479, holding agreement for right to work mineral land could not be enforced by grantee after thirteen years' delay without tender of royalties called for by agreement; *Puckhaber v. Henry*, 152 Cal. 423, 125 Am. St. Rep. 75, 93 Pac. 116, holding pledgor could not recover pledged property without payment of debt secured though barred by limitations; *Burns v. Hiatt*, 149 Cal. 621, 625, 117 Am. St. Rep. 157, 87 Pac. 197, 198, applying rule to grantee of mortgagor; *Trippet v. State*, 149 Cal. 531, 86 Pac. 1087, 8 L. R. A. (n. s.) 1210, heirs could not quiet title without paying inheritance tax for enforcement of which there was no legal method; *Bacon v. Rice*, 14 Idaho, 114, 93 Pac. 512, holding owner could not quiet title against tax lien without payment thereof; dissenting opinion in *Burns v. Hiatt*, 149 Cal. 626, 117 Am. St. Rep. 157, 87 Pac. 199, majority holding rule applies to grantee of mortgagor.

Distinguished in *Cameron v. Ah Suong*, 8 Cal. App. 313, 96 Pac. 1026, holding in ejectment, complaint of intervening mortgagee who set up claim under outlawed mortgage in regard to which no equity was pleaded stated no cause of action; *Marshutz v. Seltzer*, 5 Cal. App. 143, 89 Pac. 878, holding rule does not apply when mortgage is by third party and plaintiff claims under title adverse to mortgage.

91 Cal. 465-469, 27 Pac. 760, **PEOPLE v. NEIL.**

Where Particular Circumstances are Necessary to constitute complete offense, failure to set them forth in information renders it defective.

Approved in *Ex parte Goldman* (Cal. App.), 88 Pac. 821, holding where act fell within several offenses according to purpose for which it was done, failure to allege purpose rendered indictment fatally defective.

91 Cal. 470-476, 27 Pac. 781, **PEOPLE v. BIBBY.**

Instrument Which, if Genuine, has Value and may be used to perpetrate fraud may be subject of forgery, though other steps must be taken to complete instrument.

Approved in *People v. De Ryana*, 8 Cal. App. 340, 96 Pac. 921, holding proof of loss under insurance policy subject to forgery though not complete instrument of fraud in itself; *Jones v. State*, 60 Tex. Cr. 69, 130 S. W. 1013, holding bond of guardian of infant over fourteen years of age subject of forgery.

Forgery of Worthless Instruments. See note, 24 L. R. A. 33, 40, 43.

Where Instrument Charged to have Been Forged is valid on face, it is unnecessary to allege facts assumed in such instrument.

Approved in *People v. McPherson*, 6 Cal. App. 269, 91 Pac. 1099, following rule; *People v. Johnson*, 7 Cal. App. 129, 93 Pac. 1042, holding information for forgery of receipt need not set out how it could be used to work fraud; *State v. Blodgett*, 143 Iowa, 582, 121 N. W. 687, and *Wooldridge v. State*, 49 Fla. 144, 38 So. 5, both holding school warrant imported such validity as to make it subject of forgery.

Distinguished in *People v. Di Ryana*, 8 Cal. App. 337, 96 Pac. 921, holding where unintelligible forged writing did not clearly show it could be used to defraud, it must be shown in what way it could defraud; *People v. Lanterman*, 9 Cal. App. 680, 100 Pac. 722, holding indictment for presenting fraudulent claim against county for traveling expenses on official business, containing recital supervisors were authorized to pay order, was insufficient in absence of allegation of fact showing such authority.

Want of Internal Revenue Stamp on Instrument as affecting criminal prosecution. See note, 46 L. R. A. 455.

Evidence of Other Crimes in Criminal Cases. See note, 62 L. R. A. 290.

Competency of Handwritings as Standards for comparison. See note, 63 L. R. A. 442.

Comparison of Handwriting. See note, 62 L. R. A. 873.

91 Cal. 477-484, 27 Pac. 777, **WIXON v. DEVINE.**

Allowance of Amendments to Pleadings by trial court will not be disturbed on appeal unless it is apparent discretion has been abused.

Approved in *Idaho Placer etc. Co. v. Green*, 14 Idaho, 299, 94 Pac. 162, following rule; *Clarkson v. Hoyt* (Cal.), 36 Pac. 384, holding

discretion abused in refusing amendment attacking statement of account on ground of fraud.

91 Cal. 484-486, 28 Pac. 777, LEACH v. AITKEN.

Judge Before Whom Action is Tried cannot be compelled by mandamus to settle bill of exceptions after expiration of his term.

Approved in *State v. Gibson*, 187 Mo. 554, 86 S. W. 181, holding writ did not lie to compel trial judge to sign bill of exceptions after expiration of statutory time; *Holderman v. Schane*, 56 W. Va. 14, 48 S. E. 514, holding writ did not lie to compel mayor and councilmen to reconvene as canvassing board of election, after expiration of their term.

91 Cal. 488-491, 27 Pac. 758, SIMPSON v. BUDD.

Miscellaneous.—Cited in *Clark v. Budd* (Cal.), 27 Pac. 759, companion case.

91 Cal. 492-505, 27 Pac. 775, WATKINS v. BRYANT.

Time for Giving Notice of Motion for new trial may be waived or extended by consent.

Approved in *Mendocino County v. Peters*, 2 Cal. App. 27, 82 Pac. 1123, holding where bill of exceptions recited notice of motion for new trial was seasonably served, objection to time of service is deemed waived.

91 Cal. 506-509, 27 Pac. 765, OLSON v. LOVELL.

Contract to Convey Land Signed by One of two co-owners cannot be specifically enforced against him when repudiated by owner not bound.

Approved in *Mullarky v. Young*, 9 Cal. App. 688, 100 Pac. 710, holding contract for conveyance of land between two named parties on each part, but signed by only one of each, was not complete contract, for breach of which damages could be recovered; *Tillery v. Land*, 136 N. C. 548, 48 S. E. 828, holding vendor would not be compelled to specifically perform contract to sell land where evident intent was not to sell his own interest alone, but in conjunction with interests of others, conveyance of which could not be obtained.

Disapproved in *Melin v. Woolley*, 103 Minn. 502, 115 N. W. 655, 22 L. R. A. (n. s.) 595, holding in such case contract could be enforced to extent of interest of cotenant who signed.

91 Cal. 512-518, 25 Am. St. Rep. 209, 26 Pac. 767, WORLEY v. NETHERCOTT.

Purchaser of Land in Possession Under Contract of sale cannot retain possession without paying contract price, though vendor cannot deliver good title.

Approved in *Goervaise v. Brookins*, 156 Cal. 108, 103 Pac. 331, *Garvey v. Lashells*, 151 Cal. 531, 91 Pac. 500, *Dunn v. Mills*, 70 Kan. 661, 79 Pac. 148, and *Livesley v. Muckle*, 46 Or. 424, 80 Pac. 903, all following rule; *Spies v. Butts*, 59 W. Va. 399, 53 S. E. 903, holding vendor entitled to lien on lumber made from timber cut on land by purchaser who refused to make required payments on purchase price.

Right of Grantee in Possession to Question right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 383, 397.

Value of Improvements Placed on Land by vendee in good faith may be recovered upon rescission of contract of purchase for failure of vendor's title.

Approved in *Owen v. Pomona Land & Water Co. (Cal.)*, 61 Pac. 475, following rule.

91 Cal. 526-535, 25 Am. St. Rep. 212, 27 Pac. 779, 13 L. R. A. 761,
RUTLEDGE v. CRAWFORD.

Where Marks on Ballots may be Reasonably supposed to be result of accident, they should not be rejected as bearing distinguishing mark.

Approved in *Doll v. Bender*, 55 W. Va. 410, 47 S. E. 296, holding distinguishing marks should not cause exclusion from count.

Where Voter Erased Name on Ballot and substituted another, believing he was voting for candidate for different office, ballot could not be counted according to his intention.

Approved in *Easterbrooks v. Atwood*, 83 Vt. 357, 76 Atl. 110, holding evidence as to intention of voter which would contradict ballot was inadmissible in election contest.

Intention of Statute is to Govern, though such construction may not in all respects agree with letter.

Approved in *Hicks v. Krigbaum*, 13 Ariz. 241, 108 Pac. 485, holding statute substantially complied with as to notice of election; *Sires v. Melvin*, 135 Iowa, 472, 113 N. W. 111, holding where deed of adoption showed consent of mother alone was necessary, it was not essential to give name of father, though statute provided for giving names of both.

Elector, Who was Candidate, may Contest and defeat election attacked, but cannot have himself declared elected unless he alleges he has constitutional qualifications for office.

Reaffirmed in *Bass v. Leavitt*, 11 Cal. App. 585, 105 Pac. 772.

Constitutionality of "Australian Ballot" Statutes. See note, 16 L. R. A. 755.

Miscellaneous.—Cited in *Town of Eufaula v. Gibson*, 22 Okl. 512, 98 Pac. 567, to point that court has power to determine legal effect of ballots conceded to have been cast.

91 Cal. 545-548, 27 Pac. 859, **EX PARTE HAYMOND.**

Person Summoned to Testify before de facto grand jury cannot raise question of its competency to act.

Approved in *In re Davies*, 68 Kan. 794, 75 Pac. 1048, holding legality of de facto grand jury could not be attacked in habeas corpus proceeding.

Organization of Grand Jury. See note, 27 L. R. A. 777.

91 Cal. 548-549, 27 Pac. 1031, **DENNIS v. SUPERIOR COURT.**

Personal Liability of Stockholder of Corporation for corporate debt is obligation arising on contract.

Approved in *Miller & Lux v. Katz*, 10 Cal. App. 579, 102 Pac. 947, and *Walker v. Woodside*, 164 Fed. 683, 90 C. C. A. 644, both following rule; *Foreign Mines Development Co. v. Boyes*, 180 Fed. 597, action on stockholder's liability on notes given by corporation and secured by mortgage is based on notes so as to preclude attachment under California Code of Civil Procedure, section 537.

Right to Enforce Stockholder's Liability outside of state or incorporation. See note, 34 L. R. A. 750.

91 Cal. 549-551, 27 Pac. 929, **SAN LUIS OBISPO v. HASKIN.**

Several Propositions for Bonds for municipal improvements may be submitted to be voted on separately at same election.

Approved in *San Diego v. Potter*, 153 Cal. 294, 95 Pac. 149, holding submission of unauthorized proposition for bonds did not invalidate election held under act of 1901, as to authorized propositions submitted.

91 Cal. 565-580, 25 Am. St. Rep. 219, 27 Pac. 924, **LATAILLADE v. ORENA.**

Rule That Probate Decree Settling Account is conclusive does not apply when guardian fraudulently conceals fund from ward, and ward may compel him to account in equity for property concealed.

Approved in *Hanley v. Hanley*, 4 Cal. Prob. 479, equity will relieve against fraud in setting apart homestead.

Where Guardian Received Trust Moneys for ward, and appropriated them for his own use, concealing such facts, ward's right to recover is not barred by limitations until three years after discovery of fraud.

Approved in *Miller v. Ash*, 156 Cal. 566, 105 Pac. 609, holding action against guardian to account for fund of ward not barred by forty-five years' delay when he had concealed receipt of fund; *McMurray v. Bodwell*, 16 Cal. App. 579, 117 Pac. 628, holding limitations did not run against action to recover community moneys placed by plaintiff's wife before her death, and without husband's knowledge, in safety deposit box of daughter, until fact was discovered.

Pleading Should State Ultimate Facts and not conclusions of law, but averments complained of as conclusions of law may appear from contest to be sufficient as statements of facts.

Approved in *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 610, 117 Pac. 771, holding averments that certain defendants had received more than their shares, and others less, from proceeds of sale were averments of fact in view of facts known to pleader.

Where Personal Property has Been Wrongfully Converted, owner may waive tort and sue in assumpsit for value.

Reaffirmed in *Fountain v. Sacramento*, 1 Cal. App. 462, 82 Pac. 637.

Right to Waive Tort and Sue in assumpsit. See note, 134 Am. St. Rep. 191.

91 Cal. 580-584, 27 Pac. 931, **CAVANAUGH v. JACKSON.**

Acquiescence for Three Years by Purchaser in location of division line fixed by his grantor and adjacent owner held to bar him from questioning line.

Approved in *Loustalot v. McKeel*, 157 Cal. 640, 642, 643, 108 Pac. 710, 711, holding occupation to agreed boundary for seven years barred claim it was not true line; *Bree v. Wheeler*, 4 Cal. App. 112, 87 Pac. 256, holding executed oral agreement dividing disputed water right could not afterward be repudiated by one party; *Hoar v. Hennessy*, 29 Mont. 258, 74 Pac. 454, upholding boundary line on disputed boundary fixed by oral agreement and acted upon thereafter; *Nystrom v. Lee*, 16 N. D. 568, 114 N. W. 481, arguendo.

Distinguished in *Lewis v. Ogram*, 149 Cal. 508, 117 Am. St. Rep. 151, 87 Pac. 61, 10 L. R. A. (n. s.) 610, holding agreement on boundary line, knowing it is not true line, for purpose of transferring land, without using words of conveyance, was unenforceable.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 686.

91 Cal. 584-588, 27 Pac. 932, **ELTZBOTH v. RYAN.**

Court has Discretion to Impose Costs on party asking continuance as consideration to granting same.

Reaffirmed in *Boone v. Skinner*, 85 Ark. 202, 107 S. W. 674.

91 Cal. 589-592, 27 Pac. 933, **EX PARTE TUTTLE.**

Gambling in Its Various Modes is proper subject for police regulation.

Approved in *In re O'Shea*, 11 Cal. App. 571, 105 Pac. 777, upholding "racetrack" bill; *Ex parte Murphy*, 8 Cal. App. 443, 445, 97 Pac. 200, 201, upholding ordinance regulating public poolrooms; *In re McCue*, 7 Cal. App. 766, 96 Pac. 111, upholding act providing for punishment of lewd and dissolute person as vagrant; *Louisville v. Wehmhoff*, 116 Ky. 831, 76 S. W. 881, upholding ordinance prohibiting poolroom operators from allowing use of room for transmission of messages relating to racetrack betting; *In re Jones*, 4 Okl. Cr. 86, 109 Pac. 575, holding poolroom and billiard-hall proper subject of police regulation; *Samuelson v. State*, 116 Tenn. 489, 115 Am. St. Rep. 805, 95 S. W. 1016, upholding statute prohibiting "ticket scalping."

91 Cal. 593-600, 28 Pac. 45, **LEE CHUCK v. QUAN WO CHONG.**

Complaint in Unlawful Detainer alleging tenancy on sufferance need not allege notice to quit.

Approved in *Craig v. Gray*, 1 Cal. App. 599, 82 Pac. 700, complaint for unlawful detainer of property after expiration of lease need not allege notice to quit.

Unlawful Detainer. See note, 120 Am. St. Rep. 42.

91 Cal. 600-603, 27 Pac. 936, **FITZGERALD v. NEUSTADT.**

Trial Court has Discretion to Deny Motion for judgment on pleadings and allow plaintiff to amend complaint.

Approved in *Bergerow v. Parker*, 4 Cal. App. 172, 87 Pac. 249, holding court could allow unverified answer to verified complaint to be verified upon motion for judgment on pleadings.

91 Cal. 603-605, 27 Pac. 937, **DAVIS v. BROWNING.**

Verification of Claim Against Estate of Decedent by executrix of estate of another decedent sufficiently complies with statute.

Approved in *Empire State Min. Co. v. Mitchell*, 29 Mont. 59, 74 Pac. 81, holding attorney for corporation could verify its claim against decedent's estate when no other officer resided in county.

Statement of Claims Against Estates of decedents. See note, 130 Am. St. Rep. 321.

91 Cal. 606-611, 27 Pac. 934, **BANBURY v. ARNOLD.**

Certificate of Acknowledgment to Instrument affecting title to married woman's property is no essential part of execution or validity of instrument.

Approved in *Cordano v. Wright*, 159 Cal. 615, 115 Pac. 229, holding execution of deed by married woman admitted by failure to deny, though her acknowledgment thereon was defective.

When Defects in Certificates of Acknowledgment are fatal. See note, 108 Am. St. Rep. 529.

Specific Performance of Contracts for conveyance where wife refuses to join. See note, 24 L. R. A. 764.

91 Cal. 621-631, 28 Pac. 268, ORENA v. SANTA BARBARA.

Where City Resurveys Streets, owner of lot bounded by lines of original survey cannot extend his fence out to line of new survey when for many years he has recognized old survey as boundary.

Approved in *Bayhouse v. Urquides*, 17 Idaho, 290, 105 Pac. 1067, holding adjoining owners could not be bound by new survey unless based on survey as originally made and monuments as erected.

In Determining Line of Street, location generally acquiesced in by public, by lot owners, and by city is conclusive in absence of more certain evidence.

Approved in *Andrews v. Wheeler*, 10 Cal. App. 618, 103 Pac. 148, holding evidence of stakes and monuments commonly recognized admissible in action to quiet title to disputed boundary between lots, where map was uncertain and there were no field-notes; *Winchester v. Payne*, 10 Cal. App. 504, 102 Pac. 532, holding description in deed applied to lines of street as actually opened and possessed by owners on both sides in absence of proof of different intention.

Title to Land in Public Street cannot be acquired by adverse possession.

Approved in *People v. Kerber*, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 879, rule applies to tide lands held by city; *Merced Falls Gas etc. Co. v. Turner*, 2 Cal. App. 724, 84 Pac. 241, holding electric light company could not acquire prescriptive right to place of location of poles on streets.

Right to Acquire Title by Adverse Possession to lands devoted to public use. See notes, 87 Am. St. Rep. 777; 18 L. R. A. 148.

Abandonment of Highway by Nonuser, or otherwise than by act of authorities. See note, 26 L. R. A. 453.

91 Cal. 636-640, 27 Pac. 1088, HARMS v. SILVA.

Prior Chattel Mortgage, Though Recorded without certificate of acknowledgment, is valid as against later mortgage, given with mortgagee's knowledge of existence of former.

Reaffirmed in *Williams v. First Nat. Bank*, 48 Or. 575, 87 Pac. 892.

91 Cal. 640-648, 28 Pac. 47, EX PARTE NICHOLAS.

Decision of Superior Court in Refusing to set aside information, though erroneous, is not void, but valid and binding until reversed on appeal.

Approved in *Borello v. Superior Court*, 8 Cal. App. 218, 96 Pac. 406, holding error in decision of motion to set aside indictment not reviewable on application for writ of prohibition; *Ex parte Fowler*, 5 Cal. App. 553, 554, 90 Pac. 960, holding error in exercise of jurisdiction of superior court in allowing filing of new information not reviewable on habeas corpus.

Court has Power upon Acquittal on ground of variance to allow filing of new information without re-examination before committing magistrate.

Reaffirmed in *People v. Holmes*, 13 Cal. App. 216, 109 Pac. 491.

Distinguished in *State v. Second Jud. Dist. Court*, 36 Utah, 405, 104 Pac. 285, after acquittal on ground of variance, new information could not be filed after dismissal of action and discharge of accused after plea.

91 Cal. 649-654, 25 Am. St. Rep. 530, 27 Pac. 1089, 14 L. R. A. 459, **STEVENSON v. COLGAN**.

Appropriation of Money by Legislature to pay claim for services, though not showing upon face nature of claim, is not gift and is valid.

Approved in *Cahill v. Colgan* (Cal.), 31 Pac. 618, upholding appropriation for expenses of receiver incurred by Secretary of State.

Appropriation of Public Money. See note, 89 Am. St. Rep. 815.

In Passing on Validity of Statute, court must confine itself to facts appearing on face of statute and facts of which it can take judicial notice.

Approved in *People v. Sacramento Drainage Dist.*, 155 Cal. 386, 103 Pac. 214, following rule; *Lee v. Tucker*, 130 Ga. 48, 60 S. E. 166, holding existence of facts necessary to particular legislation would not be inquired into by court; *Lucweiko v. Com. Pub. Lands*, 19 Haw. 491, holding court could not inquire whether claim for which legislature made appropriation had any foundation in fact; dissenting opinion in *Ex parte Fedderwitz* (Cal.), 62 Pac. 942, majority holding valid justice's court in city created by charter preamble of which recited it was city of over ten thousand inhabitants.

Conclusiveness of Enrolled Bill. See note, 23 L. R. A. 347.

Courts can Only Declare Statute invalid when question arises as pure question of law unmixed with matters of fact.

Approved in *Smith v. Mathews*, 155 Cal. 756, 103 Pac. 201, reaffirming rule; *Crockett v. Mathews*, 157 Cal. 157, 106 Pac. 576, holding court could not review determination of legislature as to matter of fact essential to validity of act being construed.

Unconstitutionality of Statute as Defense against mandamus to compel enforcement. See note, 47 L. R. A. 519.

91 Cal. 654-655, 27 Pac. 1092, **LANGAN v. LANGAN**.

Court has Discretion to Allow Alimony pending suit for divorce.

Reaffirmed in *Stewart v. Stewart*, 156 Cal. 655, 105 Pac. 957.

91 Cal. 655-656, 27 Pac. 1091, **LILLEY v. PARKINSON**.

It is not Competent on Examination of medical witnesses to read extracts from medical works and ask whether statements therein are correct when sole object is to place before jury opinion of author referred to.

Approved in *Griffith v. Los Angeles Pacific Co.*, 14 Cal. App. 147, 111 Pac. 107, holding medical work properly excluded when medical witness had not based his testimony on it.

Distinguished in *People v. Bowers*, 1 Cal. App. 505, 82 Pac. 554, holding question framed from medical work asked of medical witness was not erroneous.

91 Cal. 657-659, 27 Pac. 1093, BYRUM v. STOCKTON ETC. AGRICULTURAL WORKS.

Breach of Warranty of Harvesting Machine to do certain work occurs when machine is delivered and not when it actually fails upon test.

Approved in *Bancroft v. San Francisco Tool Co.* (Cal.), 47 Pac. 686, breach of warranty of elevator effected when completed.

91 Cal. 659-664, 27 Pac. 1091, ESTEP v. ARMSTRONG.

Power to Sell, Given to Executrix, to convert whole estate into money, is not devise of land to her.

Approved in *Estate of Campbell*, 149 Cal. 716, 87 Pac. 574, holding will gave power to sell to executrix in her representative capacity as naked power not coupled with interest.

Code Provision in Regard to Conversion of real property into money from death of testator where will directs conversion does not change rule that title vests in heir on death of testator.

Reaffirmed in *Estate of Campbell*, 149 Cal. 717, 87 Pac. 575.

91 Cal. 664-669, 27 Pac. 1081, COOK v. RICE.

Judgment in Force, not Suspended by appeal or otherwise, is not rendered incompetent as evidence by reason of time for appeal not having expired.

Approved in *Jenner v. Murphy*, 6 Cal. App. 437, 92 Pac. 406, holding judgment for alimony on which divorced wife may demand execution, though not final, admissible in evidence in action to set aside husband's conveyance of property in fraud of judgment.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

91 Cal. 669-672, 27 Pac. 1080, FLYNN v. DOUGHERTY.

What Constitutes a Transaction a Sale. See note, 94 Am. St. Rep. 234.

Purchase of Property to be Manufactured, adapted, or grown, as within statute of frauds. See note, 30 L. R. A. (n. s.) 319, 323.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 92 CALIFORNIA.

92 Cal. 9-14, 28 Pac. 50, SHANAHAN v. CRAMPTON.

Where Land, Paid for With Community Funds, is conveyed to wife "as her separate property and estate," she takes in trust for the marital community.

Approved in Mitchell v. Moses, 16 Cal. App. 600, 117 Pac. 687, parol evidence admissible to show that land conveyed to married woman is community property.

Equitable Relief is not Appropriate in action to quiet title.

Disapproved in Coleman v. Jagers, 12 Idaho, 129, 118 Am. St. Rep. 207, 85 Pac. 895, one may maintain action to quiet title though he has neither possession nor legal title.

92 Cal. 14-32, 27 Am. St. Rep. 82, 27 Pac. 1100, 14 L. R. A. 320, JANIN v. LONDON & S. F. BANK.

Bank in Receiving Ordinary Deposits becomes debtor of depositor.

Approved in Smith's Cash Store v. First Nat. Bank, 149 Cal. 34, 84 Pac. 664, 5 L. R. A. (n. s.) 870, bank is guilty of no breach of trust in employing money as it sees fit; State v. Franklin Co. Savings Bk. & T. Co., 74 Vt. 255, 52 Atl. 1070, bank subject to franchise tax on amounts both of savings and commercial deposits.

Title of Bank to Money Deposited with or collected by it. See note, 86 Am. St. Rep. 777.

Bank Makes Unauthorized Payments at its peril in absence of negligence or estoppel on part of depositor.

Approved in Jordan-Marsh Co. v. National Shawmut Bk., 201 Mass. 408, 87 N. E. 743, bank liable to depositor where signature of payee to indorsement was forged, though it relied upon responsible guaranty of indorsement.

In Order to Justify Submission to Jury, proof must raise more than mere conjecture or surmise.

Approved in Hercules Oil etc. Co. v. Hocknell, 5 Cal. App. 707, 91 Pac. 344, reaffirming rule; In re Daly, 15 Cal. App. 331, 114 Pac. 788, Bush v. Wood, 8 Cal. App. 651, 97 Pac. 710, Archibald Estate v. Matteson, 5 Cal. App. 445, 90 Pac. 725, Non-Refillable Bottle Co. v. Robertson, 8 Cal. App. 105, 90 Pac. 325, and The Union Ice Co. v. Doyle,

6 Cal. App. 294, 92 Pac. 116, all holding that motion for nonsuit should be denied if plaintiff has made out prima facie case.

Duty of Depositor as to Forged Checks charged to him by bank. See note, 27 L. R. A. 427.

Loss or Prejudice from Negligent Failure to give prompt notice of forgery of check as condition of bank's exoneration from liability. See note, 20 L. R. A. (n. s.) 80.

92 Cal. 33-38, 27 Pac. 1098, **DOBINSON v. McDONALD.**

When Real Estate Broker is Considered as procuring cause of sale or exchange. See note, 44 L. R. A. 349.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 608, 614.

92 Cal. 38-41, 27 Pac. 1095, **ANDERSON v. STRASSBURGER.**

What Constitutes "Satisfactory Title" within requirement of agreement relating to land. See note, 18 L. R. A. (n. s.) 744.

92 Cal. 44-47, 27 Pac. 1097, **SHIRLEY v. SHIRLEY.**

Evidence of Parol Gift of Land must be clear and definite.

Approved in *Raleigh v. Wells*, 29 Utah, 224, 110 Am. St. Rep. 689, 81 Pac. 911, title by adverse possession based upon parol gift to plural wife held not established.

92 Cal. 47-53, 27 Am. St. Rep. 91, 28 Pac. 54, **ARROYO DITCH ETC. CO. v. SUPERIOR COURT.**

Term "Assessment" as Used in Constitutional Provision conferring jurisdiction upon superior court does not include assessment of private corporation.

Approved in *Bottle Mining etc. Co. v. Kern*, 154 Cal. 98, 97 Pac. 26, applying same interpretation to word as used in provision as to jurisdiction of supreme court.

Superior Court cannot Acquire Jurisdiction of cause improperly transferred from justice's court by thereafter determining that it has jurisdiction.

Approved in *Lane v. Superior Court*, 5 Cal. App. 765, 91 Pac. 406, prohibition will lie to prevent superior court from trying appeal from justice's court where undertaking filed more than thirty days after rendition of judgment; *McAllister v. Tindal*, 1 Cal. App. 237, 81 Pac. 1117, mere allegation that determination of action will necessarily involve title to real property does not authorize justice to certify case to superior court.

92 Cal. 53-60, 27 Am. St. Rep. 95, 28 Pac. 51, 14 L. R. A. 474, **DAGGETT v. COLGAN.**

Legislature may appropriate Money for Exhibition of products of state.

Approved in *Woman's Relief Corps etc. Assn. v. Nye*, 8 Cal. App. 544, 97 Pac. 215, upholding act making appropriation for home for ex-army nurses and dependent female relatives of Union veterans; *Leatherwood v. Hill*, 10 Ariz. 247, 248, 89 Pac. 522, 523, upholding appropriation for benefit of historical society; *Sisson v. Buena Vista Co.*, 128 Iowa, 454, 104 N. W. 459, 70 L. R. A. 440, upholding act

authorizing creation of drainage districts; *McGlone v. Womack*, 129 Ky. 288, 111 S. W. 692, 17 L. R. A. (n. s.) 855, upholding tax on dogs to compensate owners of sheep killed by dogs; *Kentucky Livestock Breeders' Assn. v. Hager*, 120 Ky. 133, 85 S. W. 739, upholding act appropriating money for state fair; *Hager v. Kentucky Children's Home Society*, 119 Ky. 245, 83 S. W. 608, 67 L. R. A. 815, upholding appropriation to society organized to seek out destitute children and to provide them with homes; *Minneapolis v. Janney*, 86 Minn. 119, 90 N. W. 315, upholding acts authorizing city to hold industrial exposition.

Public Purposes for Which Money may be appropriated or raised by taxation. See note, 14 L. R. A. 481.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 36, 37, 49, 72.

Validity of Statute Providing for Assistance of individual members of certain classes of unfortunate or afflicted persons. See note, 7 L. R. A. (n. s.) 1198.

92 Cal. 69-74, 28 Pac. 95, VITORENO v. COREA.

Rule That Debtor cannot Avoid Fraudulent Conveyance applies only where parties are in *pari delicto*.

Approved in *McColgan v. Muirland*, 2 Cal. App. 10, 82 Pac. 1115, setting aside judgment obtained to recover property deeded by judgment debtor in trust.

92 Cal. 83-85, 28 Pac. 101, SHAINWALD, BUCKBEE & CO. v. CADY.

Use of Word "Sold" Does not Conclusively Show present conveyance.

Approved in *Estate of Goetz*, 13 Cal. App. 202, 109 Pac. 146, applying rule where purchaser simply made deposit, deed was placed in escrow, and transaction was finally canceled by mutual agreement; *Sanderson v. Wellsford*, 53 Tex. Civ. App. 641, 116 S. W. 385, in petition for broker's commissions, allegation of sale is supported by proof of enforceable contract to sell.

Distinguished in *Christensen v. Cram*, 156 Cal. 634, 105 Pac. 950, where nothing to contrary appears, word "sold" primarily indicates consummated sale.

When Broker Earns Commission. See note, 139 Am. St. Rep. 251.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 349, 607.

Broker's Right to Commission Where Purchaser procured is financially unable to perform. See note, 20 L. R. A. (n. s.) 1170.

92 Cal. 89-92, 28 Pac. 104, CALLAHAN v. EEL RIVER ETC. R. R. CO.

Railroad Held Liable for Injuries Received by young child while playing on turntable.

Approved in *Edgington v. Burlington etc. R. Co.*, 116 Iowa, 430, 90 N. W. 102, 57 L. R. A. 561, reaffirming rule; *Cahill v. Stone*, 153 Cal. 574, 96 Pac. 86, 19 L. R. A. (n. s.) 1094, allowing recovery for injuries sustained by boy twelve years old while playing with unguarded push-car; *Chicago etc. R. R. Co. v. Fox*, 38 Ind. App. 279, 70 N. E. 85, railroad liable for injury to child who was playing on unlocked and unguarded turntable.

Liability of Railways for Injuries to Children trespassing on turntable. See notes, 14 L. R. A. 783; 4 L. R. A. (n. s.) 81.

92 Cal. 93-96, 28 Pac. 103, LYFORD v. NORTH PAC. COAST R. R. CO.

What Covenants Run With the Land. See note, 82 Am. St. Rep. 674.

92 Cal. 100-103, 28 Pac. 213, COWAN v. ABBOTT.

Fact That Receipt in Full is Given is not conclusive.

Approved in *Brown v. Crown Gold Milling Co.*, 150 Cal. 389, 99 Pac. 92, receipt is always open to explanation and purpose for which it was given may be shown.

Where Complaint Contains Two Counts, one upon express contract and the other upon quantum meruit, plaintiff need not elect upon which count he will rely.

Approved in *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal. App. 752, 108 Pac. 718, in action for conversion of exempt property, where plaintiff pleaded two different exemptions, it was error to compel him to elect between them at close of his case; *Darknell v. Coeur D'Alene etc. Transp. Co.*, 18 Idaho, 67, 108 Pac. 538, count based on express contract for services may be united with count based on implied contract; *Blankenship v. Decker*, 34 Mont. 298, 85 Pac. 1036, count based on quantum meruit may be joined with count based on express contract, though contract required by statute to be in writing.

92 Cal. 104-108, 28 Pac. 214, O'BRIEN v. GREENEBAUM.

Effect of Giving Creditor Secret Advantage in composition. See note, 27 L. R. A. 36.

92 Cal. 108-116, 28 Pac. 57, BURKE v. BOURS.

Agent must Act With Utmost Good Faith toward principal.

Approved in *Butler v. Agnew*, 9 Cal. App. 332, 99 Pac. 398, agreement of agent employed to sell land to divide commissions with purchaser and to receive half interest in land is void; *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 232, 90 Pac. 41, agent which has commingled with its own stock machinery intrusted to it for resale must account as of date when machinery was so intrusted.

Right of Broker to Purchase Realty listed with him. See note, 20 L. R. A. (n. s.) 1161.

92 Cal. 117-131, 28 Pac. 98, SUTRO v. RHODES.

Where Overissued County Bonds are Sold in Good Faith and without express warranty of their validity, there is no implied warranty.

Approved in *O'Sullivan v. Griffith*, 153 Cal. 506, 95 Pac. 875, grantee of right, title and interest of grantor in street railroad franchises must pay price, though grantor had no title.

92 Cal. 131-134, 28 Pac. 104, BENNETT v. HYDE.

Time is of Essence of Contract when parties so stipulate.

Approved in *Machold v. Farnan*, 14 Idaho, 268, 94 Pac. 174, where time is of essence of contract for sale of real property, vendee must make actual tender of price and demand for deed within time specified; *Hanschka v. Vodopich*, 20 S. D. 554, 108 N. W. 29, in option contract time is necessarily material.

92 Cal. 138-142, 28 Pac. 215, 15 L. R. A. 93, ALLEN v. SAN JOSE LAND CO.

Change from Open Ditch to Covered Pipe-line is substantial alteration of easement.

Approved in Kern Island etc. Co. v. Bakersfield, 151 Cal. 406, 90 Pac. 1053, grant of right of way for ditch does not give right to enlarge ditch or change its course; Wutchumna Water Co. v. Ragle, 148 Cal. 765, 84 Pac. 165, where prescriptive right to divert water is not found to have been limited by any requirement of notice, court cannot impose such requirement in its judgment; Winslow v. Vallejo, 148 Cal. 727, 113 Am. St. Rep. 349, 84 Pac. 193, 5 L. R. A. (n. s.) 851, city having easement for one water-pipe cannot lay another; Drake v. Russian River Land Co., 10 Cal. App. 666, 103 Pac. 172, easement for one purpose does not carry with it right to use land for other purposes; Oahu Ry. etc. Co. v. Armstrong, 18 Haw. 262, change in method of use, dimensions and location of watercourse over land of another is substantial; Rolens v. Hutchinson, 83 Kan. 623, 112 Pac. 131, change from drainage pipes to open ditch is substantial alteration of easement; Kavanaugh v. St. Louis Traction Co., 127 Mo. App. 278, 105 S. W. 282, grant to street railway company of right to use tracks of another company does not imply right to use trolley system.

92 Cal. 143-144, 28 Pac. 219, KRUMDICK v. WHITE.

Effect on Contract of Death of Party. See note, 23 L. R. A. 710.

92 Cal. 150-152, 28 Pac. 218, MALONE v. BEARDSLEY.

Error in Granting Nonsuit is Error in Law, and must be excepted to.

Approved in Nelmes v. Wilson (Cal.), 34 Pac. 341, and Martin v. Southern Pacific Co., 150 Cal. 131, 88 Pac. 704, both reaffirming rule.

92 Cal. 152-154, 27 Am. St. Rep. 101, 28 Pac. 105, SANBORN v. DOE.

Proceeding to Contest Validity of Discharge in insolvency must be commenced by creditor.

Approved in Wagner v. Superior Court (Cal.), 34 Pac. 648, it cannot be commenced by assignee in insolvency proceeding.

Right to Complain of Fraud is not assignable.

Distinguished in San Francisco Sav. Union v. Long (Cal.), 53 Pac. 910, right of sureties to be subrogated to lien on principal's property is assignable.

Assignability of Right of Action for Tort. See note, 100 Am. St. Rep. 721.

Assignment of Right to Set Aside Judgment. See note, 15 L. R. A. 813.

Who may Proceed to Set Aside Judgments against other parties. See note, 54 L. R. A. 763.

92 Cal. 155, 28 Pac. 221, BARNHART v. FULKERTH.

Appeal will not be Dismissed Because Trial Court had no jurisdiction of proceedings for new trial, but question will be considered upon hearing.

Approved in Johnson v. Phenix Ins. Co., 152 Cal. 198, 92 Pac. 183, failure to serve notice of motion for new trial on adverse party neces-

sitates affirmance of order denying such motion; *Estate of Young*, 149 Cal. 176, 85 Pac. 146, bill of exceptions to order dismissing petitions for partial distribution, not served upon all "adverse parties," cannot be considered.

92 Cal. 159-176, 28 Pac. 558, WHEELER v. BOLTON.

Point That Findings Do not Support Judgment must be presented on appeal from judgment.

Approved in *Southern Cal. R. Co. v. Slauson* (Cal.), 68 Pac. 108, and *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 451, 84 Pac. 332, both reaffirming rule; *Swift v. Occidental M. & P. Co.* (Cal.), 70 Pac. 471, *Frank v. Chatfield* (Cal.), 60 Pac. 525, and *Great Western Gold Co. v. Chambers*, 153 Cal. 310, 95 Pac. 152, all holding that questions as to sufficiency of complaint, rulings upon demurrers, and sufficiency of findings to support judgment, cannot be considered on appeal from order denying new trial; *Rockwell v. Light*, 6 Cal. App. 566, 92 Pac. 650, objections to amount of judgment cannot be considered on appeal from order denying new trial.

Interest can be Charged Against Executor only when he has been guilty of willful misfeasance, or has profited by his own acts.

Approved in *Title Ins. etc. Co. v. Ingersoll*, 158 Cal. 489, 111 Pac. 366, interest not chargeable against trustee commingling trust funds with his own where he can show that they have been prudently managed and especially where such commingling was with consent of beneficiary; *In re Davis' Estate*, 35 Mont. 286, 88 Pac. 960, interest not chargeable against administrator pending appeal from order of distribution, where it is not shown that he could have invested money or that he has not been diligent in prosecuting appeal.

Liability of Executors or Trustees for compound interest. See note, 29 L. R. A. 623, 639.

Deposit of Trust Fund in Bank by executors or administrators. See note, 98 Am. St. Rep. 376.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 337, 340.

92 Cal. 176-182, 28 Pac. 222, CRANE v. McCORMICK.

Mistake of One Party, Unknown to the Other, will not support reformation of contract.

Approved in *Los Angeles etc. R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 25, 27, 87 Pac. 1030, 1031, mere failure to read instrument with attention will not prevent its reformation; *De Laval Dairy Supply Co. v. Steadman*, 6 Cal. App. 656, 92 Pac. 878, where means of knowledge were equally available to both parties, vendee will not be heard to say that he was deceived by vendor's misrepresentations as to contents of contract; *Tatum v. Coast Lumber Co.*, 16 Idaho, 483, 101 Pac. 960, 23 L. R. A. (n. s.) 1109, negligence and mistake of vendor in computing prices of various articles are no ground for rescission of contract, where vendee acted in good faith.

Mistakes for Which Written Instruments may be canceled or corrected in equity. See note, 117 Am. St. Rep. 230.

Where Contract Provides That Brokers are entitled to commissions on sale of realty effected by owners, they need not show that they could have produced purchaser within time fixed in contract.

Distinguished in *Philbrook v. Moxey*, 191 Mass. 36, 77 N. E. 521, attorney employed to effect settlement is entitled to compensation for services actually rendered when client repudiates contract.

Real Estate Agent's Right of Recovery depends entirely upon his contract with owner of land.

Distinguished in *Sanchez v. Yorba*, 8 Cal. App. 492, 97 Pac. 205, ownership of land by employer is immaterial.

When Real Estate Broker is Considered as procuring cause of sale or exchange. See note, 44 L. R. A. 349.

Mutuality of Contract Giving Real Estate Broker exclusive authority or promising him commissions in case of sale by anyone else, but not in terms imposing any obligation upon him. See note, 19 L. R. A. (n. s.) 600.

92 Cal. 183-187, 28 Pac. 227, 679, IN RE WILLIAMS.

Where Property is Devised to Executor, in trust, with power to sell, such sale need not be confirmed by court.

Approved in *Blair v. Hazzard*, 158 Cal. 724, 112 Pac. 299, where land is devised to trustees, with power to sell, they can pass title, subject to administration.

Miscellaneous.—Cited in *In re Williams' Estate* (Cal.), 32 Pac. 242, subsequent phase of same litigation.

92 Cal. 188-192, 28 Pac. 223, EX PARTE CURTIS.

Miscellaneous.—Cited in *Packenhams v. Reed*, 37 Wash. 262, 79 Pac. 787, supreme court may grant habeas corpus to admit prisoner to bail pending appeal.

92 Cal. 192-194, 28 Pac. 221, IN RE VAUGHN.

Grantee of Heirs is Entitled to Distribution.

Approved in *Cooley v. Miller & Lux*, 156 Cal. 516, 105 Pac. 983, decree distributing interest to devisee does not affect rights of latter's grantee, where such rights were not passed upon; *Estate of Steward*, 1 Cal. App. 60, 81 Pac. 730, grantee of heirs may oppose application for order of sale; *Hill Co. v. Lawler* (Cal.), 45 Pac. 848, widow's grantee is not affected by decree of distribution rendered on stipulation of widow and residuary devisees.

92 Cal. 195-199, 28 Pac. 229, IN RE VANCE.

General Rule That Residence of Father is residence of his unmarried minor child does not apply where he has abandoned child.

Approved in *Smidt v. Benenga*, 140 Iowa, 404, 118 N. W. 441, guardians of child, though not parents, may determine his domicile.

Civil Responsibility for Wrongful or Negligent Act of servant or agent toward one not sustaining contractual relation. See note, 27 L. R. A. 200.

Right to Guardianship of Child. See note, 1 Cof. Prob. 181.

92 Cal. 199-202, 28 Pac. 226, PALMER & REY v. BARCLAY.

Affidavits of Merits Setting Forth That Affiant has stated all facts constituting defense to attorney is insufficient.

Approved in *Cooper-Power v. Hanlon*, 7 Cal. App. 725, 95 Pac. 679, reaffirming rule; *Jensen v. Dorr*, 9 Cal. App. 19, 98 Pac. 46, affidavit of merits setting forth that affiant has stated "all the facts" to his counsel is insufficient.

Court may Permit Affidavit of Merits to be amended after time for filing original has expired.

Approved in *Pittman v. Carstenbrook*, 11 Cal. App. 230, 104 Pac. 702, defendant does not waive previous motion for change of venue by filing amended demurrer.

92 Cal. 202-209, 28 Pac. 225, **KENEZLEBER v. WAHL.**

Where Plaintiff Could not Anticipate Evidence from allegations of answer, new trial was properly granted.

Distinguished in *Weinburg v. Soms* (Cal.), 33 Pac. 342, new trial on ground of newly discovered evidence properly denied where no subpoena issued or continuance asked for; *Hardin v. Card*, 15 Wyo. 232, 88 Pac. 221, new trial will not be granted for surprise where evidence was on matter plainly controverted by pleadings.

Granting of New Trial on Ground of Surprise is largely matter for discretion of lower court.

Approved in *People v. Boyd*, 16 Cal. App. 134, 116 Pac. 324, showing of diligence in seeking witness as basis for introduction of his testimony at preliminary examination is largely matter for discretion of court.

92 Cal. 209-221, 28 Pac. 799, **BOARD OF EDUCATION OF SAN FRANCISCO v. MARTIN.**

No Title can be Acquired by Adverse Possession to land reserved for public purposes.

Approved in *Bowden v. San Francisco*, 199 U. S. 601, 26 Sup. Ct. 748, 50 L. Ed. 328, reaffirming rule; *Kern Island etc. Co. v. Bakersfield*, 151 Cal. 407, 90 Pac. 1053, user of ditch along highway without objection from public authorities gives no prescriptive right.

Right to Acquire Title by Adverse Possession to lands devoted to public use. See note, 87 Am. St. Rep. 779.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 170, 177.

92 Cal. 221-228, 28 Pac. 935, **MEADS, SEAMAN & CO. v. LASAR.**

In Action to Recover Personal Property, judgment should be for possession or value in case delivery cannot be had.

Approved in *Johnson v. Gallegos*, 10 N. M. 5, 60 Pac. 72, return of property is satisfaction of judgment.

Sufficiency of Evidence to Support Verdict will not be considered in absence of specifications.

Reaffirmed in *Matter of Baker*, 153 Cal. 542, 96 Pac. 14.

Whether Sale of Personal Property is accompanied by immediate delivery and followed by actual and continued change of possession is question of fact.

Reaffirmed in *Simons v. Daly*, 9 Idaho, 93, 72 Pac. 508.

Certificate of Partnership which gives names of partners with initials is sufficient.

Approved in *In re Farmers' Supply Co.*, 170 Fed. 504, law requiring certificates to be filed by partnerships does not affect jurisdiction of federal courts.

92 Cal. 229-235, 28 Pac. 339, **MILLER v. HICKEN.**

When Want of Constructive Notice follows from facts found, it is immaterial that there is no express conclusion of law to that effect.

Reaffirmed in *Gainsley v. Gainsley* (Cal.), 44 Pac. 457.

Reinstatement of Mortgage Released or discharged by mistake. See note, 58 L. R. A. 790.

92 Cal. 235-239, 28 Pac. 285, BAIRD v. PEALL.

Each Distinct Proposition Involved in a Finding excepted to should be separately specified in bill of exceptions.

Approved in dissenting opinion in *Smith Table Co. v. Madsen*, 30 Utah, 316, 84 Pac. 892, majority holding that assignment of errors need not be filed in court below.

92 Cal. 239-277, 28 Pac. 341, BRUNER v. SUPERIOR COURT.

Court has No Power to Appoint Elisor unless sheriff and coroner challenged as incompetent.

Distinguished in *State v. Barber*, 13 Idaho, 78, 79, 88 Pac. 421, 422, district judge may order grand jury to be drawn for any county in his district.

Meaning of "Elisor" in Code of Civil Procedure is that given in Political Code.

Approved in *Sunset Telephone etc. Co. v. Pomona*, 172 Fed. 834, 97 C. C. A. 251, word "telegraph" includes "telephone" in both Civil and Penal Codes.

Distinguished in dissenting opinion in *Sunset Telephone etc. Co. v. City of Pomona*, 172 Fed. 840, 97 C. C. A. 251, majority holding that word "telegraph" includes "telephone" in both Civil and Penal Codes.

It is Duty of Sheriff in First Instance to summon venire.

Approved in *People v. Vasquez*, 9 Cal. App. 547, 99 Pac. 983, after court had set aside panel of one special venire on ground of sheriff's bias and prejudice, it was prejudicial error to order sheriff to summon other special venires.

No Mere Irregularities in Formation of Grand Jury, other than such as are grounds of challenge, are grounds for setting aside indictment.

Reaffirmed in *People v. Hatch*, 13 Cal. App. 526, 109 Pac. 1099.

Organization of Grand Jury. See note, 27 L. R. A. 779.

Prohibition will Lie to Prevent Trial of indictment found by illegally impaneled grand jury.

Approved in *Terrill v. Superior Court (Cal.)*, 60 Pac. 39, where defendant has been convicted on void indictment, prohibition will lie to prevent trial judge from pronouncing sentence; *Bell v. District Court*, 28 Nev. 296, 113 Am. St. Rep. 854, 81 Pac. 877, 1 L. R. A. (n. s.) 843, constitutionality of statute authorizing summary proceedings for removal of public officers may be determined on prohibition; *Ewans v. Willis*, 22 Okl. 322, 97 Pac. 1051, 19 L. R. A. (n. s.) 1050, prohibition will lie to prevent trial upon information not presented by county attorney; *Keefe v. Carbon County District Court*, 16 Wyo. 395, 94 Pac. 462, prohibition will lie to prevent trial on second information for same offense after court had granted change of venue.

Distinguished in *Hogan v. Superior Court*, 16 Cal. App. 789, 117 Pac. 950, prohibition will not lie to review sufficiency of evidence to sustain verdict of guilty in justice's court.

Overruled in *In re Hatch*, 9 Cal. App. 337, 99 Pac. 400, on application for prohibition, validity of grand jury which indicted petitioner cannot be considered.

Writ of Prohibition. See note, 111 Am. St. Rep. 935, 952.

Where Accused has Been Indicted by Illegal Grand Jury, remedy by appeal is not plain or speedy or adequate.

Approved in *Primm v. Superior Court*, 3 Cal. App. 210, 84 Pac. 787, granting prohibition to restrain court from continuing attachment after appeal by plaintiff from judgment in favor of defendant.

92 Cal. 277-281, 28 Pac. 270, PEOPLE v. WONG WANG.

Courts will Take Judicial Notice of census returns.

Reaffirmed in *Ex parte Show*, 4 Okl. Cr. 432, 113 Pac. 1069.

Indictment must Allege That Offense was committed within jurisdiction of court.

Distinguished in *People v. Thompson*, 7 Cal. App. 619, 95 Pac. 388, words "at said county" in charging part of information may be construed with reference to caption.

Miscellaneous.—Cited in *People v. Ah Ung* (Cal.), 28 Pac. 272, decided on authority of cited case.

92 Cal. 282-285, 27 Am. St. Rep. 103, 28 Pac. 286, PEOPLE v. AH LEN.

Statement by Counsel for Prosecution of facts not in evidence is prejudicial error.

Approved in *People v. McRoberts*, 1 Cal. App. 27, 81 Pac. 735, unwarrantable license to refer to criminal history of county and to avow belief in efficacy of mob law; *Danford v. State*, 53 Fla. 26, 43 So. 601, reversing where state attorney read from paper in such manner as to suggest that it was evidence of witness at preliminary hearing, though court instructed that paper was not evidence; *State v. Irwin*, 9 Idaho, 44, 71 Pac. 611, 60 L. R. A. 716, reversing where assistant prosecutor repeatedly asked questions calling for incompetent evidence of a prejudicial nature; *State v. Thompson*, 106 La. 366, 30 So. 897, reversing because prosecuting officer referred in argument to the "six fatherless little children" of deceased.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 649, 661.

92 Cal. 285-292, 28 Pac. 288, NOYES v. SOUTHERN PAC. R. R. CO.

Where Evidence Justifies Inference for or against negligence, question is for jury.

Reaffirmed in *Davey v. Southern Pac. Co.* (Cal.), 45 Pac. 171.

92 Cal. 293-296, 28 Pac. 287, IN RE GALLAND.

Pledgee Need not Present Claim to executor of pledgor.

Approved in *Murray's Estate*, 56 Or. 138, 107 Pac. 21, claim arising from contract of administratrix for care of horse belonging to estate need not be presented.

Liability of Decedent's Estate for funeral expenses. See note, 33 L. R. A. 660.

Items and Amounts Allowable as Funeral Expenses against deceased's estate. See note, 28 L. R. A. (n. s.) 573.

92 Cal. 296-344, 27 Am. St. Rep. 106, 28 Pac. 272, 675, 14 L. R. A. 755, IN RE MADERA IRR. DIST.

Irrigation District Legislation is Valid because the land included in district requires reclamation and it is for the public welfare that such reclamation should be afforded.

Approved in *Jenison v. Redfield*, 149 Cal. 503, 87 Pac. 64, owner of land in irrigation district is not entitled to water for use of his land outside of district; *Los Angeles County v. Reyes* (Cal.), 32 Pac. 234, upholding law conferring right of eminent domain for private road; *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 533, 85 Pac. 316, upholding laws for creation of irrigation districts; *Albuquerque Land etc. Co. v. Gutierrez*, 10 N. M. 237, 251, 61 Pac. 359, irrigation company may exercise right of eminent domain; *Little W. W. Irr. Dist. v. Preston*, 46 Or. 6, 78 Pac. 982, and *Billing's Sugar Co. v. Fish*, 40 Mont. 270, 106 Pac. 570, 26 L. R. A. (n. s.) 973, upholding law for creation of drainage districts.

Every Act of the Legislature is Presumed to be within its power.

Approved in *In re Spencer*, 149 Cal. 400, 117 Am. St. Rep. 137, 86 Pac. 897, upholding statute regulating employment and hours of labor of children; *People v. Nye*, 9 Cal. App. 160, 98 Pac. 245, upholding that vacancy in certain state offices shall be filled by governor for balance of unexpired term; *In re Finley*, 1 Cal. App. 200, 81 Pac. 1042, upholding statute imposing death penalty upon life convict who commits assault with deadly weapon; dissenting opinion in *Ex parte Dietrich*, 149 Cal. 107, 84 Pac. 770, 5 L. R. A. (n. s.) 873, majority holding void act requiring weight to be marked upon packages of butter.

Distinguished in *Hilborn v. Nye*, 15 Cal. App. 303, 114 Pac. 803, legislature cannot allow post session expenses independently of constitutional limit on its expenses during session.

If by Any Possibility Legislation may be for public welfare, will of legislature must prevail over doubts of court.

Approved in *People v. San Joaquin Valley Agricultural Assn.*, 151 Cal. 802, 91 Pac. 742, district agricultural association organized under act of 1850 is public corporation, whose property cannot be levied on by execution; *Sisson v. Buena Vista County*, 128 Iowa, 453, 104 N. W. 459, 70 L. R. A. 440, upholding act of providing for creation of drainage districts; *Walker v. Shasta Power Co.*, 160 Fed. 859, 19 L. R. A. (n. s.) 725, 87 C. C. A. 66, affirming 149 Fed. 570, and holding taking of land for right of way for ditch and flume to convey water used in generating electricity for public use is public use.

Legislature may Provide for Local Public Improvement, and may tax all land in district therefor, though some land outside of district is benefited and some land in district is not.

Approved in *Robinson v. Linscott*, 12 Cal. App. 433, 107 Pac. 705, supervisors may order road constructed from general fund of county, which is raised in part from taxation of municipalities which are required to construct their own streets; *Roby v. Drainage Dist. of Shunganunga*, 77 Kan. 757, 95 Pac. 400, lands in drained district, though never subject to overflow, may be assessed for benefits derived, if they are subject to damage from lands actually overflowed; *Arnold v. Knoxville*, 115 Tenn. 219, 90 S. W. 475, act authorizing special assessment on abutting property for municipal improvement does not violate constitutional requirement that taxes be uniform; *Rico v. Snider*, 134 Fed. 957, legislature may provide for reclamation of swamp lands.

Legislature may Authorize Inhabitants of District to organize themselves into public corporation with limited powers.

Approved in *Petition of East Fruitvale Sanitary Dist.*, 158 Cal. 457, 111 Pac. 370, sanitary district annexed to city loses its iden-

tity; Nevada Nat. Bk. v. Kern County, 5 Cal. App. 650, 91 Pac. 127, mandamus will lie to compel levy of tax to pay interest on irrigation district bonds; Roby v. Shunganunga Drainage Dist., 77 Kan. 759, 95 Pac. 401, drainage district may include land in incorporated city; Billing's Sugar Co. v. Fish, 40 Mont. 280, 106 Pac. 570, 26 L. R. A. (n. s.) 973, legislature may give county drain commissioner power to assess land benefited by drain.

Legislature may Leave Creation of Irrigation District to vote of those who are to be affected thereby.

Reaffirmed in People v. Ontario, 148 Cal. 631, 84 Pac. 208.

Irrigation District is Public Corporation.

Approved in People v. San Joaquin Valley Agricultural Assn., 151 Cal. 803, 91 Pac. 743, district agricultural association is public corporation and its property is exempt from execution; Healey v. Anglo-Californian Bk., Ltd., 5 Cal. App. 282, 90 Pac. 55, officers of irrigation district cannot dispense with any of essential proceedings prescribed by statute for investing them with power to contract; Perry v. Otay Irr. Dist. (Cal.), 60 Pac. 41, collector of irrigation district, after his successor has qualified, cannot offset his claim for compensation against moneys in his hands belonging to district; Whipple v. Tuxworth, 81 Ark. 402, 99 S. W. 90, improvement district in city held to be de facto corporation; Hertle v. Ball, 9 Idaho, 199, 72 Pac. 954, officers of irrigation district are public officers within statute providing for election contests; State v. Hanson, 80 Neb. 731, 115 N. W. 297, drainage district may be formed by majority vote of property owners interested.

Legislature may Act Directly upon Local Districts or it may intrust such legislation to subordinate public bodies.

Approved in Potter v. Santa Barbara, 160 Cal. 356, 116 Pac. 1104, legislature may create road divisions, leaving issuance of bonds and levying of taxes to boards of supervisors.

Delegation of Legislative Power to minor municipalities. See note, 86 Am. St. Rep. 242.

It is No Objection to Law for Creation of irrigation districts that it makes no provision for hearing for land owners prior to establishment of district.

Approved in People v. Ontario, 148 Cal. 632, 634, 84 Pac. 208, 209, reaffirming rule; Ross v. Supervisors of Wright County, 128 Iowa, 441, 104 N. W. 511, 1 L. R. A. (n. s.) 431, upholding provision limiting right of appeal from ruling of board of supervisors on drainage assessment.

Creation of Irrigation District Does not Affect Property of anyone within district.

Distinguished in Wilcox v. Engebretsen, 160 Cal. 293, 116 Pac. 752, order of city council changing street grade is not conclusive adjudication upon sufficiency of petition therefor.

Description of Boundaries of Irrigation District held sufficient.

Approved in Williams v. Bisagno (Cal.), 34 Pac. 641, resolution to pave street, referring by number to certain ordinances, is sufficient; Murray v. Nixon, 10 Idaho, 617, 79 Pac. 646, upholding judgment referring to maps for description of right of way involved.

In Proceeding for Confirmation of Irrigation District, that petition was presented to supervisors, signed by qualified freeholders, must be proved under ordinary rules of evidence.

Approved in *Ahern v. Board of Directors*, 39 Colo. 418, 89 Pac. 965, abstracts of title and testimony of circulators of petition, inadmissible.

Existence of Public Use as Question for courts. See note, 88 Am. St. Rep. 932, 933, 934.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 49, 51, 53, 81, 86.

Uses for Which Power of Eminent Domain cannot be exercised. See note, 102 Am. St. Rep. 821, 828, 832.

Constitutionality of Frontage Rule of Assessment. See note, 17 L. R. A. 332.

Protection of Private Rights from Public Interference. See note, 18 L. R. A. 544.

Charging Expense of Grading for Sidewalk upon abutting owner. See note, 28 L. R. A. 499.

Right to Impose on Abutting Owners Duty or expense of sprinkling, sweeping, and cleaning streets or sidewalks. See note, 24 L. R. A. 412.

Municipal Taxation of Rural Lands. See note, 34 L. R. A. 200.

Constitutionality of Local Option Laws. See note, 114 Am. St. Rep. 321.

92 Cal. 344-358, 27 Am. St. Rep. 143, 28 Pac. 563, 16 L. R. A. 361,
DUNLAP v. STEERE.

Equity will Set Aside Judgment for Fraud.

Approved in *Hanley v. Hanley*, 4 Cal. Prob. 479, equity will set aside order setting apart homestead, procured by fraud; *Doyle v. Hampton*, 159 Cal. 733, 116 Pac. 41; *Smith v. Collis*, 42 Mont. 364, 112 Pac. 1073, and *Duphorne v. Moore*, 82 Kan. 161, 107 Pac. 791, all holding judgment based upon willfully false affidavit for publication of summons may be set aside.

Distinguished in *Tracy v. Muir*, 151 Cal. 371, 121 Am. St. Rep. 117, 90 Pac. 835, equity will not relieve against adjudication as to genuineness of will, in absence of extrinsic fraud; *Wagner v. Beadle*, 82 Kan. 470, 108 Pac. 859, equity will not set aside judgment on ground that it was based on claim insufficient in law but admitting of assertion in good faith; *Miller v. Margerie*, 149 Fed. 698, 79 C. C. A. 382, equity will not set aside order of trustee confirming title to townsite lot in Alaska, in absence of fraud or mistake preventing presentation of claim to such trustee.

Whether Jurisdiction of Suit to Quiet Title or remove cloud on title of land within territorial jurisdiction may rest upon constructive service of nonresident. See note, 29 L. R. A. (n. s.) 626.

Miscellaneous.—Cited in *In re Bonds of Madera Irrigation Dist.* (Cal.), 28 Pac. 285, same case on appeal from order denying new trial; *McKnight v. Grant*, 13 Idaho, 640, 121 Am. St. Rep. 287, 92 Pac. 991, where affidavit for publication shows unequivocally that defendant resides outside of state, showing of further diligence to find him within state is unnecessary.

92 Cal. 359-370, 28 Pac. 261, **PEOPLE v. FREEMAN.**

Motion for New Trial on Ground of newly discovered evidence must be supported by strong showing of diligence and as to materiality and truth of such evidence.

Approved in *People v. Byrne*, 160 Cal. 225, 226, 116 Pac. 525, reaffirming rule; *People v. Weber*, 149 Cal. 350, 86 Pac. 681, no abuse of discretion in refusing new trial where newly discovered evidence appeared to be untrue; *People v. Singh*, 11 Cal. App. 429, 105 Pac. 424, new trial rightly refused where evidence was merely cumulative and could easily have been produced at trial; *People v. Mar Gin Suie*, 11 Cal. App. 56, 103 Pac. 958, motion rightly refused where there was sharp conflict in affidavits; *Marks v. Shoup*, 2 Alaska, 71, new trial properly denied where new evidence was known to counsel prior to trial.

New Trial will not be Granted to permit accused to offer evidence in support of new defense.

Approved in *Johnson v. State*, 128 Ga. 108, 57 S. E. 356, new trial rightly denied to permit accused to prove different alibi.

92 Cal. 370-372, 28 Pac. 570, IN RE CROGHAN.

Homestead, Selected by Husband from His Separate Property, upon his death vests absolutely in his widow.

Approved in *Estate of Clavo*, 6 Cal. App. 778, 93 Pac. 296, applying rule where husband made second declaration of homestead for benefit of second wife on property from his separate estate.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 45.

92 Cal. 372-378, 28 Pac. 568, PETERSON v. KINKEAD.

Unlawful Detainer. See note, 120 Am. St. Rep. 56.

92 Cal. 378-382, 28 Pac. 569, NEWMAN v. SAN FRANCISCO.

Miscellaneous.—Cited in *Phillips v. Winter* (Cal.), 37 Pac. 156, party to action for partition, who acquires independent title pending suit, cannot set it up in subsequent action for partition.

92 Cal. 382-387, 28 Pac. 573, HUGHES v. OANNEDY.

Tax Deed Which Omits Matters Recited in Certificate of sale is void.

Approved in *Baird v. Monroe*, 150 Cal. 564, 89 Pac. 353, deed to state omitting date when right of redemption had expired, held invalid but validated by curative act of 1903; *Seaverns v. Costello*, 8 Ariz. 312, 71 Pac. 931, tax deed not containing recitals required by statute is void.

Tax Deed is Void Where Notice was not Served or posted on premises, in compliance with section 3785, Political Code.

Approved in *King v. Samuel*, 7 Cal. App. 64, 93 Pac. 394, reaffirming rule; *Johnson v. Taylor*, 150 Cal. 203, 119 Am. St. Rep. 181, 88 Pac. 904, 10 L. R. A. (n. s.) 818, matter of notice is regulated by law in force at time of tax sale.

Miscellaneous.—Cited in *Sanford v. Bergin*, 156 Cal. 51, 103 Pac. 336, mortgage is barred by lapse of time within which action could have been brought on obligation which it secured.

92 Cal. 388-393, 28 Pac. 485, BEASLEY v. SAN JOSE FRUIT PACKING CO.

Master is Presumed to Have Done His Duty in selection of competent servants.

Distinguished in *Still v. San Francisco etc. Ry. Co.*, 154 Cal. 568, 129 Am. St. Rep. 177, 98 Pac. 676, 20 L. R. A. (n. s.) 322, employer

held liable for failure to make reasonable investigation as to knowledge by newly appointed conductor of rules for meeting and passing of trains.

Declaration of Defendant's Foreman, made evening after accident, as to carelessness of fellow-servant, is inadmissible.

Approved in *Mutter v. T. & L. Lime Co.* (Cal.), 42 Pac. 1070, declarations of defendant's foreman after suit commenced inadmissible; *Waldeck v. Pac. Coast S. S. Co.*, 2 Cal. App. 169, 83 Pac. 159, statements in letter of agents, which were narratives of past events and no part of *res gestae*, held inadmissible; *Wheeler v. Oregon R. R. etc. Co.*, 16 Idaho, 407, 102 Pac. 358, statement of witness that accident was her fault, made shortly thereafter, inadmissible; *Hogan v. Kelly*, 29 Mont. 489, 75 Pac. 82, written declarations of vendee's agent, made several months after bill of sale was executed, are inadmissible.

Distinguished in *Bundy v. Sierra Lumber Co.*, 149 Cal. 778, 87 Pac. 624, admitting declaration of defendant's agent, whose duty it was to examine trestles, that particular trestle was in dangerous condition; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 530, 99 Pac. 96, statements of engineer of train, made two or three minutes after accident, as to movements of child run over, held admissible.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 315.

92 Cal. 398-403, 28 Pac. 575, **FORRESTER v. SCOTT.**

Land Grant of March 3, 1871, passed perfect title to Southern Pacific Company, which attached to specific land when map of definite location was filed in general land office.

Approved in *Charlton v. Southern Pac. R. Co.* (Cal.), 33 Pac. 1120, mere possession gives no right against such grant unless possessor is qualified under pre-emption or homestead laws.

92 Cal. 403-407, 27 Am. St. Rep. 150, 28 Pac. 674, **KULLMAN v. GREENEBAUM.**

Composition Agreement is Agreement Between Creditors themselves as well as between debtor and creditors.

Approved in *Reynolds v. Pennsylvania Oil Co.*, 150 Cal. 634, 89 Pac. 612, contract held not to be composition agreement.

Effect of Giving Creditor Secret Advantage in composition. See note, 27 L. R. A. 35.

92 Cal. 412-414, 28 Pac. 444, **FOGEL v. SCHMALZ.**

Question Presented on Motion for Nonsuit is question of law.

Approved in *Smith v. Superior Court*, 2 Cal. App. 531, 84 Pac. 55, appeal from judgment of justice's court, though taken on questions both of law and fact, presents question of law only.

92 Cal. 414-419, 28 Pac. 803, **SAN FRANCISCO v. BRADBURY.**

Lands Devoted to Public Use cannot be Acquired by adverse possession.

Approved in *People v. Kerber*, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 79, title to tide lands situated on waterfront of navigable bay cannot be acquired by adverse possession.

Right to Acquire Title by Adverse Possession to lands devoted to public use. See note, 87 Am. St. Rep. 779.

92 Cal. 419-420, 28 Pac. 441, TAYLOR v. FORD.

Action Under Section 1050, Code of Civil Procedure, to determine adverse claim is action at law.

Approved in *Miller v. Kettenbach*, 18 Idaho, 258, 138 Am. St. Rep. 192, 109 Pac. 507, court of equity will not release guarantor unless circumstances exist which could not have been shown in defense to action at law; *Harrison v. Russell*, 17 Idaho, 201, 105 Pac. 49, in such action plaintiff has right to open and close evidence and argument; *Kenny v. McKenzie*, 25 S. D. 489, 127 N. W. 599, equitable estoppel may be pleaded in action to quiet title; *Burleigh v. Hecht*, 22 S. D. 308, 117 N. W. 370, where plaintiff in action to quiet title seeks to recover possession, parties are entitled to jury trial.

Distinguished in *Shields v. Johnson*, 10 Idaho, 482, 79 Pac. 393, where action to quiet title is brought by party in possession, neither party is entitled to jury, as matter of right.

92 Cal. 421-427, 28 Pac. 577, 15 L. R. A. 190, PEOPLE v. AH TEUNG.

Departure from Unlawful Imprisonment is not escape, within meaning of law.

Approved in *King v. State*, 42 Fla. 265, 28 So. 208, allegation that prisoner was in lawful custody of known public officer authorized to have such custody is sufficient.

Escape from Lawful Custody is Criminal.

Reaffirmed in *State v. Clark*, 32 Nev. 148, 104 Pac. 595.

92 Cal. 427-431, 28 Pac. 580, COATES v. OLEAVES.

Vendee of Land Who Enters into Possession is estopped from denying vendor's title.

Approved in *Gervaise v. Brookins*, 156 Cal. 107, 103 Pac. 331, failure of vendor's title does not entitle vendee to remain in possession; *Garvey v. Lashells*, 151 Cal. 532, 91 Pac. 501, applying rule to vendee who has purchased outstanding title.

When Vendor may Recover Possession from vendee. See note, 107 Am. St. Rep. 726.

92 Cal. 431-432, 28 Pac. 579, WHALEY v. KING.

Mandamus as Proper Remedy Against Public Officers. See note, 98 Am. St. Rep. 900.

92 Cal. 433-436, 28 Pac. 486, IN RE HILDEBRANDT.

Claim Due to Executor must be Presented to judge for allowance within time allowed by law for presentation of claims.

Reaffirmed in *Estate of Long*, 9 Cal. App. 755, 100 Pac. 892.

92 Cal. 437-457, 28 Pac. 580, OHM v. SAN FRANCISCO.

Conclusions of Law in Pleading will not be Considered in passing upon demurrer.

Approved in *Townsend v. Sullivan*, 3 Cal. App. 119, 84 Pac. 436, where answer admits facts constituting cause of action, denials and averments of conclusions of law raise no issues; *Smith v. Rogers County*, 26 Okl. 822, 110 Pac. 670, allegation that advertisement of letting of contract has not been published and posted as required by law is mere legal conclusion.

92 Cal. 457-471, 28 Pac. 490, FELTON v. LE BRETON.

Trust Deed may be Treated as mortgage with power of sale.

Approved in *Herbert Craft Co. v. Bryan* (Cal.), 68 Pac. 1021, only one action may be maintained to enforce trust deed.

Beneficiary Under Deed of Trust may Purchase at sale in pursuance of trust.

Approved in *Marquam v. Ross*, 47 Or. 413, 83 Pac. 862, mortgagee in possession may purchase security at execution sale.

Who may not Purchase at Judicial, execution and other compulsory sales. See note, 136 Am. St. Rep. 808.

Trustee may Bid for Beneficiary at Sale in pursuance of trust.

Reaffirmed in *Stockwell v. Barnum*, 7 Cal. App. 419, 94 Pac. 403.

Burden of Proof is upon Attorney to Show that dealing with client was fair and just.

Approved in *Lynch v. McDonald*, 155 Cal. 707, 102 Pac. 919, applying rule where it did not appear that attorney explained to client legal effect of contract for former's services; *Thweatt v. Freeman*, 73 Ark. 579, 84 S. W. 721, granting relief where attorney advised client to sell property at certain price and bought it himself, concealing facts as to true value; dissenting opinion in *Pierce v. Palmer*, 31 R. I. 468, 77 Atl. 216, majority refusing to hold respondent in disbarment proceedings guilty of oppression in collecting fee from funds intrusted to him.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 185.

92 Cal. 481-482, 28 Pac. 490, GORDON v. BUCKLES.

Prohibition will Lie to Prevent Court from punishing as contempt disobedience of order beyond its jurisdiction.

Approved in *Powhatan Coal etc. Co. v. Ritz*, 60 W. Va. 409, 56 S. E. 263, 9 L. R. A. (n. s.) 1225, granting prohibition against preliminary injunction which deprived party of possession of property without hearing.

92 Cal. 482-492, 28 Pac. 585, PEOPLE v. WILLARD.

On Trial for Receiving Stolen Goods, proof of subsequent distinct offenses is not admissible to show guilty knowledge.

Distinguished in *People v. Zimmerman*, 11 Cal. App. 118, 104 Pac. 591, admitting evidence of transaction in which defendant was entrapped, to show motive and intent.

Where Goods Stolen from Different Persons are received at same time, offense is single.

Approved in *People v. Bunkers*, 2 Cal. App. 204, 84 Pac. 368, one cannot be active offender in one crime and accomplice in commission of another at same time and by same overt acts.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 812.

92 Cal. 492-493, 28 Pac. 675, EX PARTE HEYLMAN.

Ordinance Imposing License Tax upon Peddlers of meat from vehicles is valid.

Approved in *Ex parte Byles*, 93 Ark. 619, 126 S. W. 97, upholding license tax on peddler's selling certain enumerated articles; *McKnight v. Hodge*, 55 Wash. 295, 104 Pac. 507, upholding license tax on ped-

dlers exempting peddlers of farm products and books and periodicals; *Servouitz v. State*, 133 Wis. 240, 126 Am. St. Rep. 955, 113 N. W. 280, upholding license tax upon peddlers.

Right to Discriminate Between Harmless Articles in legislation regulating peddlers. See note, 21 L. R. A. (n. s.) 352.

Constitutional Limitations on Power to Impose License or occupation taxes. See note, 129 Am. St. Rep. 275.

Limit of Amount of License Fees. See note, 30 L. R. A. 434.

92 Cal. 493-497, 27 Pac. 156, 28 Pac. 484, **RICHARDS v. GRIFFITH.**

Where Equity is Latent, Lien will not be kept alive to prejudice of subsequent bona fide purchaser.

Reaffirmed in *Foster v. Williams*, 144 Mo. App. 225, 128 S. W. 798.

Right of Subrogation. See note, 99 Am. St. Rep. 481, 502.

92 Cal. 497-499, 28 Pac. 592, **BLUM v. McHUGH.**

Miscellaneous.—Cited in *Stockton Savings etc. Soc. v. Purvis* (Cal.), 42 Pac. 442, oral agreement that crop should be stored in landlord's name and rent paid therefrom did not create lien on growing crop.

92 Cal. 500-501, 28 Pac. 591, **BJORMAN v. FORT BRAGG RED-WOOD CO.**

It is Within Discretion of Trial Judge to grant new trial where he is satisfied that verdict is against weight of evidence.

Approved in *Scrivani v. Dondero* (Cal.), 44 Pac. 1066, *Castor v. Bernstein*, 2 Cal. App. 708, 84 Pac. 246, and *Eidinger v. Sigwart*, 13 Cal. App. 677, 110 Pac. 525, all reaffirming rule; *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 429, 83 Pac. 440, statement of ground upon which new trial was granted, to be effectual, must be incorporated in order.

92 Cal. 506-614, 28 Pac. 589, **PEOPLE v. THOMPSON.**

It is Proper to Show Motive and Interest on cross-examination.

Approved in *Van Valkenburgh v. Oldham*, 12 Cal. App. 580, 108 Pac. 46, reaffirming rule; *People v. Mack*, 14 Cal. App. 15, 110 Pac. 968, evidence that witness for defendant tried to induce prosecuting witness to absent herself from trial is admissible; *People v. Cowan*, 1 Cal. App. 413, 82 Pac. 341, permitting district attorney to ask witness, on cross-examination, as to his membership in same miners' union as defendant; *State v. Hennessy*, 29 Nev. 346, 90 Pac. 228, evidence of purpose with which decedent went upon premises where killing occurred is admissible.

Where It is Claimed That Homicide was Committed in self-defense, evidence of threats or hostile conduct, communicated or uncommunicated, is admissible.

Approved in *People v. Lanear*, 148 Cal. 574, 83 Pac. 997, in such case evidence of reputation of deceased as dangerous man, whether known or unknown to defendant, is admissible.

Evidence of Antecedent Threats on Trial for homicide. See note, 3 L. R. A. (n. s.) 526.

Where Conflicting Instructions are Given, one of which is erroneous, minds of jury must have been confused.

Approved in *People v. Maughs*, 149 Cal. 261, 86 Pac. 190, applying rule to erroneous instruction on right of defendant to stand his ground.

Evidence of Difficulties Between Defendant and deceased may be introduced to prove malice, but details thereof cannot be gone into to determine which party was in the right.

Reaffirmed in *Sylvester v. State*, 46 Fla. 169, 35 So. 143.

92 Cal. 514-527, 27 Am. St. Rep. 158, 28 Pac. 593, **ALEXANDER v. JACKSON**.

Homestead Filed upon Land as to Which Husband had contract of sale is fed by deed subsequently executed to husband.

Reaffirmed in *Towne v. Towne*, 6 Cal. App. 704, 92 Pac. 1053.

Wife Claiming Homestead Under Husband's Contract for purchase of land cannot demand deed without tendering performance of contract.

Reaffirmed in *Helgebye v. Dammen*, 13 N. D. 175, 100 N. W. 247.

92 Cal. 528-542, 28 Pac. 681, **SPRING VALLEY WATERWORKS v. DRINKHOUSE**.

Before Land can be Taken for Public Use, it must appear that taking is necessary for such use.

Approved in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1018, reaffirming rule.

Distinguished in *Northern Light etc. Co. v. Stacher*, 13 Cal. App. 408, 109 Pac. 903, electric light and power company seeking to condemn riparian rights need not set forth in complaint that present equipment is insufficient.

Evidence of Prices at Which Other Land has been sold is admissible on cross-examination to test fairness of witness' opinion as to value.

Approved in *Union P. R. Co. v. Stanwood*, 71 Neb. 156, 91 N. W. 194, reaffirming rule.

In Action to Condemn Land for Reservoir Site, evidence of value of land for reservoir purposes is admissible.

Disapproved in *Sacramento etc. R. R. Co. v. Heilbron*, 156 Cal. 411, 104 Pac. 981, evidence of value of land for special purpose is inadmissible.

Evidence of Special Value of Property taken for public use. See notes, 124 Am. St. Rep. 537; 11 L. R. A. (n. s.) 996.

Right to Consider Value as Part of a Natural Water-power, in fixing compensation on condemnation. See note, 3 L. R. A. (n. s.) 912.

Evidence of Value is to be Confined to What Property is worth in market, having regard to most valuable use to which it may be devoted.

Approved in *Salstrom v. Orleans Bar Gold Min. Co.*, 153 Cal. 558, 96 Pac. 295, owner of land cannot recover its value both for hydraulic mining and for agriculture, such uses being necessarily incompatible; *Ranck v. Cedar Rapids*, 134 Iowa, 565, 111 N. W. 1028, admitting evidence of value of premises for livery-stable and undertaking-rooms; *Kansas etc. Ry. Co. v. Weidenmann*, 77 Kan. 303, 94 Pac. 147, market value of land may be shown for every purpose to which it is adapted.

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 293.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 56, 61, 73.

Miscellaneous.—Cited in *Dethample v. Lake Keon etc. Irr. Co.*, 73 Kan. 55, 84 Pac. 545, where perpetual easement is condemned in land which has only a surface value, measure of recovery is value of fee.

92 Cal. 548-552, 28 Pac. 599, GREEN v. REDDING.

Tenant cannot Avoid Lease by abandoning premises as unfit for occupation without notice to landlord to repair.

Approved in Angevine v. Knox-Goodrich (Cal.), 81 Pac. 530, lessor not liable to tenant for injury to his health from defective sewer.

92 Cal. 552-555, 28 Pac. 601, SHEPPERD v. TYLER.

Right to Rents on Lease of Intestate's Property. See note, 40 L. R. A. 323.

92 Cal. 560-563, 28 Pac. 778, SAN FRANCISCO v. STAUDE.

Judgment on Pleadings is Proper Where Answer Denies no material allegation, and fails to present affirmative defense.

Approved in St. Mary's Hospital v. Perry, 152 Cal. 343, 92 Pac. 866, reaffirming rule.

Liability on Guaranty or Surety Obligation obtained by fraud. See note, 21 L. R. A. 411.

92 Cal. 564-568, 28 Pac. 603, ESTATE OF TAYLOR.

Opinion of Witness as to Capacity of Testator to make will is not admissible.

Approved in Estate of Tobin, 3 Cal. Prob. 541, and In re Estate of Cheney, 78 Neb. 276, 110 N. W. 732, both reaffirming rule; In re Coburn, 11 Cal. App. 621, 105 Pac. 931, opinions of witnesses as to ability of alleged incompetent to manage his property and as to whether he was likely to be imposed upon by designing persons are inadmissible; Nobles v. Hutton, 7 Cal. App. 25, 93 Pac. 294, holding that questions related to "mental competency," though form may not have been strictly within language of section; Denver etc. Ry. Co. v. Scott, 34 Colo. 105, 81 Pac. 765, opinion of witness as to whether person was mentally capable of making contract is inadmissible.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 722.

Right of Witness to Give Opinion on issue of sanity or mental capacity. See note, 36 L. R. A. 66, 70.

While It is for the Defendant to prove circumstances of mitigation or justification, jury should acquit if, upon whole case, they have reasonable doubt.

Reaffirmed in People v. Button (Cal.), 38 Pac. 203.

92 Cal. 568-572, 28 Pac. 600, PEOPLE v. CARROLL.

Erasure in Information of Name of Defendant as to whom information had been withdrawn is not prejudicial error.

Distinguished in People v. Noon, 1 Cal. App. 48, 49, 81 Pac. 747, 748, mutilation of information by tearing page therefrom is ground for reversal in absence of showing as to what missing page contained.

92 Cal. 573-577, 28 Pac. 688, TAYLOR v. REYNOLDS.

Municipal Power Over Nuisances Affecting highways and waters. See note, 39 L. R. A. 671.

92 Cal. 580-589, 28 Pac. 779, EYRE v. HARMON.

Penal Clauses of Statutes Should be Strictly Construed.

Approved in Savings & Loan Society v. McKoon, 120 Cal. 179, 52 Pac. 306, statute requiring corporation to file copy of articles in any county "in which it holds any property" does not apply to mortgage; State ex rel. Reeves v. Ross, 62 W. Va. 17, 57 S. E. 289, per

diem penalty against officer for failure to release exempt property can be recovered only for time he holds it under live process.

Miscellaneous.—Cited in *Eyre v. Levy* (Cal.), 28 Pac. 782, decided upon authority of cited case.

92 Cal. 590-594, 28 Pac. 597, 788, PEOPLE v. MITCHELL.

Intent to Defraud is Essential Element of forgery.

Approved in *People v. Elphis* (Cal.), 72 Pac. 838, and *State v. Swensen*, 13 Idaho, 5, 7, 81 Pac. 380, 381, both holding information fatally defective which did not allege such intent or that instrument was passed with guilty knowledge.

Comparison of Handwriting. See note, 62 L. R. A. 872.

92 Cal. 594-596, 28 Pac. 604, PEOPLE v. ELLSWORTH.

It is Immaterial Whether the District Attorney states all of the evidence in his opening statement.

Approved in *People v. Weber*, 149 Cal. 337, 86 Pac. 675, making of opening statement is optional.

Miscellaneous.—Cited in *State v. Suttles*, 13 Idaho, 93, 88 Pac. 239, to point that all presumptions are in favor of regularity of proceedings of courts of record.

92 Cal. 596-599, 28 Pac. 784, MICKLE v. HEINLEN.

Payment may be Proved Under Denial, though not affirmatively averred.

Reaffirmed in *Cunningham v. Springer*, 13 N. M. 285, 82 Pac. 238.

92 Cal. 600-605, 28 Pac. 809, OONBOY v. DICKINSON.

Liability for Removal of Lateral or Subjacent Support of land in its natural condition. See note, 68 L. R. A. 680.

92 Cal. 605-607, 28 Pac. 673, RANKIN v. COLGAN.

Act Being Valid on Its Face, evidence aliunde cannot be considered to determine whether it makes gift in violation of Constitution.

Approved in *Cahill v. Colgan* (Cal.), 31 Pac. 618, upholding appropriation for expenses of receiver.

Unconstitutionality of Statute as Defense against mandamus to compel enforcement. See note, 47 L. R. A. 519.

92 Cal. 611-616, 28 Pac. 807, PEOPLE v. OAKLAND.

Corporation is Person Within Statute providing remedy for usurpation of franchise.

Approved in *State v. Des Moines City Ry. Co.*, 135 Iowa, 708, 109 N. W. 873, applying rule to street railway company occupying street after expiration of its franchise.

New City Charter Containing Different Description of territory from that contained in original charter detaches omitted territory.

Distinguished in *People v. Long Beach*, 155 Cal. 610, 102 Pac. 667, where freeholders' charter included in boundaries adjacent territory not legally annexed to city, approval of charter by legislature does not extend city limits so as to include such territory.

92 Cal. 617-623, 28 Pac. 557, WINDHAUS v. BOOTY.

Gift of Real Property to Wife and daughters, five years before execution returned unsatisfied, will not be set aside where no proof that donor was insolvent at time of gift.

Distinguished in *Wolters v. Rossi* (Cal.), 57 Pac. 74, gift by insolvent judgment debtor to his wife after order for his examination in supplementary proceedings is fraudulent.

Presumption That Status Continues operates only prospectively.

Approved in *Western Union Tel. Co. v. Hughey*, 55 Tex. Civ. App. 406, 118 S. W. 1131, unconsciousness of sick person does not give rise to presumption of unconsciousness fifteen hours previous.

Fraudulent Intent must be Shown in action to set aside gift as void against creditors.

Reaffirmed in *Clark v. Olsen* (Cal.), 33 Pac. 274.

Presumption That Voluntary Conveyance is in fraud of creditors. See note, 119 Am. St. Rep. 557.

Failure of Court to Find upon All Material Issues is not prejudicial error where court finds upon issue determination of which controls judgment.

Approved in *Bradley v. Parker* (Cal.), 34 Pac. 235, *Norris v. Crandall* (Cal.), 65 Pac. 570, and *Ward v. Eastwood*, 3 Cal. App. 442, 86 Pac. 744, all reaffirming rule; *Colby v. Title Ins. & Trust Co.*, 160 Cal. 639, 117 Pac. 916, but holding rule inapplicable; *Haese v. Heitzeg*, 159 Cal. 573, 114 Pac. 817, finding which contradicts stipulation of parties is ineffectual.

92 Cal. 623-625, 28 Pac. 679, ANDERSON v. RICHARDSON.

Monuments Mentioned in a Deed Control courses and distances.

Reaffirmed in *Birk v. Hodgkins*, 159 Cal. 579, 114 Pac. 824.

Location of Boundaries. See note, 129 Am. St. Rep. 996.

92 Cal. 631-632, 28 Pac. 678, BARNEY v. VIGOREAUX.

In Complaint on Promissory Note, Failure to allege that some part thereof has not been paid is ground for reversal.

Approved in *Arnold v. American Ins. Co.*, 148 Cal. 664, 84 Pac. 183, 25 L. R. A. (n. s.) 6, failure in action on insurance policies to allege that buildings were occupied as dwellings and that furniture was contained therein is not cured by verdict; *Van Horn v. Holt*, 30 Mont. 72, 75 Pac. 681, and *Curtiss v. Bachman* (Cal.), 40 Pac. 802, both holding complaint on injunction bond must allege that plaintiff in injunction suit has not paid damages.

92 Cal. 632-639, 28 Pac. 785, ROSS v. CONWAY.

Court of Equity will Set Aside Conveyance executed by dying person under influence of spiritual adviser.

Approved in *Yordi v. Yordi*, 6 Cal. App. 28, 91 Pac. 352, conveyance from wife to husband held to have been procured by intimidation; *Sullivan v. Kenney*, 148 Iowa, 377, 126 N. W. 355, setting aside will and conveyances of aged father in favor of his daughter on account of undue influence and insane delusions; *McPherson v. Byrne*, 155 Mich. 340, 118 N. W. 985, setting aside gift to spiritual adviser for indefinite charitable purposes; *Edgerly v. Edgerly*, 73 N. H. 409, 62 Atl. 718, denying probate to will executed under influence of confidential business adviser and in his favor.

Distinguished in *Broadbuss v. James*, 13 Cal. App. 474, 110 Pac. 162, mere relation of parent and child is not sufficient to invalidate deed from parent to child; *Estate of Harris*, 3 Cal. Prob. 11, fact that proponent of will was son of testatrix, lived in same house with her for years and acted as her business agent, does not import fraud or

undue influence; *Stuart v. Hauser*, 9 Idaho, 84, 72 Pac. 730, undue influence of one business associate over another held not established.

92 Cal. 639-647, 28 Pac. 676, *ARCATA v. ARCATA ETC. R. R. CO.*

Legislature may Confer upon Municipal Boards power to say whether railroad shall be laid in streets.

Approved in *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 679, 87 Pac. 31, direct legislative authority is not required to take property which is already applied to public use.

Distinguished in *Los Angeles v. Southern Pac. R. R. Co.*, 157 Cal. 368, 370, 108 Pac. 68, city council cannot authorize construction of third track.

Permission to Railroad to Lay Sidetrack on streets cannot be revoked after it has been acted upon.

Approved in *Denison etc. Ry. Co. v. St. Louis etc. Ry.*, 96 Tex. 242, 72 S. W. 202, 30 Tex. Civ. App. 476, when city consents to use of street for right of way purposes and railroad accepts, right of way becomes vested.

Distinguished in *East Tennessee Tel. Co. v. Frankfort*, 143 Ky. 86, 136 S. W. 138, permission to telephone company to place poles on street and to carry wires across bridge may be revoked.

Privilege of Using Streets as a Contract within constitutional provision against impairing obligation. See note, 50 L. R. A. 144.

Where Statute Provides That Failure to Pay or to complete work within given time shall work forfeiture, no action is necessary to enforce same.

Approved in *Kaiser Land etc. Co. v. Curry*, 155 Cal. 650, 654, 103 Pac. 345, 347, failure of domestic corporation to pay license tax imposed by act of 1905 ipso facto works forfeiture of its charter.

Disapproved in *Santa Rosa etc. R. Co. v. Central St. Ry. Co. (Cal.)*, 38 Pac. 990, when street railroad fails to construct road in compliance with section 502, Civil Code, its franchise continues until declared forfeited by court or legislative authority.

92 Cal. 653-655, 28 Pac. 787, *LUCK v. LUCK.*

Court may Award Custody of children, though it denies divorce.

Reaffirmed in *Horton v. Horton*, 75 Ark. 24, 86 S. W. 824.

92 Cal. 656-658, 28 Pac. 687, *DOUGLASS v. McFARLAND.*

One Who Contracts to Manufacture Railroad Ties on land of another and retains possession thereof has lien for amount due.

Distinguished in *Quist v. Sandman*, 154 Cal. 757, 99 Pac. 208, employees of contractor have no lien on tanbark peeled for services rendered in peeling same.

92 Cal. 659-665, 28 Pac. 689, *PEOPLE v. ROBERTS.*

Distinction Between Dockage and Wharfage.

Approved in *Riddick v. Dunn*, 145 N. C. 35, 58 S. E. 441, wharfinger may charge owner of goods for use of wharf.

Right to Wharfage. See note, 70 L. R. A. 198, 201.

92 Cal. 665, 28 Pac. 686, *KOOKEMANN v. BICKEL.*

Necessity of Color of Title, not expressly made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1222.

Invalid Tax Deed as Color of Title within general statutes of limitations. See note, 11 L. R. A. (n. s.) 785.

92 Cal. 674-676, 28 Pac. 838, MADDOX v. WYMAN.

Where Mortgage Provides That on Default in making any payment mortgaged property may be sold, mortgagee may foreclose upon such default, though by terms of note some of installments are not due.

Distinguished in Hall v. Jameson, 151 Cal. 613, 121 Am. St. Rep. 137, 91 Pac. 521, 12 L. R. A. (n. s.) 1190, where power of sale was exercised before maturity of note, statute of limitations on unpaid balance did not commence to run until such maturity.

NOTES

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CASES IN 93 CALIFORNIA.

93 Cal. 1-7, 29 Pac. 247, HYDE v. BOYLE.

Miscellaneous.—Cited in *Green v. Thornton*, 8 Cal. App. 162, 96 Pac. 383.

93 Cal. 7-16, 28 Pac. 842, PACIFIC FIRE INS. CO. v. PACIFIC SURETY CO.

Liability of Surety is Strictly Limited to terms of contract executed by him.

Approved in *Indiana & Ohio etc. Ins. Co. v. Bender*, 32 Ind. App. 295, 69 N. E. 694, where proviso in bond that collections by agent should be turned over at end of each month was not enforced by employer, sureties were not liable for funds misappropriated; *Perpetual Building etc. Assn. v. United States Fidelity etc. Co.*, 118 Iowa, 737, 92 N. W. 688, delay of six or eight days in notifying surety company of employee's defalcation did not violate condition of bond to give immediate notice of acts involving loss; *Rodgers Shoe Co. v. Coon*, 157 Mich. 550, 122 N. W. 134, dealings between employer and employee did not affect liability of surety on bond of employee.

Liability on Guaranty or Surety Obligation obtained by fraud. See note, 21 L. R. A. 412.

Fidelity Insurance. See note, 100 Am. St. Rep. 788.

93 Cal. 17-34, 28 Pac. 788, WICKERSHAM v. CRITTENDEN.

Directors of Corporation are Precluded from transacting any business in which their private interests conflict with their duty to the stockholders.

Approved in *McConnell v. Combination Min. etc. Co.*, 30 Mont. 258, 104 Am. St. Rep. 703, 76 Pac. 200, resolution of four directors by which they voted three of their number salaries and back pay was wholly void.

Distinguished in *Escondido Lumber etc. Co. v. Baldwin*, 2 Cal. App. 608, 84 Pac. 285, upholding contract under which contractor, who was to erect schoolhouse, purchased materials from corporation of which one of the school trustees was a stockholder and general manager.

Officers and Directors of a Corporation are trustees of an express trust.

Approved in *Boyd v. Mutual Fire Assn.*, 116 Wis. 172, 96 Am. St. Rep. 948, 90 N. W. 1092, 61 L. R. A. 918, statute of limitations did not run in favor of directors of mutual insurance company against creditors of the corporation.

Right of Officers of Corporations to compensation for services rendered. See note, 136 Am. St. Rep. 914.

Court of Equity may Remove from Office directors who have proven unfaithful.

Approved in *California etc. Assn. v. Superior Court*, 8 Cal. App. 712, 97 Pac. 770, refusing writ of prohibition to restrain court and receiver from selling personal property of corporation.

Any Person Who is Necessary to a complete determination of the question may be made a defendant.

Approved in *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 605, 117 Pac. 770, upholding joinder of parties in action by corporation against different raisin growers with whom it had separate contracts to pack and sell raisins, where each consented to commingling of raisins and was equitably interested in fund to be derived from sales.

Stockholder may Sue Corporation without joining other stockholders as well as on behalf of other stockholders.

Approved in *McConnell v. Combination Min. etc. Co.*, 30 Mont. 250, 104 Am. St. Rep. 703, 76 Pac. 197, upholding complaint averring action was brought for others as well as plaintiffs, though its allegations were not sufficient to entitle it to be considered as brought on behalf of others.

Actions by Stockholders in Behalf of Corporations. See note, 97 Am. St. Rep. 47.

93 Cal. 43-55, 28 Pac. 839, 16 L. R. A. 145, ARCHER v. SALINAS CITY.

When Dedication is Complete, Owner Loses all control over and right to use the property.

Approved in *Smith v. Glenn (Cal.)*, 62 Pac. 183, evidence was insufficient to show an intention to dedicate land as highway; *Myers v. Oceanside*, 7 Cal. App. 92, 93, 93 Pac. 688, where evidence showed implied offer to dedicate land to city as public park was revoked by acts of private ownership before offer was accepted, no actual dedication ever took place; *Evans v. Blankenship*, 4 Ariz. 316, 39 Pac. 814, applying rule where one who had dedicated public square to the city afterward offered the land to state for a capitol site; *McAlpine v. Chicago etc. Ry. Co.*, 68 Kan. 214, 75 Pac. 75, 64 L. R. A. 85, strip of land dedicated to public as "levee" did not revert to dedicator because an authorized use was made of such land; *Dallas v. Gibbs*, 27 Tex. Civ. App. 278, 65 S. W. 83, where land deeded to city for street purposes was duly accepted, failure of city to complete opening of street did not defeat dedication; *Thorndike v. Milwaukee Auditorium*, 143 Wis. 13, 126 N. W. 885, misuser or wrongful diversion of property conveyed to municipality in trust for public does not forfeit the title.

One Who Sells Lots With Reference to plat showing space designated as a street or park is estopped to deny dedication of such space to the public.

Approved in *The McCarthy Company v. Moir*, 12 Cal. App. 444, 107 Pac. 629, where owner contracted to sell lots fronting on a cer-

tain street according to proposed map of a tract, and afterward sold residue of tract to one who refused to recognize such street, such purchaser had notice of its existence; *Davies v. Epstein*, 77 Ark. 224, 92 S. W. 20, plat was sufficient to raise presumption of dedication to public use of land lying between front tier of lots and bank of a lake; *Frauenthal v. Slaten*, 91 Ark. 357, 121 S. W. 398, plat showing space marked "Spring Square" indicated irrevocable intention to dedicate square to public; *Florida etc. Ry. Co. v. Worley*, 49 Fla. 306, 38 So. 621, filing of plat with word "Park" written on a parcel shown thereon and sale of lots according to plat operated as dedication, notwithstanding omission to mention the park in dedicatory statement; *Riverside v. MacLain*, 210 Ill. 321, 102 Am. St. Rep. 164, 71 N. E. 413, 66 L. R. A. 288, purchasers of lots who relied on existence of tract of land as a public park had an easement in the park which could be enforced; *Cole v. Minnesota Loan & Trust Co.*, 17 N. D. 427, 117 N. W. 361, acts and representations of proprietors of townsite estopped them from denying block was dedicated as a public square; *Sanborn v. Amarillo*, 42 Tex. Civ. 117, 93 S. W. 474, designation of block on map as "Elwood Park" necessarily dedicated the property to public use.

Property Dedicated to the Public cannot be lost by adverse possession.

Approved in *People v. Kerber*, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 879, where it was claimed public use of tide lands had been abandoned, if statute of limitations can run against the state, it will begin when public use ceased.

Purchasers of Lots by Reference to Map have not only easement in streets abutting thereon, but in all streets leading therefrom.

Reaffirmed in *Danielson v. Sykes*, 157 Cal. 690, 109 Pac. 88.

93 Cal. 55-58, 28 Pac. 795, HURLBUTT v. SPAULDING SAW CO.

When Equity has Taken Jurisdiction of a case, it will grant any relief embraced in the issues.

Approved in *Cordano v. Ferretti*, 15 Cal. App. 675, 115 Pac. 660, in action to enforce parol contract to convey property in consideration of care during natural life, where there was no issue as to value of services rendered, failure of trial court to find amount of compensation due plaintiff was not prejudicial error.

93 Cal. 59-73, 28 Pac. 845, HARRIS v. ZANONE.

Unless Verdict is so Excessive as to shock moral sense and raise presumption of passion or prejudice, it will not be disturbed.

Approved in *Lanigan v. Neely*, 4 Cal. App. 772, 89 Pac. 446, upholding verdict for eight thousand dollars in action for damages for breach of promise of marriage.

Where Slanderous Words are Actionable Per Se, proof of the speaking or publication is all that is necessary.

Approved in *McDonald v. Nugent*, 122 Iowa, 655, 98 N. W. 508, applying rule to words charging another with being inflicted with a venereal disease; *Paxton v. Woodward*, 31 Mont. 209, 107 Am. St. Rep. 416, 78 Pac. 217, derogatory remarks made concerning a school teacher were not libelous per se.

When Facts Essential to Show Communication was privileged are not conceded, question of existence of privilege is for jury.

'Approved in *Abraham v. Baldwin*, 52 Fla. 157, 42 So. 592, 10 L. R. A. (n. s.) 1051, applying rule in action for slander where plaintiff charged defendant with calling him a thief.

Omission of Name of Libeled Person in publication does not deprive the matter of its libelous character.

Approved in *Eckert v. Van Pelt*, 69 Kan. 359, 76 Pac. 910, 66 L. R. A. 266, allegation in petition that the language was used of and concerning plaintiff imports that it was so understood by those who read it; *Sherbley v. Huse*, 75 Neb. 818, 106 N. W. 1031, upholding petition containing no recital of facts showing libelous article referred to plaintiff.

Plaintiff is not Limited to Libelous Character of publication to show malice.

Approved in *Paxton v. Woodward*, 31 Mont. 212, 107 Am. St. Rep. 416, 78 Pac. 218, in action by school teacher for libel, defamatory statements made after commencement of action were admissible to show malice.

93 Cal. 73-74, 28 Pac. 794, FRANKEL v. DEIDESHEIMER.

When Judges of Supreme Court are equally divided in opinion, judgment of lower court will be affirmed.

Approved in *State v. McClung*, 47 Fla. 227, 37 So. 52, such judgment possesses no dignity as a judicial precedent.

93 Cal. 74-79, 28 Pac. 794, PEOPLE v. KRUSICK.

Crime of Seduction Under Promise of Marriage is not proved unless it be established person seduced was of previous chaste character.

Approved in *In re Vandiver*, 4 Cal. App. 654, 68 Pac. 994, testimony of father of prosecuting witness as to her reputation for previous chaste character was sufficient to justify submission of question to jury.

93 Cal. 80-84, 27 Am. St. Rep. 167, 28 Pac. 796, ROBINSON v. EASTON, ELDRIDGE & CO.

Contract Conferring Option to Sell Land for commission above a fixed price creates relation of vendor and purchaser.

Cited in *Chatfield v. Continental Bldg. etc. Assn.*, 6 Cal. App. 672, 92 Pac. 1043, declining to consider whether contract was assignable.

Disapproved in *Burnett v. Potts*, 236 Ill. 501, 86 N. E. 259, such a contract creates relation of principal and agent.

93 Cal. 96-108, 28 Pac. 851, REED v. RING.

Fact That One Acting as Guardian ad Litem was not duly appointed does not invalidate proceedings.

Reaffirmed in *Estate of Harris*, 3 Cal. Prob. 7.

Effect of Void Proceedings for Sale of realty to start statute running in favor of purchaser in possession. See note, 8 L. R. A. (n. s.) 355.

93 Cal. 108-111, 28 Pac. 854, WELLER v. DICKINSON.

In Pleading a Judgment Rendered by a court of general jurisdiction, it is not necessary to plead jurisdictional facts.

Approved in *Hibernia Savings & Loan Soc. v. Boyd*, 155 Cal. 197, 100 Pac. 241, and *Bennett v. Bennett*, 65 Neb. 435, 91 N. W. 409, both reaffirming rule.

93 Cal. 111-113, 28 Pac. 855, PEOPLE v. PHELAN.

Evidence of Drunkenness may be Considered for purpose of determining intent to commit felony.

Distinguished in *People v. Hower*, 151 Cal. 644, 647, 648, 91 Pac. 509, 510, 511, in prosecution for assault with intent to murder, instruction that evidence of drunkenness can only be considered by jury for purpose of determining degree of crime was not prejudicial.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 470.

Question of Whether Accused was Capable of criminal intent is exclusively for the determination of the jury.

Approved in *Jenkins v. State*, 58 Fla. 67, 50 So. 583, refusing to set aside verdict of guilty on ground defendant was intoxicated when he broke and entered building.

93 Cal. 114-120, 28 Pac. 855, BURNETT v. LYFORD.

Harmless Error Does not Call for a reversal of judgment.

Approved in *Love v. Anchor Raisin Vineyard Co. (Cal.)*, 45 Pac. 1046, applying rule in action by assignee of note given by a corporation to its president, where the payee was allowed to state amount due at time of its transfer to plaintiff.

Administrator Should be Allowed Credit for disbursements made prudently and in good faith.

Approved in *Patrick v. Patrick*, 72 Neb. 460, 100 N. W. 941, where executor, by order of court, paid mortgage debt which mortgagee had failed to prove his claim for in the probate proceedings, he was entitled to credit for sum so paid.

93 Cal. 120-125, 28 Pac. 812, DORLAND v. SMITH.

Lien of Judgment in Street Assessment Foreclosure cannot be enforced after such time as destroys ordinary judgment liens.

Reaffirmed in *Hinckley v. Seattle*, 37 Wash. 271, 79 Pac. 779.

93 Cal. 126-128, 28 Pac. 811, DAVIS v. LEZINSKY.

Recitals in a Judgment must be Given such construction as will sustain the judgment, if possible.

Approved in *Pacific Paving Co. v. Vizelich*, 1 Cal. App. 283, 82 Pac. 83, applying rule where judgment was objected to as greater than amount prayed for.

93 Cal. 128-133, 29 Pac. 250, PATTERSON v. MUNYAN.

Where Traveled Road Departs from True Line, its use for period of limitation will make public highway of strip used.

Distinguished in *Shanline v. Wiltsie*, 70 Kan. 184, 78 Pac. 438, where general travel departed from true course of legal highway duly established, public easement over true course was not abandoned.

93 Cal. 139-143, 28 Pac. 813, SEVENTY-SIX LAND ETC. CO. v. SUPERIOR COURT.

Refusal of Party to Comply With Decree of court directing him to execute conveyance constitutes contempt of such court.

Approved in *'76 Land & Water Co. v. Superior Court (Cal.)*, 28 Pac. 814, following rule.

Punishment of Corporation for Contempt. See note, 4 L. R. A. (n. s.) 1003.

93 Cal. 144-152, 28 Pac. 857, SMITH v. SCHIELE.

Purchaser of Real Property has Right to demand a title free of encumbrances and defects.

Approved in *Glassman v. Condon*, 27 Utah, 467, 76 Pac. 344, where contract of sale recited vendee would assume two hundred and fifty dollars of mortgage of one thousand dollars existing on land, vendor was bound to deliver deed subject to mortgage for two hundred and fifty dollars only.

Broker Who Produces Bona Fide Purchaser is entitled to commissions, where failure to consummate sale is due to fault of owner.

Approved in *Little v. Fleishman*, 35 Utah, 569, 101 Pac. 985, where sale was not consummated because owner was unable to furnish sufficient abstract of title, broker was entitled to commissions.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 609.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 593, 605, 606, 618, 623.

Broker's Right to Commission on Failure of employer's title. See note, 3 L. R. A. (n.s.) 576.

93 Cal. 153-158, 28 Pac. 831, PEOPLE v. EDWARDS.

An Office is not to be Deemed Vacant so long as anyone is authorized to discharge the duties of such office.

Approved in *People v. Nye*, 9 Cal. App. 157, 98 Pac. 244, one appointed to office of controller on death of incumbent, after his election to but before qualifying for succeeding term, held only for balance of unexpired term subject to right to hold over until his successor qualified; *Rice v. Palmer*, 78 Ark. 454, 96 S. W. 403, where one elected to fill office of circuit clerk died before taking office and before term of office of his predecessor had expired, there was no vacancy; *State v. Acton*, 31 Mont. 42, 77 Pac. 301, where election of school superintendent resulted in tie vote, incumbent was entitled to hold office until successor was regularly elected.

Where Officer's Term is Fixed at a Term of years, incumbent holds office for such term.

Approved in *People v. Campbell*, 138 Cal. 16, 70 Pac. 921, term of office of judge of superior court being fixed by the Constitution, he is not entitled to hold office after that time; *People v. Nickel*, 9 Cal. App. 785, 100 Pac. 1076, term of new incumbent in office of port warden commenced on date of his appointment and not on termination of preceding term.

93 Cal. 166-169, 28 Pac. 863, TULLER v. ARNOLD.

The Rule That the Appellate Court will not pass upon the evidence when conflicting does not apply when evidence is documentary.

Approved in *Conlon v. Gardner* (Cal.), 32 Pac. 565, upholding rule where affidavits on motion for change of venue on ground of change of residence were conflicting.

Overruled in *Bradley v. Davis*, 156 Cal. 268, 269, 104 Pac. 303, on motion for change of venue, where evidence in respect to residence was conflicting, though contained entirely in affidavits, finding of trial court will not be disturbed.

To Authorize the Issuance of Attachment the money must have been, by the contract, made payable in this state.

Approved in *Atwood v. Little Bonanza etc. Co.*, 13 Cal. App. 596, 110 Pac. 344, in action on notes made by foreign corporation which failed to show any place of payment, plaintiff was not entitled to attachment; *Drake v. De Witt*, 1 Cal. App. 618, 82 Pac. 982, upholding dissolution of attachment issued in action brought to recover commissions earned under written contract made in another state.

Protection of Nonresident Creditor against garnishment. See note, 19 L. R. A. 578.

93 Cal. 169-172, 28 Pac. 862, **GILLESPIE v. WRIGHT.**

Party Making Improper Attempt to present claim against an estate is not estopped from again presenting it within proper time.

Approved in *Patrick v. Austin*, 20 N. D. 267, 127 N. W. 112, where claim was not duly verified at time of two first presentations, statute of limitations did not commence to run until after third presentation; *In re Smith's Estate*, 13 N. D. 516, 101 N. W. 892, claim may be allowed by county judge after rejection by administrator, provided this is done before it is barred by limitations.

93 Cal. 172-178, 28 Pac. 814, **MORTIMER v. MARDER.**

In Absence of Evidence as to Law of another state, it will be presumed to be same as this state.

Approved in *O'Sullivan v. Griffith*, 153 Cal. 507, 95 Pac. 875, applying rule in action for purchase price of certain franchises transferred to defendant, where plaintiff sought to prove they were void under laws of state granting them.

Presumption as to Law of Other States. See note, 21 L. R. A. 469.

How Case Determined When Proper Foreign Law not proved. See note, 67 L. R. A. 43.

93 Cal. 179-186, 28 Pac. 829, **SWAIN v. FOURTEENTH ST. R. R. CO.**

Verdict will not be Set Aside as excessive unless clearly not the result of fair and honest judgment of jury.

Approved in *Hale v. San Bernardino etc. Traction Co.*, 156 Cal. 715, 106 Pac. 84, upholding judgment for twelve thousand dollars in favor of widow and child for death of man twenty-six years old, employed in hardware store at seventy-five dollars per month.

Contributory Negligence of Victim of Accident does not necessarily bar his action for damages.

Approved in *Kramm v. Stockton Electric R. R. Co.*, 3 Cal. App. 615, 616, 86 Pac. 741, applying rule in action for death of one employed in work of spreading gravel on street where car was operated; *Shanks v. Springfield Traction Co.*, 101 Mo. App. 707, 74 S. W. 387, where deaf person was guilty of contributory negligence in walking on track, it was for jury to say whether collision could have been avoided by reasonable exertion on part of motorman.

Jurors may Give Effect to Such Inferences as may be reasonably drawn from facts proven.

Approved in *Chicago etc. Ry. Co. v. Moore*, 166 Fed. 667, 92 C. C. A. 357, in action for personal injuries sustained through falling of boom of derrick, finding of jury that nail used as pin was insufficient in strength was justified.

Right of Jurors to Act on Knowledge of Facts in or relevant to issue. See note, 31 L. R. A. 492.

Injuries by Street-car Collisions with vehicles or horses. See note, 25 L. R. A. 510.

93 Cal. 186-188, 28 Pac. 943, FANNING v. LEVISTON.

Where Evidence Presented for Review consists of conflicting affidavits, ruling of trial court will not be disturbed.

Reaffirmed in *Doak v. Bruson*, 152 Cal. 19, 91 Pac. 1002.

Statute Allowing Prevailing Party Five Per Cent on amount recovered is still in force.

Approved in *Doyle v. Eschen*, 5 Cal. App. 64, 89 Pac. 840, statute of 1895 (Stats. 1895, p. 268, c. 207), to establish fees of county officers, etc., did not repeal section 6 of act of 1866 regulating fees in city and county of San Francisco.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 908.

93 Cal. 189-194, 27 Am. St. Rep. 171, 28 Pac. 1043, GRIMMER v. CARLTON.

Rights will not be Conserved which may never accrue.

Approved in *Guardianship of Hayden*, 1 Cal. App. 77, 81 Pac. 669, one who agreed to care for incompetent in consideration of his agreement to make him deed of land could not prevent sale of land to furnish fund for incompetent's maintenance; *Stewart v. Pierce*, 116 Iowa, 744, 89 N. W. 238, court had no power to compel corporation by injunction to continue employment of one owning half interest in stock.

93 Cal. 194-205, 29 Pac. 31, DAWSON v. SCHLOSS.

General Specification That There is No Evidence to support the verdict is insufficient.

Approved in *Bell v. Staacke* (Cal.), 70 Pac. 472, specification that the evidence "is insufficient to justify the finding," followed by statement of what finding contains, is defective; *Meek v. Southern California Ry. Co.*, 7 Cal. App. 608, 95 Pac. 167, refusing to consider statement specifying generally evidence was insufficient to justify the decision; *Crooks v. Harmon*, 29 Utah, 308, 81 Pac. 96, assignment of error directed against judgment on ground it was not supported by the evidence presented no question for review.

No Bar Arises as to Any of the Wrongdoers until injured party has received satisfaction.

Approved in *Cole v. Roebling Construction Co.*, 156 Cal. 449, 105 Pac. 258, in action for damages for personal injuries against two joint tort-feasors, default judgment may be rendered against one, and action left to proceed against the other; *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 156, 86 Pac. 180, one who sued two joint tort-feasors jointly was not estopped from subsequently proceeding against one only without consent of other; *Shreeder v. Davis*, 43 Wash. 136, 86 Pac. 200, joint judgment against two or more persons for a tort, though reversed as to one appealing, remains in force against another not appealing.

Effect of Judgment Against One Joint Tort-feasor upon liability of other. See note, 58 L. R. A. 414.

Under Specification of Insufficiency of Evidence to support the verdict, court will only consider what the evidence fails to show.

Approved in *Smith Table Co. v. Madsen*, 30 Utah, 316, 84 Pac. 892, reaffirming rule; *Ball v. Gussenhoven*, 29 Mont. 332, 74 Pac. 874, specifications which simply stated what the evidence shows must be disregarded.

Advice of Counsel as Defense to Action for malicious prosecution. See note, 18 L. R. A. (n. s.) 55, 63.

93 Cal. 206-215, 28 Pac. 944, **SMITH v. WORN.**

Easement Acquired by Deed is not Lost by mere nonuser.

Approved in *Davidson v. Ellis*, 9 Cal. App. 147, 98 Pac. 256, applying rule where easement for right of way granted over land was retained on conveyance of adjoining land to connect with highway; *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 111, 93 Pac. 903, applying rule in action to quiet title to easement in use of stairway for purpose of access to second story of adjoining building.

Effect of Nonuser of Easement. See note, 18 L. R. A. 537.

Failure to Maintain Easement as Raising Presumption of abandonment. See note, 2 L. R. A. (n. s.) 832.

Abandonment or Loss of Private Way by nonuser or improvements inconsistent with use. See note, 22 L. R. A. (n. s.) 883, 888, 889.

Whether Erection of Gates or Bars is a proper use of premises is a question of fact.

Approved in *Speer v. Erie R. R. Co.*, 70 N. J. Eq. 324, 62 Atl. 945, where railroad, on conveyance of strip of land for right of way, erected fences with gates at road crossing, it had no right to maintain them after they became unnecessary; *Flaherty v. Fleming*, 58 W. Va. 672, 52 S. E. 858, 3 L. R. A. (n. s.) 461, where free right of way for alleyway was created by express grant, the placing of fence or gate thereon by subsequent owner was a wrongful obstruction.

93 Cal. 222-236, 27 Am. St. Rep. 174, 28 Pac. 937, **BALL v. RAWLES.**

Whether Facts and Circumstances Constituting Cause of action exist is question of fact.

Approved in *People v. Chadwick*, 4 Cal. App. 68, 87 Pac. 386, applying rule to instruction given in prosecution for perjury.

In Actions for Malicious Prosecution, what facts constitute probable cause is a question of law for the court.

Approved in *Booraem v. Potter Hotel Co.*, 154 Cal. 100, 97 Pac. 65, upholding action of court in granting nonsuit where the facts were uncontroverted; *Holliday v. Holliday* (Cal.), 53 Pac. 44, upholding instruction meagerly grouping facts which would constitute want of probable cause, when given with instruction fully grouping facts constituting probable cause; *Michael v. Matson*, 81 Kan. 363, 105 Pac. 538, where instruction tending to lead jury to understand they were to decide whether facts justified arrest was not corrected by further statement, it was reversible error; *Simmons v. Gardner*, 46 Wash. 286, 89 Pac. 888, facts shown, coupled with advice given by prosecuting attorney, constituted probable cause as a matter of law.

Acting on Advice of Justice of the Peace that reasonable grounds for arrest existed is sufficient to exonerate complainant from liability.

Disapproved in *Catzen v. Belcher*, 64 W. Va. 319, 131 Am. St. Rep. 903, 61 S. E. 932, defendant cannot justify his action in the prosecution upon having relied on advice of justice of the peace.

In Action for Malicious Prosecution, it is incumbent on plaintiff to prove want of probable cause and malice.

Approved in *Carpenter v. Ashley*, 15 Cal. App. 464, 115 Pac. 269, applying rule where evidence showed reasonable grounds for believing charge made was true.

One Causing Arrest of Another on a criminal charge is justified in acting in good faith on reasonable grounds.

Approved in *Carpenter v. Ashley*, 15 Cal. App. 467, 115 Pac. 270, upholding rule where accused was not convicted; *Fleischhauer v. Fabens*, 8 Cal. App. 32, 34, 96 Pac. 18, 19, in action for malicious prosecution, instruction omitting element as to actual belief of prosecutor in guilt of accused was properly refused.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 458.

What Libelous Statements are Privileged. See note, 104 Am. St. Rep. 126.

Liability for Libel or Slander in Course of judicial proceedings. See notes, 123 Am. St. Rep. 633; 13 L. R. A. (n. s.) 823.

93 Cal. 241-252, 27 Am. St. Rep. 186, 29 Pac. 54, **PEOPLE ex rel. BRYANT v. HOLLADAY.**

In Actions to Which a City is a Party, it represents the public.

Approved in *Santa Rosa etc. R. Co. v. Central St. Ry. Co. (Cal.)*, 38 Pac. 991, where city council continued to recognize street railroad franchises long after they were liable to forfeiture, the city and the public were estopped to claim forfeiture; *Healy v. Deering*, 231 Ill. 431, 432, 121 Am. St. Rep. 331, 83 N. E. 228, decree consented to by city of Chicago as part of its plan to vacate portion of public street was res adjudicata against the public; *Quinn v. Monona County*, 140 Iowa, 109, 117 N. W. 1102, where suit had been brought against road supervisor and township trustees to determine location of highway, second action against county involving same issues should be abated.

Who are Bound by Judgment for or against a municipality or other governmental body or its officers. See note, 105 Am. St. Rep. 205, 206, 209.

City may Maintain Action to Prevent unlawful obstruction of a street.

Approved in *Port Townsend v. Lewis*, 34 Wash. 417, 75 Pac. 983, reaffirming rule; *Oates v. Town of Headland*, 154 Ala. 506, 45 So. 911, upholding right of city to maintain bill to settle title of public in public square.

Right of Municipality to Maintain Suit to enjoin or abate public nuisance. See note, 51 L. R. A. 660, 661.

Injunctions by Municipalities Against Nuisances upon highways and streets. See note, 42 L. R. A. 815, 816.

Power of Municipal Corporations to Define, prevent, and abate nuisances. See note, 36 L. R. A. 609.

Municipalities, in Controlling and Managing Public Parks, are subject to legislative control.

Approved in *Hartford v. Maslen*, 76 Conn. 611, 57 Atl. 744, city could not restrain state from erecting monument on grounds purchased by city and accepted by state as part of its capitol grounds.

Title Acquired After Issues in Action are joined is not affected by judgment rendered therein.

Approved in *Wadly v. Leggitt*, 82 Ark. 266, 119 Am. St. Rep. 70, 101 S. W. 721, one who acquired outstanding title after adjudication

against her title was not debarred from pleading it in subsequent action.

Erroneous Judgment Which is Unreversed is binding on the parties and their privies.

Approved in *Philbrook v. Newman*, 148 Cal. 175, 82 Pac. 773, reaffirming rule; *Smith v. Vandepaar*, 3 Cal. App. 303, 85 Pac. 138, applying rule where residuary legatee, who failed to appeal from decree of distribution, sought to afterward show it was violative of constitutional provision against perpetuities.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

Right to Acquire Title by Adverse Possession to lands devoted to public use. See note, 87 Am. St. Rep. 779.

Dedication of Streets. See note, 139 Am. St. Rep. 328.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 170.

Ejectment. See note, 116 Am. St. Rep. 73.

Miscellaneous.—Cited in *People ex rel. Chandler v. Smith* (Cal.), 29 Pac. 247.

93 Cal. 252-253, 28 Pac. 1053, **DONOHUE v. SUPERIOR COURT.**

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 896.

93 Cal. 253-262, 27 Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, **FAY v. PACIFIC IMPROVEMENT CO.**

Temporary Sojourner, Who Pays Board at public inn by the week, is a guest.

Approved in *Holstein v. Phillips*, 146 N. C. 372, 59 S. E. 1040, hotel was liable as insurer for money and jewelry stolen from trunk of one who entered summer resort under arrangement to stop for indefinite time at reduced rate per week.

Who are Guests at Inn. See note, 105 Am. St. Rep. 939.

Fact That House is Open for the Public marks the distinction between inn or hotel and boarding-house.

Approved in *Humburd v. Crawford*, 128 Iowa, 745, 105 N. W. 330, place where meals were served to whomsoever applied was a public eating-house.

Liability of Innkeepers for Injury to, or loss of, guest's property. See note, 99 Am. St. Rep. 583.

Meaning of Expression "Act of God." See note, 129 Am. St. Rep. 458.

93 Cal. 263-266, 28 Pac. 828, 18 L. R. A. 510, **SOUTHERN PACIFIC R. R. CO. v. FERRIS.**

Railroad Corporation has Right to construct railroad on road dedicated as highway.

Approved in *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 679, 87 Pac. 31, reaffirming rule.

Right of Railroad to Keep Trespassers from track or right of way. See note, 66 L. R. A. 588.

93 Cal. 266-270, 28 Pac. 1070, **POWERS v. CHABOT.**

Statutory Undertaking Beyond What is Required by statute is to that extent inoperative.

Approved in *Weldon v. Rogers*, 154 Cal. 636, 98 Pac. 1071, applying rule to undertaking on appeal from order refusing to vacate order allowing execution on an old judgment; *Olsen v. Birch*, 1 Cal. App. 103, 81 Pac. 658, undertaking in twice the amount of judgment on appeal from judgment for certain sum, on foreclosure of liens on steamship, was unenforceable against sureties; *Estate of McGinn*, 3 Cal. Prob. 129, undertaking on appeal in double the amount of costs from decree revoking probate of will is without validity.

93 Cal. 277-283, 28 Pac. 946, PEOPLE v. WINTERS.

Whether Law has Been Properly Declared is to be determined from the charge as a whole.

Reaffirmed in *People v. Besold*, 154 Cal. 370, 97 Pac. 874.

93 Cal. 283-288, 28 Pac. 1045, WETHERLY v. STRAUS.

Actual Fraud, When Relied on, must be alleged and proved.

Approved in *Hammond v. McCollough*, 159 Cal. 649, 115 Pac. 219, reaffirming rule; *Duncan v. Duncan*, 6 Cal. App. 408, 92 Pac. 312, upholding rule in action by wife to recover household furniture sold by husband; *Virginia Timber etc. Co. v. Glenwood Lumber Co.*, 5 Cal. App. 259, 90 Pac. 49, in action for conversion of lumber sold by plaintiff to third person, who transferred it to defendant, evidence tending to show sale was fraudulent, was inadmissible under the pleadings; *Eaton v. Metz (Cal.)*, 40 Pac. 948, in action in claim and delivery, under answer pleading fraud generally, evidence of actual fraud was inadmissible.

Distinguished in *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 416, 95 Pac. 1031, in action for conversion of personal property procured by fraud, it is unnecessary to allege the fraud; *Baker v. Baker*, 9 Cal. App. 740, 100 Pac. 894, where plaintiff's cause of action to quiet title to property, of which she had made a deed, did not rest upon fraud, but the necessity for proving fraud arose after answer.

Fraudulent Intent is a Question of fact and not of law.

Approved in *Roberts v. Burr (Cal.)*, 54 Pac. 851, applying rule in action to recover jewelry sold by firm, composed of father and son, to wife and mother.

Transfer from Husband to Wife of Homestead is not per se fraudulent as against creditors.

Approved in *Nicholdson v. Nesbitt*, 4 Cal. App. 588, 88 Pac. 727, upholding conveyance of homestead by husband and wife to daughter; *Yardley v. San Joaquin Valley Bank*, 3 Cal. App. 656, 86 Pac. 979, where husband agreed to use five hundred dollars of loan to purchase stock in name of his wife, in consideration of execution by her of mortgage on homestead to secure such loan, transaction was not in fraud of his creditors.

In Action by Bailor Against Bailee, latter cannot set up title of third person without the consent of such person.

Approved in *Bondy v. American Transfer Co.*, 15 Cal. App. 750, 115 Pac. 966, reaffirming rule.

Bailee Who Fails to Deliver Deposit to bailor on demand must show satisfactory circumstances in defense.

Approved in *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 27, 116 Pac. 303, depositary who decides without aid of court as to

ownership of property takes risk of having to pay true owner its value in case he has made mistake; *Bates v. Capital State Bank*, 18 Idaho, 435, 110 Pac. 279, applying rule in action to recover bonds deposited with bank.

93 Cal. 288-299, 28 Pac. 1046, SHEEHY v. MILES.

Property Set Apart for Use of Family goes to widow and children in equal shares.

Approved in *Burke v. Modern Woodmen of America*, 2 Cal. App. 613, 84 Pac. 276, where mutual benefit certificate was payable to legal heirs of member, his widow, brothers, sisters, nephews and nieces were entitled to proceeds in equal shares.

On Death of a Spouse, Homestead selected from community property vests in survivor.

Approved in *Fisher v. Bartholomew*, 4 Cal. App. 583, 88 Pac. 609. title of surviving husband to homesteaded property of wife was not affected by order of probate court authorizing sale of premises.

Decree Setting Apart Homestead vests title in party to whom set apart.

Reaffirmed in *Estate of Hayes*, 1 Cal. Prob. 554.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 49.

A Perfect Title is One Which is Good and valid beyond a reasonable doubt.

Approved in *Henderson v. Beatty*, 124 Iowa, 167, 99 N. W. 718, and *Dobson v. Zimmerman*, 55 Tex. Civ. App. 403, 118 S. W. 240, both reaffirming rule; *Norris v. Hay*, 149 Cal. 701, 87 Pac. 383, vendee was entitled to rescind contract to purchase land on discovering vendor had made prior contract to sell same land, the validity of which was doubtful; *Reed v. Sefton*, 11 Cal. App. 91, 103 Pac. 1097, bond to convey did not destroy marketability of title; *Fagan v. Hook*, 134 Iowa, 386, 105 N. W. 157, under contract to convey by warranty deed and provide abstract showing good title a title by adverse possession was insufficient.

93 Cal. 300-315, 28 Pac. 1049, UNDERHILL v. SANTA BARBARA LAND ETC. CO.

Ratification by Shareholders of Acts of directors may be presumed from circumstances of case.

Approved in *Bassett v. Fairchild (Cal.)*, 61 Pac. 796, applying rule where resolution by which stockholders ratified payment to a director for services outside his duties was a general one, but objection was made that it included such compensation.

Limitation on the Amount of a Particular Kind of indebtedness does not apply to other kinds.

Approved in *Fidelity Trust Co. etc. v. Louisville Gas Co.*, 118 Ky. 595, 111 Am. St. Rep. 302, 81 S. W. 929, provision in charter of gas company that it might issue bonds for five hundred thousand dollars and execute mortgage to secure them, did not prevent it from guaranteeing payment of one million dollars of bonds sold by it.

Copartners may Create Corporation to carry out their intentions as to property of firm.

Approved in *Baldwin v. Miller & Lux*, 152 Cal. 463, 92 Pac. 1033, upholding rule where partnership was dissolved by death of member,

and tenants in common of the property organized corporation to carry on business of late firm.

Indebtedness Created by Corporation in excess of its subscribed capital stock is not void.

Approved in *Smith v. Ferries etc. Ry. Co.* (Cal.), 51 Pac. 714, 724, issue of bonds in excess of subscribed capital stock of corporation was not void; *Rankin v. Brewery & Ice Co.*, 12 N. M. 54, 73 Pac. 613, applying rule in suit by stockholders to restrain majority of board of directors from ratifying contracts which would swell debts of corporation beyond amount of its capital stock.

Enforceability of Loan to Private Corporation which has exceeded borrowing powers. See note, 11 L. R. A. (n.s.) 599.

Seal of Corporation Attached to Instrument signed by proper officers is prima facie evidence of its execution under proper authority.

Approved in *Potts Drug Co. v. Benedict*, 156 Cal. 327, 104 Pac. 434, 25 L. R. A. (n.s.) 609, and *Greve v. Echo Oil Co.*, 8 Cal. App. 283, 96 Pac. 907, both reaffirming rule.

Misnomer of Corporation in Written Instrument does not necessarily invalidate same.

Approved in *Nisbet v. Clio Min. Co.*, 2 Cal. App. 441, 83 Pac. 1080, upholding action of court in allowing plaintiff to amend complaint so as to correct name of defendant corporation.

93 Cal. 316-321, 28 Pac. 950, ROBINSON v. CRESCENT CITY MILL ETC. CO.

Intervention is Proper by Any Person having a claim or lien on funds which are the subject of action.

Approved in *Faricy v. St. Paul Invest. etc. Society*, 110 Minn. 317, 125 N. W. 678, in action seeking money judgment for one hundred and four one thousand dollar bonds, receiver of a loan association was entitled to intervene as a basis for action to recover stockholders' liability.

93 Cal. 321-329, 27 Am. St. Rep. 203, 28 Pac. 951, 15 L. R. A. 431, BOURM v. HART.

The State is not Liable for Tort committed by its agents.

Approved in *Elmore v. Fields*, 153 Ala. 350, 127 Am. St. Rep. 31, 45 So. 67, applying rule in action against state charging warden of state prison with cutting timber on land adjoining penitentiary grounds.

Liability of State for Negligence or misfeasance of its officers. See note, 116 Am. St. Rep. 214.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 35, 64.

Suits Against the United States. See note, 96 Am. St. Rep. 662.

Protection of Private Rights from Public Interference. See note, 18 L. R. A. 544.

Appropriations of Public Money. See note, 89 Am. St. Rep. 815.

Appropriation of Public Money for Pensions. See note, 99 Am. St. Rep. 995.

93 Cal. 329-362, 28 Pac. 1053, SCHULTZ v. McLEAN.

Where One of Two Innocent Persons must Suffer by fraud of a third, he by whose negligence it happened must be the sufferer.

Approved in *Conklin v. Benson*, 159 Cal. 793, 116 Pac. 38, equities of innocent purchaser of land must be protected, though injury be done to party who has been imposed upon or defrauded by her agent or original grantee; *Wilcox-Rose Construction Co. v. Evans*, 9 Cal. App. 121, 98 Pac. 84, where agent is invested with apparent authority to dispose of property and use materials and labor of principal, redress for wrongful act of agent will be denied against innocent third person; *United States v. Conklin*, 169 Fed. 184, grantors of land to United States in exchange for lieu land cannot take advantage of fraud practiced on them in conveying the land exchanged as against the United States.

Distinguished in *Raymond v. Glover* (Cal.), 37 Pac. 774, where agent for sale of land intrusted to deliver deed to vendee on execution of purchase money note and mortgage fraudulently took note and mortgage in his own name, there was no valid delivery of deed.

Miscellaneous.—Cited in *Schultz v. McLean* (Cal.), 28 Pac. 1060.

93 Cal. 365-370, 28 Pac. 953, CROOKER v. BENTON.

Appurtenances. See note, 81 Am. St. Rep. 769.

Transfer of Right to Use Water for Irrigation. See note, 65 L. R. A. 410.

93 Cal. 371-372, 28 Pac. 1060, WELCH v. MOHR.

Liability of Hirer Driving Team where not hired to go. See note, 26 L. R. A. 367.

93 Cal. 372-375, 28 Pac. 934, EBEL v. CHANDLER.

Miscellaneous.—Cited in *Lovejoy v. Chandler*, 93 Cal. 376, 28 Pac. 935.

93 Cal. 377-380, 28 Pac. 1061, PEOPLE v. WILSON.

Requirement of Code That Order holding defendant be indorsed upon deposition may be regarded as directory.

Approved in *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 479, 480, 107 Pac. 716, upholding filing of information by district attorney though order of commitment was not indorsed upon complaint or depositions taken by magistrate.

Order Holding Defendant to Answer for public offense, made after preliminary examination by magistrate, is necessary to sustain information.

Approved in *People v. Siemsen*, 153 Cal. 389, 390, 95 Pac. 864, upholding rule where it was claimed information was filed before order holding defendant had been signed.

93 Cal. 380-384, 28 Pac. 1062, LOS ANGELES COUNTY v. SUPERIOR COURT.

Power of Court to Require Sheriff to furnish suitable courtrooms is limited to express language of statute.

Approved in *Falconer v. Hughes*, 8 Cal. App. 56, 96 Pac. 20, court could not legally give its directions to person other than sheriff before calling on him to execute its directions.

Power of Courts to Provide Necessary Places and equipment for their business. See note, 22 L. R. A. 399.

93 Cal. 384-392, 28 Pac. 1063, MALONE v. BIG FLAT GRAVEL MIN. CO.

It is the Right of Transferee to prosecute or defend action in name of original party.

Approved in *Leslie v. Gibson*, 80 Kan. 510, 133 Am. St. Rep. 219, 103 Pac. 117, one who holds title under conveyance after judgment in suit to quiet title may move to open judgment; *Sykes v. Beck*, 12 N. D. 252, 96 N. W. 846, upholding prosecution of appeal by purchaser pendente lite, in name of original defendant.

Right to Appeal as a Party interested or injured. See note, 119 Am. St. Rep. 762.

Who may Proceed to Set Aside Judgments against other parties. See note, 54 L. R. A. 767.

Availability to Privies of Remedy of party to open default judgment. See note, 26 L. R. A. (n.s.) 1066.

Delay of Mail or Train or Loss of Mail as accident or surprise for which default judgment may be set aside. See note, 30 L. R. A. (n.s.) 741.

93 Cal. 393-394, 29 Pac. 70, BYRNES v. MOORE.

Unless It is Clear the Evidence will not justify a recovery, it is error to grant a nonsuit.

Approved in *Estate of Chevallier*, 159 Cal. 168, 113 Pac. 133, upholding granting of nonsuit where evidence presented by contestant of will would not have supported verdict in her favor.

What Constitutes Immediate Delivery and actual change of possession must be determined from the particular facts of the case.

Approved in *Cameron v. Calberg* (Cal.), 31 Pac. 530, reaffirming rule; *Rosenberg Bros. & Co. v. Ross*, 6 Cal. App. 760, 93 Pac. 286, evidence showed delivery and actual and continued change of possession of crop of prunes; *Castle v. Sibley*, 1 Cal. App. 651, 82 Pac. 1068, in action to recover proceeds of property levied on, evidence was sufficient to sustain the findings as to sale by judgment debtor.

93 Cal. 395-400, 29 Pac. 58, ROLLINS v. WRIGHT.

Legislature may Make Tax Deed conclusive as to things in their nature nonessential.

Approved in *Bank of Lemoore v. Fulgham*, 151 Cal. 240, 90 Pac. 938, omission of statement "sold for taxes" and date of sale, on tax bills subsequent to sale for taxes did not violate rights of taxpayer.

Recital of Matters Required to be Recited in tax deeds is prima facie evidence of their truth.

Approved in *Griggs v. Hartzoke*, 13 Cal. App. 433, 109 Pac. 1105, reaffirming rule; *Gibson v. Smith*, 24 S. D. 527, 124 N. W. 739, where tax deed regular on its face showed the land mentioned was sold in bulk, evidence attempting to show irregularity in mode of selling the land was incompetent.

Legislature cannot by Subsequent Statute import new terms into a sale.

Approved in *Solis v. Williams*, 205 Mass. 356, 91 N. E. 150, Statutes of 1905, chapter 325, section 3, extending time for redemption from tax sale, applies only to sales after its passage.

Applicability to Past Tax Sales of statute eliminating or requiring notice of expiration of redemption period. See note, 10 L. R. A. (n.s.) 819.

93 Cal. 401-406, 29 Pac. 60, FAIRCHILD v. WALL.

Mandamus will not lie to control the determination of a tribunal intended to be final.

Approved in *Van Vleck v. Board of Dental Examiners (Cal.)*, 48 Pac. 225, applying rule in proceeding against state board of dental examiners to compel issuance of certificate to practice dentistry.

93 Cal. 407-410, 28 Pac. 1066, CHAUVET v. HILL.

Lands Lying Beyond Watershed of a Stream are not entitled to be considered riparian to it.

Approved in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 330, 88 Pac. 980, 11 L. R. A. (n.s.) 1062, land not within watershed of river is not riparian thereto though it be part of entire tract which extends to river.

What is Riparian Land. See note, 11 L. R. A. (n.s.) 1063.

Riparian Owner cannot Rightfully Divert Water beyond watershed of stream.

Approved in *Crawford Co. v. Hathaway*, 67 Neb. 353, 108 Am. St. Rep. 647, 93 N. W. 790, 60 L. R. A. 889, and *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 708, 118 Am. St. Rep. 754, 65 Atl. 495, both reaffirming rule; *Clements v. Land etc. Co.*, 36 Tex. Civ. App. 345, 82 S. W. 668, upper owner had no right to convey waters of stream to nonriparian lands, though lower owner's present needs are unaffected.

Relative Rights of State and Riparian Owner in navigable waters. See note, 127 Am. St. Rep. 56.

93 Cal. 411-414, 28 Pac. 1041, GRIESS v. STATE INVESTMENT CO.

All Orders in Proceedings for New Trial which finally dispose of the motion are appealable as special orders after judgments.

Approved in *Freeman v. Brown*, 4 Cal. App. 109, 87 Pac. 205, reaffirming rule; *People v. Walker (Cal.)*, 61 Pac. 800, order overruling motion to correct minutes of court, made after judgment became final, was not appealable.

93 Cal. 414-420, 28 Pac. 1067, HUGHES v. EWING.

Creation and Alteration of School Districts is within control of legislature.

Approved in *Allen v. Bakersfield*, 157 Cal. 726, 109 Pac. 489, reaffirming rule; *Potter v. Santa Barbara*, 160 Cal. 356, 116 Pac. 1103, legislature has power to create highway districts by giving only such persons as it may think best an opportunity to be heard; *Pass School Dist. v. Hollywood Dist.*, 156 Cal. 418, 105 Pac. 123, 26 L. R. A. (n.s.) 485, by legal annexation of land of school district to city, it became a part of city school district.

School District is a Corporation of quasi municipal character.

Approved in *People v. San Joaquin Valley Agricultural Assn.*, 151 Cal. 805, 91 Pac. 744, agricultural association formed under act dividing state into agricultural districts is a public corporation; *Los Angeles School Dist. v. Longden*, 148 Cal. 382, 83 Pac. 247, fact that territorial limits of school district are coterminous with those of city does not affect its identity as a corporate entity.

Where Change in Boundaries of School District takes place, transferred territory is not liable for obligations of old corporation.

Approved in *Frankish v. Goodrich*, 157 Cal. 615, 617, 108 Pac. 685, 686, outside territory belonging to school district, on being included within boundaries of city, became taxable in latter's school district only.

93 Cal. 421-426, 29 Pac. 34, SMITH v. McDERMOTT.

Section of Libel and Slander Act requiring plaintiff to file undertaking for costs is constitutional.

Approved in *Carpenter v. Ashley*, 16 Cal. App. 309, 116 Pac. 986, in action for slander, successful defendant is entitled to reasonable attorney's fee as an item of his costs; *Skrocki v. Stahl*, 14 Cal. App. 8, 110 Pac. 960, counsel fee is allowed as costs to party that prevails in action; *Gaffey v. Mann*, 5 Cal. App. 714, 91 Pac. 173, upholding rule where constitutionality of act in allowing attorneys' fees to prevailing party was attacked.

Jurisdiction of Court in Action for slander does not depend upon filing of sufficient undertaking at time suit is commenced.

Approved in *Becker v. Schmidlin*, 153 Cal. 671, 672, 96 Pac. 280, 281, application of plaintiff to file new undertaking in lieu of defective one should have been granted.

Where Inconsistent Laws are Enacted at same session of legislature, the one last adopted prevails.

Approved in *County of Trinity v. County of Mendocino*, 151 Cal. 284, 90 Pac. 687, act of March 30, 1872, providing for establishment of boundary lines between counties, prevails over code provisions inconsistent therewith.

Act Applicable to All Persons within the same class is not unconstitutional.

Approved in *In re Finley*, 1 Cal. App. 210, 81 Pac. 1046, upholding Penal Code, section 246, providing death penalty in case of assault with deadly weapon by life convicts.

93 Cal. 427-445, 26 Pac. 597, 29 Pac. 61, PEOPLE v. McNULTY.

Repealed Statute may be Kept in Force by permanent saving clause in general body of the law.

Approved in *The Queen v. Ah Hum*, 9 Haw. 100, applying rule where law prescribing punishment for crime charged had been amended after conviction and before sentence; *Heath v. State*, 173 Ind. 298, 90 N. E. 311, amended statute relating to rape upon female child was not repealed by amending act; *State v. Rooney*, 12 N. D. 158, 95 N. W. 518, statute under which defendant was sentenced for murder was not ex post facto, though passed after his conviction.

Distinguished in *State v. Smith*, 56 Or. 27, 107 Pac. 982, in prosecution for assault and robbery, penalty provided in act in force at time of commission of offense was repealed by act in force at date of trial.

Statute Amending a Section "so as to read" repeals all contained therein not re-enacted.

Approved in *Sandoval v. County Commrs. of Bernalillo County*, 13 N. M. 545, 86 Pac. 429, section 5, chapter 108, page 205, Laws of 1901, effectually repealed section 4155 of Compiled Laws of 1897.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 282.

It is not Necessary to Allege in Indictment that the person murdered was a human being.

Approved in *People v. Gilbert*, 199 N. Y. 27, 92 N. E. 91, reaffirming rule; *Fooshee v. State*, 3 Okl. Cr. 680, 108 Pac. 559, upholding indictment alleging defendant did "kill and murder one Luther Ford."

Burden is upon One Relying on insanity as a defense to show it by a preponderance of evidence.

Reaffirmed in *People v. Willard*, 150 Cal. 552, 89 Pac. 128.

Presumption and Burden of Proof as to Sanity. See note, 36 L. R. A. 722, 727.

Measure of Proof of Insanity in Criminal Cases. See note, 39 L. R. A. 739.

93 Cal. 445-451, 29 Pac. 64, **PEOPLE v. SMITH.**

Position of Parties at Time of shooting is not a proper subject for opinion testimony.

Approved in *People v. Heacock*, 10 Cal. App. 454, 102 Pac. 544, where the issue was whether death was caused by act of accused or was result of a fall, admission of testimony of physician as to whether wounds were result of fall was prejudicial error; *People v. Fossetti*, 7 Cal. App. 632, 95 Pac. 386, where purpose of question was to show jury position of wound and course taken by bullet, it was properly allowed; *Price v. United States*, 2 Okl. Cr. 451, 139 Am. St. Rep. 930, 101 Pac. 1037, it was error to permit experts to give opinion as to position of arm of deceased at time he was shot.

93 Cal. 452-458, 27 Am. St. Rep. 207, 28 Pac. 1068, **MORRILL v. NIGHTINGALE.**

Contract Which Essentially Violates Morality or public policy is void.

Approved in *McCowen v. Pew*, 153 Cal. 741, 96 Pac. 896, 21 L. R. A. (n.s.) 800, applying rule in action on contract giving an option to purchase certain lands as an inducement to building of a line of railroad between certain points; *Murray Showcase etc. Co. v. Sullivan*, 15 Cal. App. 478, 115 Pac. 260, where president of corporation told manager unless certain shortage was paid he would rely on his bond to collect amount due, this was not a threat of arrest invalidating notes given in settlement of shortage; *Van Valkenburgh v. Oldham*, 12 Cal. App. 575, 108 Pac. 43, in proceedings to foreclose mortgage, evidence failed to show mortgage was procured by fraud, undue influence or misrepresentations.

Validity of Contracts to Stifle Criminal Prosecution. See note, 139 Am. St. Rep. 742.

Contracts Procured by Threats to Prosecute a Relative. See note, 26 L. R. A. 51.

93 Cal. 459-465, 29 Pac. 36, **IN RE BURTON.**

Superior Court Sitting in Probate has jurisdiction of every matter necessary in the proceeding.

Approved in *Estate of Warner*, 6 Cal. App. 366, 92 Pac. 193, upholding jurisdiction of probate court to determine question raised in contest by son of widow's right to letters, because of her antenuptial contract waiving right to succeed, but which she claimed was procured by fraud; *In re Burton*, 5 Cal. Prob. 238, where superior court of San Diego county had exclusive jurisdiction of estate, su-

perior court of San Francisco has no jurisdiction to set aside or review its orders.

Decree of Probate Court is No Bar to action by one not an heir or party to the proceedings.

Approved in *Coats v. Harris*, 9 Idaho, 468, 75 Pac. 245, 246, reaffirming rule; *Cooley v. Miller & Lux*, 156 Cal. 516, 105 Pac. 983, claim of successor of grantee of heirs was not barred by decree of distribution made after grant.

93 Cal. 465-476, 29 Pac. 66, SAN FRANCISCO v. PENNIE.

Uncertainties or Ambiguities not Properly Raised in trial court are waived.

Approved in *Mini v. Mini* (Cal.), 45 Pac. 1044, in absence of special demurrer, general allegation as to property of plaintiff in complaint for divorce was sufficient foundation for evidence of definite description; *Los Angeles v. Glassell*, 4 Cal. App. 46, 87 Pac. 242, complaint in action by city to recover taxes was in the form required by statute; *West v. Johnson*, 15 Idaho, 689, 99 Pac. 711, complaint in action for accounting and damages was sufficient to support the judgment; *Hollister v. State*, 9 Idaho, 660, 77 Pac. 341, upholding complaint not free from criticism, in condemnation proceedings.

93 Cal. 476-490, 29 Pac. 26, PEOPLE v. BRUGGY.

Question of Degree of Crime is exclusively for jury.

Approved in *People v. Jones*, 160 Cal. 367, 117 Pac. 180, instruction that an assault or even a blow will reduce crime of party killing from murder to manslaughter is erroneous; *People v. Machuca*, 158 Cal. 64, 109 Pac. 887, refusing to disturb jury's determination of degree of homicide in prosecution for murder, where there was evidence to support it.

To Justify Homicide There must be a Necessity, actual or apparent.

Approved in *People v. Davis* (Cal.), 36 Pac. 98, reaffirming rule; *People v. Webster*, 13 Cal. App. 353, 109 Pac. 639, where court had charged accused had a right to act on apparent necessity, instruction on "absolute necessity" was not prejudicial; *People v. Citty*, 11 Cal. App. 709, 710, 106 Pac. 261, discussing instructions raising question as to obligation of person assailed to consider question of retreat; *Wilson v. Territory*, 7 Ariz. 51, 60 Pac. 698, instructions as a whole set forth defendant's right to act upon appearances.

Charge of Court must be Construed in the light of common understanding.

Approved in *People v. Dole* (Cal.), 51 Pac. 946, applying rule to use of disjunctive in charge that defendant was guilty of forgery if he aided, abetted, or assisted in commission of crime; *People v. Ruef*, 14 Cal. App. 613, 114 Pac. 69, where court gave specific instructions on the material questions, reading of code sections did no harm; *Hayden v. Consolidated Min. etc. Co.*, 3 Cal. App. 139, 84 Pac. 423, instructions given in action by owner of irrigation ditch for injuries thereto by tenant in possession were not contradictory; *Cleveland etc. R. R. Co. v. Miller*, 165 Ind. 387, 74 N. E. 511, applying rule in action for personal injuries to charge given on right to recover for shortening of life.

Heat of Passion Which will Mitigate or reduce degree of homicide. See note, 5 L. R. A. (n. s.) 811.

Standpoint of Determination as to Danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 542.

93 Cal. 490-492, 29 Pac. 57, 247, PEOPLE v. SMITH.

Question Once Determined cannot Again be litigated between same parties.

Approved in *State v. Savage*, 64 Neb. 700, 90 N. W. 901, where right of state to oust board of fire and police commissioners had been tried and determined, judgment rendered was bar to another suit for same purpose.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 660.

93 Cal. 493-496, 27 Am. St. Rep. 212, 29 Pac. 119, BYERS v. LOCKE.

Agreement to Share in Profits of contemplated sale of real estate need not be in writing.

Approved in *Hicks v. Post*, 154 Cal. 27, 96 Pac. 880, contract by which owner of land gave other party exclusive right to sell for a compensation to be measured by price realized gave latter no interest in the land; *Jones v. Patrick*, 140 Fed. 406, applying rule to verbal agreement by which the parties were to co-operate in finding purchasers at advanced price for property on which one held option bond and to share in profits; *Weltner v. Thurmond*, 17 Wyo. 301, 129 Am. St. Rep. 1113, 98 Pac. 598, where land was conveyed in payment of mortgage debt and mortgagees agreed if property was sold for more than their claim to pay surplus to mortgagor, such contract created express trust.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 244.

Agreement of Vendee of Realty to Divide Proceeds of resale with vendor, as affected by statute of frauds. See note, 8 L. R. A. (n. s.) 1138.

Recital of Money Consideration in Deed as contractual. See note, 68 L. R. A. 926.

93 Cal. 497-500, 29 Pac. 50, BARNHART v. FULKERTH.

Witness may be Examined as to intent with which he acted, where that intent is material.

Approved in *Fanning v. Green*, 156 Cal. 285, 104 Pac. 311, where husband purchased property with community funds and directed conveyance to be made to his wife, evidence that he never intended to make gift of same to his wife was competent; *Walker v. Chanslor*, 153 Cal. 125, 126 Am. St. Rep. 61, 94 Pac. 609, 17 L. R. A. (n. s.) 455, in action for damages for forcible exclusion of persons in possession of oil lands as adverse claimants, evidence as to title and other matters bearing on intention was relevant; *Bertelsen v. Bertelsen*, 7 Cal. App. 261, 94 Pac. 81, in action to establish trust in real property purchased with plaintiff's money, court's refusal to permit plaintiff to testify as to his intent in giving the money, and permitting defendant to retain title, was error, but harmless.

Right of One to Testify as to His Intent. See note, 23 L. R. A. (n. s.) 373, 388, 390.

93 Cal. 502-505, 29 Pac. 120, RIX v. HORSTMANN.

Necessity of Color of Title not Expressly Made a condition by statute in adverse possession. See note, 15 L. R. A. (n. s.) 1195.

93 Cal. 505-512, 29 Pac. 121, ROSENTHAL v. McMANN.

Judgment Which Does not Determine Merits of action is no bar to subsequent suit.

Approved in *Dollar v. International Banking Corp.*, 13 Cal. App. 339, 109 Pac. 502, where findings in a second consular action were conclusive upon neither party, the judgment of dismissal was without prejudice to new action; *State v. District Court*, 13 N. D. 220, 100 N. W. 250, in action for removal of sheriff from office, judgment of dismissal did not bar further proceedings.

Dismissals Under Section 581, Code of Civil Procedure, are without prejudice to a new action.

Approved in *Rickey Land etc. Co. v. Glader*, 153 Cal. 180, 94 Pac. 769, under facts presented, court abused its discretion in dismissing action for failure to enter judgment within six months; *Neihaus v. Morgan* (Cal.), 45 Pac. 256, motion to dismiss for failure to enter judgment within six months was unauthorized where neither party was entitled to demand entry of judgment at time of motion; *Jones v. Chalfant* (Cal.), 31 Pac. 258, subdivision 6 of section 581, Code of Civil Procedure, does not confer an absolute right; *Hubbard v. Superior Court*, 9 Cal. App. 171, 98 Pac. 396, court had jurisdiction to proceed with trial, though summons issued out of justice's court was not served and returned within three years after action was commenced; *Hall v. Justice's Court*, 5 Cal. App. 138, 89 Pac. 871, failure to execute ministerial duty in proper time did not divest justice's court of jurisdiction.

93 Cal. 516-518, 29 Pac. 123, PEOPLE v. SCOTT.

Failure of Court to Instruct That Defendant might be found guilty of simple assault is not error, where evidence shows graver offense.

Reaffirmed in *People v. Davis* (Cal.), 36 Pac. 98.

93 Cal. 518-519, 29 Pac. 49, PEOPLE v. AHERN.

In Absence of Request for Instruction defining "reasonable doubt," court is not required to define it.

Reaffirmed in *Smith v. State*, 17 Wyo. 490, 101 Pac. 850.

Miscellaneous.—Cited in *People v. Ahern* (Cal.), 29 Pac. 49.

93 Cal. 519-530, 29 Pac. 124, KIRMAN v. HUNNEWILL.

Insufficiency of Facts Found to Support the judgment can only be considered on appeal from the judgment.

Approved in *Hayford v. Wallace* (Cal.), 46 Pac. 302, and *Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 307, both reaffirming rule.

Abandonment or Loss of Rights of Prior appropriators of water. See note, 30 L. R. A. 266.

93 Cal. 532-535, 29 Pac. 225, CROCKER v. FIELD'S BISCUIT ETC. CO.

The Passing of Title to Personal Property sold is governed by the intention of the parties.

Approved in *Grange v. Farmers' Union etc. Co.*, 3 Cal. App. 524, 86 Pac. 617, where conduct of parties showed intention to transfer title to grain at time of shipment, act of bankrupt consignee in re-delivering shipping receipts could not reinvest shipper with title.

93 Cal. 536-537, 29 Pac. 126, PEOPLE v. ARTHUR.

If Evidence Presents an Issue of Fact for determination of jury, verdict will not be disturbed.

Approved in *State v. Burke*, 11 Idaho, 426, 83 Pac. 229, 230, utter absence of evidence in this case connecting defendant with commission of offense makes a new trial necessary.

Where there is a Substantial Conflict in the evidence on material issues, a new trial will not be granted.

Approved in *Morrow v. Matthew*, 10 Idaho, 433, 79 Pac. 200, applying rule in action to enforce "grubstake" agreement to recover interest in mining claims.

Admissibility in Criminal Trial of testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 872.

93 Cal. 538-551, 27 Am. St. Rep. 215, 29 Pac. 126, MARYSVILLE ELECTRIC LIGHT ETC. CO. v. JOHNSON.

Agreement of Subscription to Stock in unincorporated company is made solely for benefit of corporation.

Approved in *Horseshoe Pier etc. Co. v. Sibley*, 157 Cal. 447, 108 Pac. 309, where person contracted with trustee to buy stock in proposed corporation, corporation was entitled to sue thereon without formal assignment from trustee; *Auburn Opera House etc. Assn. v. Hill* (Cal.), 32 Pac. 588, upholding right of corporation to maintain action for subscription of stock as contained in prospectus.

In Bilateral Contracts, the promise of each party is sufficient consideration for promise of the other.

Approved in *Shelby Co. Ry. Co. v. Crow*, 137 Mo. App. 465, 119 S. W. 436, applying rule in action to enforce liability of stockholder who had signed only preliminary subscription paper, but who had not otherwise subscribed for stock.

Contract of Subscribers to Pay their subscription in a certain manner is valid, and binding upon them.

Approved in *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 197, 81 Pac. 1032, by signing by-laws providing for enforcement of unpaid calls by action, stockholders waived right to insist corporation levy assessments therefor.

Nature and Validity of Subscription agreement to corporate stock. See note, 136 Am. St. Rep. 738, 746.

93 Cal. 555-558, 29 Pac. 232, CLAUSEN v. MEISTER.

Time to Commence Action for recovery of money cannot be extended by alleging facts showing right to equitable relief.

Approved in *Banks v. Stockton*, 149 Cal. 602, 603, 87 Pac. 84, upholding rule in suit for decree adjudging mortgage executed by guardian to be valid lien on interest of wards in property mortgaged.

93 Cal. 558-564, 27 Am. St. Rep. 223, 29 Pac. 234, 15 L. R. A. 475, STEPHENSON v. SOUTHERN PACIFIC CO.

Master is not Responsible for Act of servant done without reference to service for which he was employed.

Approved in *Louisville etc. R. R. Co. v. Gillen*, 166 Ind. 324, 76 N. E. 1059, in action by servant for injuries resulting from use of de-

fective tool by another servant, complaint failing to show act of other servant was in line of his duty was insufficient.

Disapproved in *Alsever v. Minneapolis etc. R. R. Co.*, 115 Iowa, 347, 88 N. W. 844, company liable for act of engineer, who, by blowing off steam in order to frighten children, caused child to fall and break her leg; dissenting opinion in *Stewart v. Cary Lumber Co.*, 146 N. C. 99, 59 S. E. 557, majority holding railroad liable for actual damages resulting from unnecessary blowing of whistle by engineer for purpose of frightening mule, but not for exemplary damages.

Doctrine of Respondeat Superior. See note, 83 Am. St. Rep. 230.

Liability of Principal for Unauthorized Acts of Agent. See note, 88 Am. St. Rep. 796.

Civil Responsibility for Wrongful or Negligent Act of servant or agent toward one not sustaining contractual relation. See note, 27 L. R. A. 186.

Liability of Master for Injury from Sportive Manner in which servant performs duty. See note, 13 L. R. A. (n. s.) 1194.

Liability for Injury by Servant to Third Person in use of dangerous agency. See note, 10 L. R. A. (n. s.) 396, 400, 402.

Liability of Railroad for Injuries due to frightening of animals by emission of steam. See note, 133 Am. St. Rep. 871.

93 Cal. 569-573, 29 Pac. 230, HENRY v. SUPERIOR COURT.

Executor Who is Unsuccessful in Resisting revocation of will is not entitled, as matter of right, to his costs.

Approved in *Estate of Hite*, 155 Cal. 456, 101 Pac. 451, upholding order of trial court denying application for compensation for services rendered as attorneys prior to probate of will under employment of person named as executor. See note, 2 Cof. Prob. 39.

Court has No Power to Make Allowance for expenses of contest before admission of will to probate.

Approved in *Estate of Yoell*, 160 Cal. 742, 117 Pac. 1047, applying rule to order of court directing payment of contestant's costs out of estate, where first trial of will contest resulted in disagreements, second proved abortive because of conflagration, and third resulted in mistrial.

Costs or Counsel Fees in Probate Proceeding cannot be allowed to counsel.

Approved in *In re Sullivan's Estate*, 36 Wash. 224, 78 Pac. 947, upholding rule in application to review orders of court making allowance to administrator for himself and his attorney without notice to distributees.

Right of Executor to Allowance for Attorney's Fees in attempt to establish or defend will. See note, 26 L. R. A. (n. s.) 758.

93 Cal. 576-577, 29 Pac. 244, IN RE KINGSLEY.

Opinion of Trial Court will not be Considered by appellate court on appeal.

Approved in *Davis v. Jacobson*, 13 N. D. 432, 101 N. W. 315, refusing to reverse order granting new trial merely because trial judge assigned a wrong reason for it; *Grand Central Min. Co. v. Mammoth Min. Co.*, 29 Utah, 594, 83 Pac. 684, act of trial judge in filing an opinion was not an act on which error would be predicated.

93 Cal. 578-580, 29 Pac. 223, CODY v. BEAN.

Those Claiming Estates Adversely to Mortgagor and mortgagee are not proper parties to foreclosure proceedings.

Approved in *Tinsley v. Atlantic Mines Co.*, 20 Colo. App. 66, 77 Pac. 14, in action for foreclosure, one alleged to hold title subsequent to mortgage, but who claimed paramount title by tax lien, could not be compelled to litigate his title in such action.

Distinguished in *Hoppe v. Hoppe* (Cal.), 36 Pac. 390, on foreclosure of mortgage containing covenant that receiver take and hold premises, and collect rents and apply them to satisfaction of mortgage, third persons interested in the title and rents may intervene.

93 Cal. 580-585, 29 Pac. 116, PEOPLE v. MESA.

In Prosecution for Rape, uncorroborated testimony of prosecutrix is sufficient to sustain conviction.

Approved in *People v. Ah Lung*, 2 Cal. App. 280, 83 Pac. 297, re-affirming rule.

93 Cal. 588-596, 29 Pac. 226, WILCOX v. LATTIN.

Right to Rescind is to be Determined from the title at time fixed for performance of contract.

Approved in *Crim v. Umbesen*, 155 Cal. 702, 132 Am. St. Rep. 127, 103 Pac. 180, destruction by fire of a large part of records in recorder's office entitled purchaser to rescind contract of purchase.

Vendor in an Executory Contract of sale impliedly agrees to convey good title in fee to vendee.

Approved in *Gervaise v. Brookins*, 156 Cal. 105, 103 Pac. 330, under contract by which vendor agreed "to sell all his right, title and interest" in lots, and on payment of price execute deed of grant, bargain and sale of same, free of encumbrances, he was bound to convey good title; *Whittier v. Gormley*, 3 Cal. App. 492, 86 Pac. 727, where certificate of title showed defects, purchaser was entitled to credit for sums expended to remove them.

Waiver of Purchaser's Right to Rescind land contract. See note, 30 L. R. A. (n. s.) 876.

Miscellaneous.—Cited in *Lattin v. Wilcox* (Cal.), 29 Pac. 228.

93 Cal. 596-600, 29 Pac. 228, PEOPLE v. COWGILL.

Charge of Court Should be Entirely Free from suggestion as to weight of evidence.

Approved in *State v. Crofford*, 121 Iowa, 408, 96 N. W. 894, applying rule to charge of court suggesting that the circumstantial evidence to which jury has listened was of greater weight than the direct evidence.

Circumstantial Evidence. See note, 97 Am. St. Rep. 800.

Evidence of Good Character to Create doubt of guilt. See notes, 103 Am. St. Rep. 898; 20 L. R. A. 612.

Right of Court to Caution Jury as to Believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 822.

93 Cal. 600-611, 29 Pac. 220, SICHLER v. LOOK.

Decree of Foreclosure Only Affects title of mortgagor and any rights that accrued subsequent to date of mortgage.

Approved in *Wardlow v. Middleton*, 156 Cal. 586, 105 Pac. 738, applying rule where allegation of complaint that certain defendants

claimed an interest, but same was subsequent to the mortgage, was not denied, and court found such interest was acquired after giving of mortgage; *Raggio v. Palmtag*, 155 Cal. 805, 103 Pac. 316, where persons designated in cross-complaint as claiming some interest subject to the mortgage denied the allegation but failed to show priority of their claim, they could not complain of finding against them; *Webb v. Winter* (Cal.), 65 Pac. 1030, upholding rule in action to foreclose mortgage given by owner of undivided half of premises and life interest in other half, where owners of remainder after expiration of life interest were made defendants and defaulted; *Tinsley v. Atlantic Mines Co.*, 20 Colo. App. 66, 77 Pac. 14, in action for foreclosure, where defendant alleged to have interest subsequent to mortgage disclaimed, saying he claimed by paramount title, he could not be compelled to litigate his claim in such action.

Verity of Record will be Presumed on appeal in absence of contradictory evidence.

Approved in *Segerstrom v. Scott*, 16 Cal. App. 261, 116 Pac. 692, upholding rule on appeal from judgment-roll alone where every intendment was in favor of regularity of proceedings; *Brown v. Caldwell*, 13 Cal. App. 31, 108 Pac. 875, recital in judgment of appearance by defendant must be taken as prima facie true, notwithstanding failure to serve defendant and absence of answer or other appearance, all of which appears from judgment-roll; *Western Lumber etc. Co. v. Merchants' Amusement Co.*, 13 Cal. App. 9, 108 Pac. 894, where judgment recited defendant appeared, and uncontradicted evidence in bill of exceptions sustained recital, attack on jurisdiction of court could not be sustained.

Where Note Gives Holder Option to treat entire debt due in case of default, notice of election before suit is unnecessary.

Approved in *Trinity County Bank v. Haas*, 151 Cal. 556, 91 Pac. 386, reaffirming rule; *San Gabriel Valley Bank v. Lake View Town Co.* (Cal. App.), 86 Pac. 728, filing of complaint constituted sufficient notice of election; *Julien v. Model etc. Assn.*, 116 Wis. 83, 92 N. W. 562, 61 L. R. A. 668, where mortgagor left his usual place of abode without providing for the forwarding of his mail, or giving mortgagee notice of his change of address, he waived his right to notice of election by mortgagee.

Allegations Showing Interests of Defendants are subordinate to rights of mortgagee are necessary to support decree of foreclosure.

Approved in *Wardlow v. Middleton*, 156 Cal. 586, 105 Pac. 738, reaffirming rule; *Selph v. Cobb*, 47 Fla. 294, 36 So. 761, allegation in suit to foreclose mortgage that a certain defendant was in possession of premises, but by what right or authority orator was not informed, was insufficient.

Jurisdiction of Court Does not Depend upon preservation of proof of service of summons.

Approved in *Jones v. Gunn*, 149 Cal. 693, 87 Pac. 579, upholding rule where judgment-roll contained an unsigned return of service but evidence of deputy sheriff showed actual service; *Lunnun v. Morris*, 7 Cal. App. 715, 95 Pac. 909, failure of ministerial officer to enter up a default did not affect jurisdiction of court to act; *Estate of Douglass*, 4 Cof. Prob. 353, applying rule where inventory in probate matter having been taken from files, court made order that copy be filed nunc pro tunc.

Waiver of Junior Lien by Failure to Assert it in foreclosure. See note, 68 L. R. A. 327.

Miscellaneous.—Cited in *Sichler v. Look* (Cal.), 29 Pac. 223.

93 Cal. 611-613, 29 Pac. 244, IN RE DORRIS.

Nominee of Surviving Husband or Wife has right to letters of administration.

Approved in *Estate of Bergin*, 3 Cof. Prob. 291, and *Estate of Bedell*, 3 Cof. Prob. 81, both reaffirming rule; *Estate of Myers*, 9 Cal. App. 697, 100 Pac. 713, a daughter of deceased was entitled to letters of administration in preference to nominee of two other daughters; *Estate of Daggett*, 15 Idaho, 509, 98 Pac. 851, where one other than surviving spouse, entitled to administer on estate, files application for appointment of another, such application is addressed to discretion of court.

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1162.

Ruling of Supreme Court acted on for many years will not be reversed, though its correctness be doubted.

Approved in *Hollywood Lumber Co. v. Love*, 155 Cal. 274, 100 Pac. 700, applying rule *stare decisis* to question whether property held under trust deed is subject to lien of materialman who furnished lumber after execution of trust deed; *Schoonover v. Birnbaum*, 148 Cal. 551, 83 Pac. 1000, under rule of *stare decisis* no homestead can be selected on lands owned as tenant in common or joint tenant.

93 Cal. 613-614, 29 Pac. 224, IN RE BURTON.

Pending Settlement of Bill of Exceptions, appeal will not be dismissed for failure to file transcript.

Approved in *In re Burton's Estate* (Cal.), 29 Pac. 224, applying rule to appeal from order making family allowance; *In re Burton's Estate* (Cal.), 29 Pac. 224, applying rule to appeal from order authorizing sale of certain real estate.

93 Cal. 614-624, 29 Pac. 235, LEACH v. PIERCE.

Motion for New Trial in Probate Proceedings is not authorized in absence of pleadings raising issue of fact.

Approved in *Carter v. Waste*, 159 Cal. 25, 26, 27, 112 Pac. 728, upholding rule in discussing whether motion for new trial in a proceeding for final distribution of estate is authorized; *Estate of Heywood*, 154 Cal. 314, 97 Pac. 826, pendency of proceedings preparatory to such motion would not extend time to file transcript on appeal from order; *Shipman v. Unangst*, 150 Cal. 425, 88 Pac. 1090, motion for new trial was not proper where court had set apart homestead to widow, and awarded family allowance; *In re Antonioli's Estate*, 42 Mont. 223, 111 Pac. 1034, where two *ex parte* applications for letters of administration were heard together without issue joined as to competency of either applicant, motion for new trial did not lie; *State v. Langan*, 32 Nev. 180, 105 Pac. 570, upholding motion for new trial preliminary to appeal from order setting aside homestead to widow.

Bill of Exceptions Presented for Use on motion for new trial may be used on direct appeal from order granting family allowance.

Approved in *Shipman v. Unangst*, 150 Cal. 426, 88 Pac. 1090, bill of exceptions in this case was presented too late to be used on appeal from order.

Order for Family Allowance may be made by the court of its own motion without petition therefor.

Approved in *Estate of Snowball*, 156 Cal. 237, 104 Pac. 447, on hearing of application made on behalf of children, it was immaterial whether guardian ad litem had been appointed or not; In re *Dougherty's Estate*, 34 Mont. 343, 86 Pac. 40, upholding order for family allowance made without notice.

It is the Policy of the Law to Curtail dilatory proceedings in the settlement of estates.

Approved in *Estate of Mackay*, 3 Cal. Prob. 341, where fact of marriage or legitimacy of children is in dispute, issues raised must be tried like other issues of fact.

93 Cal. 624-627, 29 Pac. 238, LEACH v. PIERCE.

Where Issues of Fact are Expressly Authorized by the code, motion for new trial is proper to review decision.

Approved in *Carter v. Waste*, 159 Cal. 26, 112 Pac. 728, statutory provisions concerning final distribution expressly authorize framing of issues of fact; *Estate of Sutro*, 152 Cal. 257, 92 Pac. 490, motion for new trial may be entertained in proceeding for partial distribution of estate; *State v. Langan*, 32 Nev. 180, 105 Pac. 570, upholding motion for new trial preliminary to appeal from order setting aside homestead to widow.

93 Cal. 627-630, 29 Pac. 239, LEACH v. PIERCE.

Order Allowing Attorney's Fee may be made ex parte.

Reaffirmed in *Estate of Roarke*, 8 Ariz. 20, 68 Pac. 529.

Order Directing Payment of a Claim against an estate is an appealable order.

Approved in *Cross v. Superior Court*, 2 Cal. App. 344, 83 Pac. 817, order directing payment of collateral inheritance tax for which estate is liable would be appealable.

93 Cal. 630-632, 29 Pac. 224, PEOPLE v. TURNBULL.

Associations Charged With the Performance of functions of state government are public corporations.

Approved in *People v. San Joaquin Valley Agricultural Assn.*, 151 Cal. 805, 91 Pac. 744, district agricultural association organized under act of April 15, 1880, is a public corporation.

Miscellaneous.—Cited in *People v. Turnbull* (Cal.), 29 Pac. 225.

93 Cal. 633-641, 29 Pac. 251, EX PARTE LIDDELL.

Title of Act is Sufficient if it contains reasonable intimation of matters under legislative consideration.

Approved in *Kaiser Land etc. Co. v. Curry*, 155 Cal. 658, 103 Pac. 349, upholding title to act imposing license tax on domestic corporations, approved March 20, 1905 (Stats. 1905, p. 493, c. 386); *People v. Bank of San Luis Obispo*, 154 Cal. 202, 97 Pac. 310, applying rule to act creating board of bank commissioners approved March 24, 1903 (Stats. 1903, p. 365, c. 266); *State v. State Bank & Trust Co.*, 31 Nev. 468, 103 Pac. 409, upholding act of March 26, 1907 (Stats. 1907, p. 229, c. 119), creating board of bank commissioners.

Numerous Provisions All Germane to general subject expressed in title may be included in act.

Approved in *Matter of Yun Quong*, 159 Cal. 511, 114 Pac. 836, upholding act regulating use and sale of poisonous drugs (Stats. 1909, p. 422); *People v. Sacramento Drainage Dist.*, 155 Cal. 385, 103 Pac. 213, applying rule to act of 1905 (Stats. 1905, p. 443, c. 368), creating Sacramento drainage district; *Robinson v. Kerrigan*, 151 Cal. 51, 121 Am. St. Rep. 90, 90 Pac. 133, applying rule to act of March 17, 1897 (Stats. 1897, p. 138, c. 110), commonly known as the "Torrens Law"; *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 326, 119 Am. St. Rep. 199, 88 Pac. 367, 8 L. R. A. (n. s.) 682, title of act of June 6, 1906, commonly known as "McEnerney Act," sufficiently complies with section 24, article IV of Constitution; *Murphy v. Bondshu*, 2 Cal. App. 252, 80 Pac. 280, act of 1901 (Stats. 1901, p. 647, c. 217), making changes in sections of Political Code relating to revenue and taxation, is not unconstitutional as embracing two subjects in its title; *Kings County v. Johnson* (Cal.), 37 Pac. 871, act of March 22, 1893, creating the county of Kings, is not unconstitutional as embracing matter not indicated in its title.

When Title of Statute Embraces only one subject, and what may be included thereunder. See note, 79 Am. St. Rep. 457, 462, 464.

Constitutionality of Code Amendment or revision. See note, 86 Am. St. Rep. 271, 274.

Legislature may Provide for the Detention and education of juvenile offenders.

Approved in *In re Sharp*, 15 Idaho, 128, 96 Pac. 565, 18 L. R. A. (n. s.) 886, upholding act of March 2, 1905 (Sess. Laws 1905, p. 106), providing for care of delinquent children; *Hunt v. Wayne Circuit Judges*, 142 Mich. 115, 105 N. W. 540, applying rule to act of September 8, 1905 (Acts 1905, p. 485, No. 312), to establish juvenile courts and to regulate jurisdiction and control of delinquent children; *Mill v. Brown*, 31 Utah, 480, 120 Am. St. Rep. 935, 88 Pac. 612, applying rule to Laws of 1905, page 182, chapter 117, creating juvenile courts with jurisdiction to provide for custody of delinquent children.

Constitutionality of Statutes Concerning Reformatories and juvenile courts. See note, 120 Am. St. Rep. 958.

Commitment of Minors to Reformatories without conviction of crime. See note, 16 L. R. A. 692.

Restraint on Freedom as Impairment of child's constitutional rights. See note, 18 L. R. A. (n. s.) 894.

93 Cal. 641-647, 29 Pac. 246, PEOPLE v. GOSSET.

Instruction Which Directly Contradicts itself is prejudicial error.

Approved in *Hampton v. State*, 160 Ind. 577, 67 N. E. 442, instruction that proof must not only coincide with hypothesis of guilt, but must be "consistent" instead of "inconsistent" with every reasonable conclusion, was prejudicial error.

A Series of Acts Enumerated in a statute as constituting one offense may be charged in a single count in the information.

Approved in *People v. Fisher*, 16 Cal. App. 274, 116 Pac. 689, applying rule where language used in information seemed to describe offense of embezzlement under several sections of the Penal Code; *People v. Harrison*, 14 Cal. App. 548, 112 Pac. 734, applying rule to

information charging defendant with lewdness with a child in the language of the statute; *Flohr v. Territory*, 14 Okl. 484, 78 Pac. 568, upholding indictment charging grand larceny in a single count by alleging property was taken by fraud and stealth; *State v. Adams*, 41 Wash. 554, 83 Pac. 1108, upholding information in prosecution for rape charging crime was committed in all the ways mentioned in the statute.

Circumstantial Evidence. See note, 97 Am. St. Rep. 777.

Scientific Books and Treatises as Evidence. See note, 40 L. R. A. 567.

93 Cal. 647-652, 29 Pac. 254, **BRONZAN v. DROBAZ.**

Only Ground on Which Motion for Nonsuit can be reviewed on appeal is that stated when motion was made.

Approved in *De Leonis v. Hammel*, 1 Cal. App. 396, 82 Pac. 352, where record failed to show any specification of grounds for motion, granting of nonsuit was held erroneous.

Order Requiring Garnishee to Pay to judgment creditor amount of his indebtedness to judgment debtor is a final determination of rights of parties.

Approved in *Societa di Mutuo Socorso v. Mantel*, 1 Cal. App. 110, 81 Pac. 660, such order estops garnishee from disputing his liability to the judgment creditor in any other action; *In re Lewis*, 67 Kan. 344, 72 Pac. 790, person cited for contempt for failure to pay money as required by order of court on supplemental proceedings could not excuse her action by claiming money did not belong to judgment debtor.

93 Cal. 653-658, 29 Pac. 219, 645, **CAMPBELL v. WEST.**

Allegation of Representative Capacity of a substituted executor may be made by way of amended complaint.

Approved in *Crary v. Kurtz*, 132 Iowa, 108, 119 Am. St. Rep. 549, 105 N. W. 591, where applicant for substitution was a trustee in bankruptcy and order permitting him to be substituted determined his legal capacity to sue, no amended or supplemental pleading was necessary.

93 Cal. 658-660, 29 Pac. 243, **PEOPLE v. McNUTT.**

Judgment of Conviction will not be Reversed for failure to give an instruction not demanded.

Approved in *Culpepper v. State*, 4 Okl. Cr. 113, 111 Pac. 683, reaffirming rule; *People v. Weber*, 149 Cal. 347, 86 Pac. 680, upholding instruction defining an alibi in absence of request for a fuller instruction on the subject; *Ward v. Territory*, 7 Ariz. 245, 64 Pac. 442, in prosecution for murder, omission to charge as to manslaughter in absence of request was not error; *Cochran v. State*, 4 Okl. Cr. 394, 114 Pac. 747, failure of court to instruct on presumption of innocence was not reversible error.

Court is not Required to Give an inapplicable instruction.

Approved in *Republic of Hawaii v. Kapea*, 11 Haw. 311, applying rule to charge given in prosecution for murder where there was no evidence of offense of lesser degree; *State v. Kapelino*, 20 S. D. 598, 108 N. W. 339, where offense charged is not divided into degrees, court was not required to instruct as to offense which might have been included under charge but evidence did not warrant; *State v.*

McPhail, 39 Wash. 204, 81 Pac. 685, evidence on trial for homicide did not warrant submission of issue of manslaughter.

Evidence and Instructions as to Character of accused. See note, 20 L. R. A. 614.

What Weapons may be Considered Deadly under law of homicide and assault. See note, 21 L. R. A. (n. s.) 503.

93 Cal. 660-664, 29 Pac. 259, **MOULTON v. McDERMOTT.**

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 129.

93 Cal. 664-674, 29 Pac. 256, **FAIVRE v. DALEY.**

Habendum Clause will Prevail over granting clause, where it is intended to restrict estate granted.

Approved in *Jacobs v. All Persons*, 12 Cal. App. 168, 106 Pac. 898, upholding rule in construing deed showing distinct limitation to life estate in habendum clause; *Condor v. Secrest*, 149 N. C. 207, 62 S. E. 923, applying rule in construing deed intended to convey life estate where words of limitation were placed in habendum instead of the premises.

In Construing Conveyances, Intention of parties should be given effect regardless of technical rules of construction.

Approved in *Pavkovich v. Southern Pacific R. R. Co.*, 150 Cal. 46, 47, 87 Pac. 1098, 1099, applying rule where qualifying clauses indeed were not irreconcilable.

Duty of One Debtor to Exonerate the Other, as ground for marshaling assets. See note, 12 L. R. A. (n. s.) 965.

93 Cal. 676-682, 29 Pac. 325, **HARRIS v. HARRISON.**

Use of Water by a Riparian Owner for irrigation purposes must be reasonable under all the circumstances.

Approved in *Clark v. Allaman*, 71 Kan. 243, 80 Pac. 584, 70 L. R. A. 971, and *Watkins Land Co. v. Clemens*, 98 Tex. 586, 107 Am. St. Rep. 653, 86 S. W. 736, 70 L. R. A. 964, both reaffirming rule; *Turner v. James Canal Co.*, 155 Cal. 95, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, defendant was entitled to reasonable use of water of river though such use might interfere with natural irrigation of plaintiff's land by overflowing of river during floods; *Meng v. Coffee*, 67 Neb. 514, 515, 516, 108 Am. St. Rep. 607, 93 N. W. 718, 60 L. R. A. 910, applying rule in suit to enjoin upper riparian owner from diverting water to such an extent as to deprive lower owner of use of stream; *Harrington v. Demaris*, 46 Or. 120, 77 Pac. 607, 1 L. R. A. (n. s.) 756, in suit to enjoin interference with flow of water in stream, evidence was sufficient to sustain award of certain number of inches for irrigation purposes; *Nesalhous v. Walker*, 45 Wash. 624, 88 Pac. 1033, each party owning same quantity of same kind of land was entitled to equal distribution of water for irrigation purposes after each used such share as was necessary for domestic purposes; *Nielson v. Sponer*, 46 Wash. 16, 123 Am. St. Rep. 910, 89 Pac. 156, upper riparian owner was not justified in taking water from stream for irrigation purposes to the destruction of ordinary domestic uses thereof by lower owner.

Relative Rights of State and Riparian Owner in navigable waters. See note, 127 Am. St. Rep. 56.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. B. A. 742.

Any Person may be Made a Defendant who claims an interest in the controversy adverse to plaintiff.

Approved in Hough v. Porter, 51 Or. 372, 95 Pac. 749, upholding complaint alleging defendants had or claimed some interest in the waters of the stream, the exact nature of which was unknown to plaintiff but that such interests, if any, were inferior to plaintiff's.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 94 CALIFORNIA.

94 Cal. 5-22, 29 Pac. 406, HILL v. McKAY.

When Meaning of Language of Contract is doubtful, acts of parties done under it form one of most reliable clues to intention of parties.

Approved in Dollar v. International Banking Corporation, 10 Cal. App. 88, 101 Pac. 36, following rule; Grant v. Bannister, 160 Cal. 781, 118 Pac. 255, a deed indefinite in its terms may be made definite by practical construction of parties; Rockwell v. Light, 6 Cal. App. 565, 92 Pac. 650, under contract for painting defendant's cottages, "trimmings" to have second coat, where owner's superintendent testified, without contradiction, that he, as superintendent, would not have accepted work had only one coat been put on porches, parties mutually interpreted contract to include porch floors.

Where Party Granted Right of Way over land for logging purposes, grantees agreeing, in part, that they would buy annually logs hauled by grantor and deposited in slough, under such contract if grantees refused to purchase logs so deposited, it was grantor's duty to sell as many as he could for highest market price.

Approved in Tustin Fruit Assn. v. Earl Fruit Co. (Cal.), 53 Pac. 699, where buyer refuses to accept perishable property under contract, it is right of seller to sell forthwith, so as to reduce his damages.

Measure of Damages upon Refusal by vendee to purchase logs contracted for is market value of logs at nearest market at time of delivery, less expense of transportation.

Approved in Welch v. Nichols, 41 Mont. 441, 110 Pac. 91, on breach by buyer of executory contract under which title did not pass, seller may exercise option and sell property as his own in market at best obtainable price, and measure of damages is difference between price fixed in contract and value to seller, together with excess of expense incurred in marketing property over and above what such expense would have been had buyer accepted.

94 Cal. 26-29, 29 Pac. 411, UPTON v. UPTON.

If Superior Judge Holding Court at time motion for change of venue because of disqualification of judge is heard is qualified to try case, and is ready and willing to try it, having been called for that purpose by disqualified judge, motion should be denied.

Distinguished in *Krumdick v. Crump*, 98 Cal. 119, 32 Pac. 800, under Code of Civil Procedure, section 398, it is duty of judge before whom action is pending, and who is disqualified from acting as such, to transfer cause without delay to some other court where like disqualification does not exist.

Overruled in *Remy v. Olds* (Cal.), 42 Pac. 240, Code of Civil Procedure, section 398, is not satisfied by calling to court of disqualified judge a judge who is not disqualified.

94 Cal. 29-33, 28 Am. St. Rep. 88, 30 Pac. 195, **CAHILL v. MURPHY.**

Mental Suffering in Action of Slander may be increased and damages consequently enhanced by fact that members of plaintiff's family would suffer by reason of disgrace imposed upon plaintiff by slanderous charge.

Approved in *St. Louis Southwestern Ry. Co. v. Thompson*, 102 Tex. 100, 113 S. W. 147, where there is evidence raising issue of exemplary damages, in action for conspiracy, resulting in plaintiff's expulsion from beneficial association, evidence that plaintiff at time had home of his own, wife and two children, was admissible as bearing on effect such expulsion might have on his mind and reputation.

Distinguished in *Tingley v. Times-Mirror*, 151 Cal. 17, 89 Pac. 1103, plaintiff cannot be cross-examined, for purpose of showing her susceptibility to mental suffering, as to her family, past history, or occupation, where she has given no testimony on such subjects in her examination in chief; *Dennison v. Daily News Publishing Co.*, 82 Neb. 678, 118 N. W. 569, 23 L. R. A. (n. s.) 362, neither grief experienced by plaintiff's wife upon reading alleged libelous article regarding plaintiff nor influence of her grief on plaintiff's mind are elements of damage recoverable in action of libel.

Admissibility of Evidence of Family Relations of plaintiff on question of damages in defamation action. See note, 23 L. R. A. (n. s.) 362.

Miscellaneous.—Cited in *Clay v. State*, 15 Wyo. 67, 86 Pac. 22, as to what is harmless error.

94 Cal. 33-45, 29 Pac. 232, **STONESIFER v. KILBURN.**

Order of Trial Court Refusing to Settle bill of exceptions, and refusing to relieve party presenting it from objection that it was not served in due season, on ground of mistake, inadvertence, surprise, and excusable neglect, is appealable order.

Approved in *Freeman v. Brown*, 4 Cal. App. 109, 87 Pac. 205, order denying motion for leave to amend statement on motion for new trial by inserting specifications excusably omitted therefrom is appealable.

Court may Believe Against Objection to bill of exceptions, and settle and allow bill, notwithstanding failure to serve it in time, where it is shown to satisfaction of court that default in service resulted wholly from excusable mistake or neglect, and that settlement thereof will promote justice.

Approved in *Mitchell v. California etc. S. S. Co.*, 156 Cal. 579, 105 Pac. 592, where default in failing to serve proposed statement on motion for new trial within time limited by law was of short duration, and was due to excusable neglect and inadvertence of attorney's clerk in obtaining orders extending time to prepare such statement, attorney being otherwise engaged, trial court should relieve of de-

fault; *Pollitz v. Wickersham*, 150 Cal. 243, 88 Pac. 913, where proposed bill of exceptions on motion for new trial was not served within time prescribed, and at time of service objection was reserved on that ground, but not presented to court until bill came up for settlement, one day after expiration of six months from service, court may, upon proper showing of excusable neglect, relieve moving party from default in service; *Utah-Nevada Co. v. De Lamar*, 9 Cal. App. 761, 100 Pac. 885, rule that trial court, in cases of doubt, should exercise its discretion in favor of granting of application for relief from default, in failing to serve proposed statement on appeal within time limited therefor, has no application to guide reviewing court upon appeal from order refusing to grant such relief, upon which sole question is whether trial court abused its discretion; *Commercial Nat. Bank v. Schlitz*, 6 Cal. App. 176, 91 Pac. 751, where fee for filing notice of intention to move for new trial was not demanded, and clerk testified that failure to pay it when notice was received would have made no difference, fact that it was paid month after notice was delivered to clerk, when failure to mark it as filed was discovered, cannot affect rights of moving party; *Sauer v. Eagle Brewing Co.*, 3 Cal. App. 129, 84 Pac. 426, where moving party showed that he had believed, and had cause to believe, that his managing clerk had in due time obtained order extending time to serve bill for thirty days, and that immediately upon discovering contrary he applied for relief under that section, and order of court relieving him of default gave him only thirty days which court might have originally granted, such order will be presumed upon appeal to have been properly granted, no abuse of discretion appearing; *Murphy v. Stelling*, 1 Cal. App. 98, 81 Pac. 731, where it appears that all facts upon which motion for relief was founded were known to moving party three weeks before hearing of grounds for objection to settlement of statement, and he then put in no evidence to contradict evidence of opposite party as to his neglect, without any reason disclosed in record to present such matter to court at that hearing, it cannot be said that court committed error in denying motion; *Haynes v. Backman* (Cal.), 31 Pac. 746, where, in proceeding to set aside foreclosure sale, it appeared that property had brought very inadequate price, that deputy having matter in charge had been asked to bid for mortgagee in latter's absence, but had neglected to do so, that mortgagee's intention to bid was known to purchaser, and that mortgagee could not collect any of deficiency from mortgagor, court might properly set sale aside; *Lengelsen v. McGregor*, 162 Ind. 266, 70 N. E. 248, where, during time fixed by trial judge for preparation and service of bill of exceptions, he left state, thereby preventing appellant from procuring settlement of his bill within time limited, and appellant was diligent in preparation of his bill, he was entitled to have same signed nunc pro tunc; *Sherman v. Southern Pac. Co.*, 31 Nev. 289, 102 Pac. 258, affidavit of counsel that, owing to business engagement, which took him to another state after stipulation for extension of time to move for new trial, of being engaged in court day stipulation expired, serious illness of his wife, and impression that stipulation included another day, he neglected to ask for extension of time, shows "mistake, inadvertence, surprise, or excusable neglect," within statute, and entitled him to relief against his default; *Morgan v. Oregon Short Line R. R. Co.*, 27 Utah, 99, 74 Pac. 525, where there was objection to, and motion to disregard, bill of exceptions because

not filed on opposing counsel within thirty days from denial of new trial, as required by statute, court may relieve against failure to serve in time for mistake, inadvertence, surprise or excusable neglect.

Distinguished in *Hocknan v. New York Drygoods Co.*, 8 Idaho, 74, 67 Pac. 798, if objections are made to settlement of statement on ground that time for settlement had expired, and such fact appears from record, trial court is without jurisdiction to settle same.

94 Cal. 45-48, 29 Pac. 709, PEOPLE v. LEMPERLE.

Upon Trial of Defendant Charged With Murder, question as to distance of deceased from muzzle of pistol at discharge is not proper subject for expert testimony by medical witness.

Approved in *People v. Heacock*, 10 Cal. App. 455, 102 Pac. 545, where evidence tending to connect death of deceased with defendant as criminal cause was wholly circumstantial, it was error to allow physician, who had testified to character of wounds and their position, to state his opinion as medical expert that cause of death was not accidental.

Error in Admitting Improper Expert Testimony for prosecution is not prejudicial, where opinion is not inconsistent with defendant's evidence or theory of case, and could not strengthen claim of prosecution.

Approved in *State v. Jockman*, 31 Nev. 521, 104 Pac. 16, in murder case, where decedent was shot twice, defendant claiming first was in self-defense and second by accident, and witness who saw shooting, and who performed autopsy, described course of each bullet, and stated that wound from either shot was sufficient to cause death, even though it was error to permit witness to give his opinion as to which was first wound received, it was not prejudicial; *Wells v. Territory*, 14 Okl. 442, 78 Pac. 126, where medical expert, who had made careful examination of body of deceased and surroundings and also of wound and direction of bullet through body, was permitted to give his opinion as to position of deceased at time wound was inflicted, this was harmless error, where defendant admitted killing, and there was no issue on which testimony could operate against him.

Applicability of Rule of Reasonable Doubt to self-defense is homicide. See note, 19 L. R. A. (n. s.) 497.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 656.

94 Cal. 54-56, 29 Pac. 328, WESTERN LUMBER CO. v. PHILLIPS.

Other Defendants Appealing from Judgment foreclosing mechanic's lien cannot object to sufficiency of form of judgment against contractor, who does not appeal, and by which appellants are not prejudiced.

Approved in *People v. Rea*, 2 Cal. App. 111, 83 Pac. 165, where court found that one of two previously elected justices of peace had died, and that other incumbent, who was also made defendant in quo warranto proceedings under County Government Act, was entitled to hold over, upon appeal by ousted defendants, without any appeal by relator, no error relating to judgment for other defendant is reviewable.

94 Cal. 56-59, 28 Am. St. Rep. 91, 29 Pac. 329, GOODRICH v. LATHROP.

Section 3407 of Civil Code Employs Words "same position" with reference to subject matter of contract, and its requirements are fully satisfied if property can be returned in substantially same condition as when he received it.

Approved in *Cox v. Boyden*, 153 N. C. 527, 69 S. E. 506, before purchaser of land can rescind and recover interest on his money, he must account for rents and profits received by him from land, together with interest, under rule that he who seeks equity must do equity; *Smith v. Detroit etc. Gold Min. Co.*, 17 S. D. 423, 97 N. W. 20, agreement for purchase of mining claim cannot be rescinded, after selling price has greatly depreciated, by demonstrating its unproductiveness, as purchaser cannot then restore to seller everything of value which he received.

94 Cal. 59-63, 29 Pac. 242, MERRILL v. FIRST NATIONAL BANK OF SAN DIEGO.

Where, After Accommodation Note had been satisfied by bank to payee, action was brought by bank against apparent maker and payee, in which judgment was recovered against apparent maker, who was, without negligence on his part, ignorant of facts constituting his defense when judgment was rendered against him, he may bring equitable action to obtain relief from judgment by having it declared satisfied as against him.

Approved in *Bacon v. Bacon*, 150 Cal. 487, 491, 89 Pac. 321, 322, power of equity to relieve against judgments is not confined to cases where they have been procured by fraud, but extends also to judgments wrongfully given by reason of mistake either of court or of injured party unmixed with fraud, and not result of negligence of injured party.

Discretion of Appellate Court will be exercised in ordering retrial, rather than to direct judgment for appellant upon findings, where it is not plain from record that party against whom reversal is pronounced cannot finally prevail in suit as result of new trial.

Approved in *Pollitz v. Wickersham*, 150 Cal. 251, 88 Pac. 916, appellate court having affirmed order granting new trial involving question of fact as to validity of plaintiff's claim, it is proper case for granting such new trial rather than to order judgment for plaintiffs, which might work unjust conclusion.

94 Cal. 63-65, 29 Pac. 484, 15 L. R. A. 635, IN RE RICHARDSON.

A Letter from Brother to Sister stating that he wanted to anticipate possibilities, and that she and her children get everything, is not testamentary in character, writer not being in extremis, and there being nothing in surrounding circumstances of writer unmistakably evincing intention that letter alone should be testamentary disposition to parties mentioned.

Approved in *In re Noyes' Estate*, 40 Mont. 242, 106 Pac. 359, letter written by one who had imperfectly executed will, to chief beneficiary, which does not refer directly to any paper whatever, and merely recites portions of will for purpose of conveying information to beneficiary of writer's solicitude in her behalf, and not to ratify any-

thing already done, or to republish will, does not, together with will, constitute valid will.

What Constitutes a Testamentary Writing. See note, 89 Am. St. Rep. 492; 5 Cof. Prob. 16.

Letter as Will. See note, 17 L. R. A. (n. s.) 1126.

94 Cal. 66-68, 29 Pac. 330, OAKS v. OAKS.

After Homestead has Been Declared upon community property by wife, deed of gift of such property from husband to wife vests in her legal title, subject to husband's rights in homestead.

Approved in *Wright v. Wright* (Cal.), 41 Pac. 696, where property purchased with community funds is conveyed to wife by direction of husband, and with intent that it shall become separate property, that conveyance will operate as gift to her.

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 379.

What is Community Property. See note, 126 Am. St. Rep. 105; 4 Cof. Prob. 47, 49.

How Far Proceeds of Exempt Property retain exempt character. See note, 19 L. R. A. 37.

94 Cal. 69-72, 29 Pac. 487, IN RE GROOME.

Where Homestead Claimant Had Received United States patent to land, and it was inventoried as part of his estate, question of adverse ownership of land by partnership of which decedent was member cannot be considered in proceeding by widow in probate court to have property set apart as home for use of herself and child.

Approved in *In re Tuohy's Estate*, 33 Mont. 247, 83 Pac. 491, under code provision requiring petition for sale of land to pay decedent's debts to set forth debts outstanding, description of property with legatees, devisees, and heirs, etc., court cannot, on application for sale of real estate to pay debts, try issues of title to real estate to be held, or of adverse possession, as between executor and devisees.

94 Cal. 73-77, 29 Pac. 485, PEOPLE v. HOWARD.

Act of 1880, to Establish Free Public Libraries by its terms applies only to such libraries as are established under its provisions.

Approved in *Hanford Library Trustees v. Hanford*, 2 Cal. App. 765, 84 Pac. 229, board of library trustees of city of sixth class created under act of March 23, 1901, are not entitled to control construction of public library building from fund donated to city, eo nomine, and not to them as trustees.

94 Cal. 86-89, 29 Pac. 416, GALLIANO v. KILFOY.

Where Plaintiff Obtained Leave to file supplemental complaint, judgment obtained in default thereafter, without additional service of supplemental complaint, is erroneous.

Approved in *Billings v. Palmer*, 2 Cal. App. 433, 83 Pac. 1077, service of amended complaint implies filing thereof, and delivery of copy and acknowledgment of service made day before filing does not become effective until date of filing of pleading.

Question Whether One Name is Idem Sonans with another is not question of spelling.

Approved in *Roland v. State*, 127 Ga. 402, 56 S. E. 413, where defendant was indicted under name of "George Rawlin," and filed plea of misnomer, and that real name was "George Roland," and evidence showed that those who knew him pronounced it "Rolin," plea properly overruled.

Idem Sonans. See note, 100 Am. St. Rep. 331, 341.

Proceedings Against Persons by Less or other than full Christian names. See note, 132 Am. St. Rep. 570.

94 Cal. 89-91, 29 Pac. 420, PEOPLE v. DILWOOD.

In Prosecution of One Conspirator for larceny, evidence of appearance, conduct, and declarations of his co-conspirator in larceny on day subsequent to stealing is inadmissible.

Approved in *People v. Ayhens*, 16 Cal. App. 622, 117 Pac. 790, to be admissible in evidence, declarations of co-conspirator must be made during existence of conspiracy and in furtherance thereof, and not after its consummation; *People v. Stokes*, 5 Cal. App. 213, 89 Pac. 1000, any error in admission of evidence or in any ruling of court, not appearing to affect substantial rights of defendant, must be disregarded.

Distinguished in *People v. Brady* (Cal.), 36 Pac. 950, where defendant, in presence of witness, by arrangement with his partner in crime, agreed that witness should accompany his partner, who should tell witness where stolen property was, and that witness should get it, and turn it over to defendant's partner, statements made to witness by such partner, in defendant's absence, as to where property may be found, are admissible against defendant.

Circumstantial Evidence. See note, 97 Am. St. Rep. 797.

94 Cal. 91-95, 29 Pac. 413, KURTZ v. FORQUER.

Joint and Several Bond, Purporting to be bond both of principals and sureties, but signed by sureties only, is not rendered invalid as against them by omission of principals to sign.

Approved in *Deer Lodge Co. v. United States etc. Guaranty Co.*, 42 Mont. 324, 326, 112 Pac. 1062, 1063, following rule; *Stimson Mills Co. v. Riley* (Cal.), 42 Pac. 1075, where bond is in form joint and several, failure of all parties named in instrument as obligors to sign bond does not render it void.

Effect of Delivery of Bond Unsigned by principal obligor. See note, 12 L. R. A. (n. s.) 1107, 1116, 1120.

Refusal of Trial Court to Strike Out Judgment-roll which had been admitted in evidence cannot be considered upon appeal, where there is nothing in record to show what was judgment-roll admitted.

Approved in *San Francisco Com. Agency v. Hogan Co.*, 6 Cal. App. 409, 92 Pac. 312, where documentary evidence is offered and rejected, so much of contents thereof as is necessary to show that error has been committed must be set forth in bill of exceptions.

94 Cal. 96-105, 28 Am. St. Rep. 94, 29 Pac. 415, FIRST NATIONAL BANK OF SAN DIEGO v. BABCOCK.

One Who Writes His Name upon Back of non-negotiable promissory note to give it credit is guarantor, and is liable prima facie for payment of note upon default of principal, without any previous demand or notice.

Approved in *Tilden v. Goldy Machine Co.*, 9 Cal. App. 10, 98 Pac. 39, following rule.

Liability of Indorser of non-negotiable instrument. See note, 97 Am. St. Rep. 985, 990.

Contract of Guaranty. See note, 105 Am. St. Rep. 507.

Release of Indorser of Note by Failure to enforce liability of maker. See note, 18 L. R. A. (n. s.) 565.

Agreements and Conditions Destroying Negotiability. See note, 125 Am. St. Rep. 207.

94 Cal. 105-108, 29 Pac. 414, RICIOTTO v. CLEMENT.

Claim and Delivery cannot be Had unless defendant is then possessed of property.

Approved in *Runge v. Wilson*, 7 Cal. App. 579, 579, 95 Pac. 179, if, after death of testator, executrix sold property to bona fide purchaser for value, without notice, and sale was confirmed, action of claim and delivery will not lie against such executrix after such sale; *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 29, 77 Pac. 303, where plaintiff alleged that he deposited stock with defendant company to be sold by latter, in consideration of certain agreement, and that defendant violated its agreement, and sold and delivered stock to others, and failed to deliver to plaintiffs or pay value thereof when requested so to do, complaint did not state cause of action in claim and delivery; *Robb v. Dobrinski*, 14 Okl. 570, 78 Pac. 103, action of replevin cannot be maintained against one who is not in actual or constructive possession of property at commencement of action.

Right to Maintain Action to Recover Property in specie against one not in possession. See note, 18 L. R. A. (n. s.) 1265, 1273.

Claim and Delivery is Statutory Remedy provided to enable one to recover possession of personal property wrongfully detained.

Approved in *Liver v. Mills*, 155 Cal. 463, 101 Pac. 300, mere re-taking of property by vendors for default in payment determines only right to possession at that time, and does not, of itself, terminate life of contract, if time is not made of its essence.

94 Cal. 112-120, 29 Pac. 421, PEOPLE v. SMALLING.

Former Jeopardy by Reason of Discharge of jury in prisoner's absence. See note, 44 L. R. A. 697.

94 Cal. 120-128, 28 Am. St. Rep. 99, 29 Pac. 859, CALIFORNIA SOUTHERN HOTEL CO. v. CALLENDER.

Corporation may Maintain Action on contract of subscription against subscriber to its stock to recover calls made in pursuance to terms of contract.

Approved in *Horseshoe Pier etc. Co. v. Sibley*, 157 Cal. 447, 108 Pac. 309, subscriber to stock of corporation may expressly agree to pay amount of his subscription either immediately or in stated payments, and thus relieve corporation of duty of making calls; *Auburn Opera-House etc. Assn. v. Hill (Cal.)*, 32 Pac. 588, where "prospectus" recited that subscriptions were to be called for in installments, etc., and defendant signed prospectus for certain number of shares, and four calls had been ordered, and defendant had refused to pay, plaintiff was entitled to recover.

It is not Essential to Ownership of Stock in corporation that certificate for stock should have been issued to stockholder.

Approved in *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 29, 108 Pac. 873, following rule; *San Francisco Com. Agency v. Miller*, 4 Cal. App. 293, 87 Pac. 631, averment, in action by corporation to recover from stockholders their proportionate share of indebtedness, that certain number of shares were issued is not equivalent to stating that only that number of shares were subscribed; *Cotter v. Butte & R. V. Smelting Co.*, 31 Mont. 133, 77 Pac. 510, where company recognized plaintiff as stockholder, and he was permitted to vote stock at stockholders' meeting, he was estopped to deny delivery of stock to him and acceptance of it.

Finding of Ultimate Fact That Subscriber had "waived" any right he may have had to object to organization of corporation implies that he had knowledge of right waived, and that his waiver was voluntary.

Approved in *Barber v. Vinton*, 82 Vt. 334, 73 Atl. 883, that land owner appeared at subsequent hearing on question of damages, in proceedings for laying out of highways, does not of itself show waiver of notice of hearing on question of necessity.

Liability to Corporations of Subscribers to Stock. See note, 93 Am. St. Rep. 377, 380, 382.

94 Cal. 128-131, 29 Pac. 489, YOUNG v. BRADY.

Evidence to Show Credibility or Bias of Witness. See note, 82 Am. St. Rep. 40.

94 Cal. 131-136, 29 Pac. 417, OERF v. PFLEGING.

After Passage of Act of March 2, 1867, mere adoption by town authorities of official map of town, which showed street laid out through lands in actual possession of private person at date of act, did not affect right of occupant to land so designated as street.

Approved in *Globe v. Slack*, 11 Ariz. 413, 95 Pac. 128, under statute making it duty of probate judge to enter townsite and appoint three commissioners to have survey made to conform as nearly as possible to original plan of town, and plat made thereof, commissioners had no authority to create additional streets.

Distinguished in *Koshland v. Cherry*, 13 Cal. App. 443, 110 Pac. 144, where alley was in use at time town patent was obtained, trust for which town trustees took title thereof was to maintain it throughout its whole length, as public alley.

94 Cal. 141-146, 29 Pac. 866, FIRST NAT. BANK OF SAN DIEGO v. FALKENHAM.

Liability of Indorser of Non-negotiable Instrument. See note, 97 Am. St. Rep. 986.

94 Cal. 146-156, 28 Am. St. Rep. 106, 29 Pac. 624, 15 L. R. A. 813, WHITNEY v. KELLEY.

In Action to Set Aside Judgment for frauds, plaintiff must not only show by complaint fraud giving right to relief, but also that he has defense to original action on merits.

Approved in *Hite v. Mercantile Trust Co.*, 156 Cal. 768, 106 Pac. 104, in action by widow against estate of alleged husband to

set aside, on ground of fraud, agreement between them whereby she released all claims in property, such agreement, until set aside, estops her from any claim to estate, and, if no right to set it aside is shown, an action cannot be maintained by her to vacate judgment which declared her never to have been his wife; *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 747, 91 Pac. 419, where affirmative defense to original action on ground of collusion failed to show facts constituting it, or to show that there was any defense to original action or any ability to supply upon new trial evidence alleged to have been suppressed at former action, no defense is stated.

Grantee Whose Grantor had Been Previously Adjudged not to be owner of land attempted to be conveyed, who is out of possession, and who was not himself party to suit in which judgment was rendered, cannot maintain suit in equity to set aside judgment because of fraud upon his grantor.

Approved in *Ready v. Smith*, 170 Mo. 175, 70 S. W. 487, where director of corporation purchased property of which corporation was equitable mortgagor, and immediately sold at profit, fraud, if any, in such purchase, was against corporation, and not against its creditors, and they were not entitled to impeach same.

Who may Proceed to Set Aside Judgments against other parties. See note, 54 L. R. A. 767.

94 Cal. 156-159, 29 Pac. 773, WILLAMETTE STEAM MILLS CO. v. UNION LUMBER CO.

Under Contract for Sale and Delivery of specified quantity of materials, if less than quantity contracted for is delivered, and vendee accepts and retains the part, he is liable for its value.

Approved in *Hills v. Edmund Peycke Co.*, 14 Cal. App. 35, 110 Pac. 1089, under contract to sell orange crop estimated to contain twenty carloads, more or less, if plaintiffs furnished nine carloads, defendant would be liable for value of such, if he received and accepted them, subject to right of defendant to set up counterclaim for damages, if any, caused by failure to fully comply with contract.

94 Cal. 159-161, 29 Pac. 623, BLAKESLEE v. HALL.

Grant to Particular Person eo Nomine "and to his successor in office as bishop" of particular church, does not pass any estate in land granted to subsequent incumbent of office, unless bishop of church was corporation sole.

Cited in *Kauffman v. Foster*, 3 Cal. App. 746, 747, 86 Pac. 1111, arguendo.

94 Cal. 162-165, 29 Pac. 490, MOSGROVE v. HARRIS.

Sale of Hogs on Ranch in Seller's Occupancy is not accompanied by immediate delivery and actual change of possession, if after sale they are allowed to remain on ranch in charge of same persons having charge of them before sale, though such persons took charge upon request of buyer after sale.

Approved in *Love v. Hill*, 21 Okl. 355, 96 Pac. 626, where H. sold to plaintiff hogs on latter's ranch, and executed bill of sale to plaintiff, which was recorded, which provided that they should be held

by H. until plaintiff ordered them delivered at certain time, within not to exceed fifteen days, such sale was void as against attaching creditors, as there was not immediate delivery and actual change of possession.

Judgment Rendered in Action in Which Service of summons was by publication, and in which defendant's property was attached, is admissible in evidence in subsequent action for claim and delivery of such property, in favor of person claiming same under judgment.

Approved in *Salemonson v. Thompson*, 13 N. D. 194, 101 N. W. 323, judgment against nonresident, where jurisdiction rests only on service by publication, and seizure of debtor's property under writ of attachment, has same conclusive effect, to extent of debtor's interest in property seized, as judgment rendered upon personal service.

Attack by Alleged Fraudulent Grantee on judgment on which action to set aside conveyance based. See note, 67 L. R. A. 591.

94 Cal. 166-179, 29 Pac. 861, 17 L. R. A. 685, WILSON v. CALIFORNIA CENTRAL R. R. CO.

Under Section 2120 of Civil Code, common carrier, in order to reduce his liability to that of warehouseman as to goods that have arrived at place of consignment, and are stored, must notify consignee of their arrival.

Approved in *Reeder v. Wells, Fargo & Co.*, 14 Cal. App. 794, 113 Pac. 344, following rule; *Hardle v. Vicksburg etc. Ry. Co.*, 118 La. 261, 42 So. 795, fact that defendant delivered goods to warehouse, who delivered to wrong consignee in error, and without its authority, does not relieve carrier of all further liability; *Poythress v. Southern Ry. Co.*, 148 N. C. 393, 62 S. E. 516, 18 L. R. A. (n. s.) 427, carrier does not become warehouseman, so as to be relieved from liability as insurer, until he has notified consignee of arrival of goods, and until consignee has had reasonable time to remove them.

When Carrier's Liability is Reduced to that of warehouseman. See note, 97 Am. St. Rep. 92, 94.

When Liability of Railway Carrier of Goods as such ceases. See note, 17 L. R. A. 693, 694.

Reasonable Time for Removal of Goods after which liability of carrier as such terminates. See note, 8 L. R. A. (n. s.) 242.

Where Common Carrier of Goods is Sued on contract of carriage for failure to carry safely, and sets up in defense that goods were destroyed by fire after, while stored in warehouse, without carrier's fault or negligence, burden of proving this defense is on him.

Approved in *Brounton v. Southern Pac. Co.*, 2 Cal. App. 177, 83 Pac. 267, railroad is not negligent in not notifying consignee of arrival, when goods are destroyed, where consignee left town early in morning of day goods were received, and did not return until afternoon of that day, when goods were burning; *Frantz v. Harper* (Cal.), 62 Pac. 603, where action is brought on contract to pay certain tolls, and answer does not deny contract, but alleges that such tolls are illegal, burden of establishing illegality thereof is on defendant; *Farmen v. United States Express Co.*, 25 S. D. 99, 125 N. W. 576, express company claiming exemption from liability for loss of package by fire on ground that it held, not as carrier, but

as warehouseman, has burden, nevertheless, to show that destruction of package was without negligence on its part.

Burden of Proof as to Negligence of Carrier holding as warehouseman. See note, 22 L. R. A. (n. s.) 979, 980.

Notwithstanding Conflict in Evidence, new trial may be granted by lower court on ground that verdict was against evidence on material issue, although judge who heard and determined motion for new trial had not tried case or heard evidence.

Approved in *Austin v. Gagan* (Cal.), 30 Pac. 790, order granting new trial, when evidence is conflicting, will not be reversed because judge who made order was not the one who presided at trial; *Texas etc. Ry. Co. v. Voliva*, 41 Tex. Civ. App. 19, 91 S. W. 355, where special judge is called away after rendition of verdict in cause tried before him, and is unable to return during term to hear motion for new trial made in cause, judge subsequently selected as special judge has authority to hear motion and to grant new trial.

In Determining Motion for New Trial, lower court is not governed by same rule that prevails in appellate court as to conflicting evidence.

Approved in *Scrivani v. Dondero* (Cal.), 44 Pac. 1066, rule that appellate court will not disturb verdict where there is evidence to sustain it does not apply with equal force to trial judge, who saw and heard witnesses, and order granting new trial will not be reversed unless there has been abuse of discretion.

94 Cal. 180-191, 29 Pac. 495, **FRANCISCO v. AGUIRRE.**

In Absence of Statute, Assignee for benefit of creditors cannot maintain action to recover property that has been conveyed by assignor in fraud of his creditors.

Approved in *Babcock v. Maxwell*, 29 Mont. 34, 74 Pac. 66, under code provision that assignee for benefit of creditors is not to be regarded as purchaser for value, and has no greater rights than assignor has, in respect to things in action transferred by assignment, assignee cannot attack previous transfer by assignor as in fraud of creditors.

Distinguished in *Nixon v. Goodwin*, 3 Cal. App. 361, 85 Pac. 171, deed by insolvent foreign mining corporation of all its mining property to creditor who was director, and who resigned for purpose of taking such deed to prefer his debt, with knowledge of its insolvency, and with intent to defraud and delay other creditors of corporation, which had no other property with which to pay them, is void as to such creditors and as to assignee in insolvency.

An Estate Does not "Devolve" from One Person to another as result of some positive act or agreement between them.

Approved in *Babcock v. Maxwell*, 29 Mont. 35, 74 Pac. 66, transfer by debtor of property not accompanied by change of possession is not void as against assignee for benefit of debtor's creditors.

Upon Execution of Bill of Sale, Title to Property Sold, as between parties to instrument, vests in purchaser, although sale was unaccompanied by actual delivery and continued change of possession.

Distinguished in *Runge v. Wilson*, 7 Cal. App. 578, 95 Pac. 179, where grantor died while in possession, and his executrix sold to

bona fide purchaser for value, without notice, and sale was confirmed, claim and delivery will not lie against executrix.

94 Cal. 192-195, 29 Pac. 622, **SCHALLEBT-GANAHL LUMBER CO. v. NEAL.**

Attorneys' Fees Awarded Claimant under section 1195 of Code of Civil Procedure, upon recovery of judgment in action to foreclose mechanic's lien, is incident of judgment.

Approved in *Peckham v. Fox*, 1 Cal. App. 308, 82 Pac. 92, attorneys' fees allowed under section 1195 of Code of Civil Procedure are lien on property foreclosed; *Shaw v. Johnston*, 17 Idaho, 685, 107 Pac. 402, attorneys' fees allowed plaintiff, in mechanic's lien proceeding, are lien upon property.

94 Cal. 195-205, 29 Pac. 491, **MARTIN v. LLOYD.**

Better Practice is for Trial Court to rule upon questions involving admissibility of evidence as they arise, though whether practice of reserved rulings is ground for reversal in any given case must depend upon particular circumstances of case.

Approved in *Preston v. Hirsch*, 5 Cal. App. 488, 90 Pac. 966, where defendant relied upon tax title derived from state, objections to introduction of which were formally stated, and defendant had full opportunity to answer them, and rulings thereon were reserved with consent of both parties, it cannot be held that defendants were prejudiced by final ruling excluding title without stating reasons for such ruling.

In Action to Quiet Title, Plaintiff must show title in himself.

Approved in *House v. Ponce*, 13 Cal. App. 281, 109 Pac. 161, where complaint in action to quiet title alleged ownership and right of possession of lots, and possession by defendant, who took issue on plaintiff's ownership, and set up tax title in himself, acquired from state, burden is upon plaintiff to show title in himself, to overcome the defendant's possession.

Reservation in Grant is to be Interpreted in favor of grantor.

Approved in *Pavkovich v. Southern Pacific R. R. Co.*, 150 Cal. 45, 87 Pac. 1098, deed of land for use of railroad way to stone quarries for purpose and with limitation that rock taken is for railroad purposes, and that grantees are not to carry on business for any other purpose, is to be taken as qualifying estate granted, for benefit of grantors, and as forbidding taking for any other purpose.

Where Language Used is not Absolute, intention of parties must be construed with reference to situation of parties, and character and condition of subject matter of contract.

Approved in *King v. Samuel*, 7 Cal. App. 61, 93 Pac. 393, extrinsic evidence was admissible to show that original sale to grantee was sixty-nine and fifty-three hundredths acres, at twenty-five dollars per acre, on west side of river, that grantee took possession only of such land, and any conflicting evidence as to whether grantee claimed any land on east side of river was to be determined by trial court, which was warranted from evidence in concluding that grantee took no lands east of river.

When General Description is Certain, and particular description uncertain, general description must prevail.

Distinguished in *King v. Samuel*, 7 Cal. App. 60, 93 Pac. 392, where whole patented land included one hundred and eighty-nine and twenty-hundredths acres in sections 27 and 28, deed from patentee, prepared by grantee's counsel, which described whole land by metes and bounds, but limited acreage granted to sixty-nine and fifty-three hundredths acres, and followed general description by clause: "This conveyance intends to convey all the land in sections 27 and 28," such clause cannot be rejected as inconsistent with prior description, but any ambiguity must be resolved against grantee who caused it to exist.

Location of Boundaries. See note, 129 Am. St. Rep. 992.

94 Cal. 205-212, 29 Pac. 633, WILLAMETTE STEAM MILLS CO. v. KREMER.

Where Claim of Lien Stated the Building was at southwest corner of certain streets, upon lot 6, in block 28, and building was at northeast corner, description being correct otherwise, and it not appearing that any other building had been erected by owner at intersection of such streets, description of block identifies lot, and call for "southwest" corner may be rejected.

Approved in *Union Lumber Co. v. Simon*, 150 Cal. 757, 89 Pac. 1079, in notice of claim for mechanic's lien, imperfect attempt to describe land by metes and bounds may be aided and rendered sufficient by further statement in notice that particular person is owner of land and building erected thereon, and that lien is for material furnished specified contractor while he was engaged in constructing building for such owner; *Nofziger Lumber Co. v. Waters*, 10 Cal. App. 91, 101 Pac. 39, where it appeared that only lot owned was lot 18, in block 4, of specified tract, and notices of liens furnished no description of building by general location, but merely misdescribed property as lot 18, in block 5 of same tract, liens are thereby rendered invalid; *Mivelaz v. Johnson*, 124 Ky. 258, 124 Am. St. Rep. 398, 98 S. W. 1021, where statement of claim for lien said, beginning at point six hundred and forty-seven and a half feet south of P street, and thence southwardly twenty-six feet four inches, and property began six hundred and thirty-seven and one-half feet south of P. street, but value of sixteen feet four inches was greater than claim, and also stated name of owner incorrectly, where statute required name of owner, if known, description of property was sufficiently accurate to identify it, and to render claim good; *West Iron Wks. v. Montana Pulp etc.*, 30 Mont. 558, 77 Pac. 416, where building to be charged was easily distinguishable, and known as paper-mill of particular corporation, and no other building of like character existed in town, notice describing it as that certain two-story brick mill building, with general description of certain blocks and certain real estate outside of same, is sufficient.

94 Cal. 212-217, 28 Am. St. Rep. 113, 29 Pac. 494, PEOPLE v. MURRAY.

Where Accused Introduced Evidence upon Motion for new trial, showing that jury had read newspaper articles during trial, tending to influence them, evidence of jurors themselves that reading of articles had not influenced them in any way prejudicial to defendant is admissible.

Approved in *State v. Mortensen*, 27 Utah, 40, 74 Pac. 129, decision of supreme court on appeal from judgment denying motion for new trial based on misconduct of jury is res adjudicata on subsequent application for new trial based on same ground, though affidavits supporting second motion show more in detail misconduct complained of.

94 Cal. 217-224, 28 Am. St. Rep. 115, 29 Pac. 627, SOUTHERN CALIFORNIA LUMBER CO. v. OCEAN BEACH HOTEL CO.

Time Within Which Sale is Directed to be made to satisfy judgment ordering sale upon foreclosure of lien is directory only.

Approved in *Weldon v. Rogers*, 157 Cal. 415, 108 Pac. 268, mere delay in making sale does not operate as abandonment; *Morton v. Reardon*, 67 Kan. 309, 100 Am. St. Rep. 459, 72 Pac. 863, where decree entered in foreclosure suit, ordering real estate to be sold, and sheriff sold property, under execution issued by clerk, six days after return of writ, and sale was confirmed, since it was within power of court to order property sold under special execution at time it was sold, confirmation rendered it valid, being approval of that which, as to time of performance, court had power to order in first instance.

Order Confirming Judicial Sale. See note, 100 Am. St. Rep. 464.

94 Cal. 225-227, 29 Pac. 500, VENZKE v. VENZKE.

Section 130 of Civil Code Only Requires that there shall be some corroborating evidence.

Approved in *Bell v. Bell*, 15 Idaho, 24, 96 Pac. 203, statutory provisions that decree of divorce cannot be granted upon uncorroborated statement, admission or testimony of parties are mandatory, and there must be some other and different corroboration of main facts in issue than such statements, etc., of parties.

Making Charges of Adultery as Ground for Divorce. See note, 18 L. R. A. (n. s.) 307.

94 Cal. 227-229, 28 Am. St. Rep. 121, 29 Pac. 500, ANDERSON v. YOAKUM.

Quitclaim Deed of State Lands, made by party who had merely prepared his application to purchase same from state, passes no interest.

Approved in *Polk v. Sleeper*, 158 Cal. 634, 112 Pac. 181, right of one who has merely filed application to purchase state land and whose application has never been approved and who has received no certificate of purchase or paid any part of purchase price, is purely personal right which does not survive him.

Quitclaim Deeds. See note, 105 Am. St. Rep. 857.

Estate in Public Lands Acquired by Pre-emptor. See note, 92 Am. St. Rep. 47.

94 Cal. 229-241, 29 Pac. 629, WILLAMETTE STEAM MILLS CO v. LOS ANGELES COLLEGE CO.

After Consolidation of Several Actions for foreclosing of different mechanics' liens, under section 1195 of Code of Civil Procedure, actions should be treated as single action by respective plaintiffs against defendants.

Approved in *Nordstrom v. Corona City Water Co.*, 155 Cal. 210, 132 Am. St. Rep. 81, 100 Pac. 244, and *Union Lumber Co. v. Simon*, 150 Cal. 762, 89 Pac. 1081, both following rule; *Coghlan v. Quartararo*, 15 Cal. App. 667, 115 Pac. 666, where in consolidated action one lien claimant averred validity of contract, and other that each contract was void, finding that both contracts were void is conclusive upon all parties to consolidated action.

Where Contract is Wholly Void, Laborer or materialman, in order to perfect his lien, cannot, under section 1187 of Code of Civil Procedure, file his claim therefor until after actual completion of building, or until there has been cessation from labor for thirty days upon unfinished building.

Approved in *Robison v. Mitchel*, 159 Cal. 590, 114 Pac. 988, owner, who, on contractor abandoning work, proceeds therewith as authorized by contract, or without such authorization, must give statutory notice of cessation from labor.

Filing of Claim Before Completion of Building is premature, and confers no right.

Approved in *Schallert-Ganahl Lumber Co. v. Sheldon (Cal.)*, 32 Pac. 236, following rule; *Santa Monica Lumber etc. Co. v. Hege (Cal.)*, 48 Pac. 70, where there was evidence that buildings were, in effect, completed before claim of lien was filed, finding to that effect will not be disturbed, though there was evidence of trifling imperfections remedied after such time; *Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 117, 75 Pac. 153, under mechanic's lien law, providing for filing of subcontractor's lien statements within thirty days "after the completion" of building, filing before such completion is premature; *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 377, 67 N. E. 322, under statutory provision that statement of lien may be filed within thirty days after lienor has ceased to furnish labor or materials on building, where they were furnished under entire contract, contractor was not entitled to file lien before completing work, since until that time there was no debt due or necessarily to become due thereon within statute.

What Constitutes Trivial Imperfection is question of fact.

Approved in *Schindler v. Green*, 149 Cal. 754, 87 Pac. 627, if omission or imperfection is so slight that it cannot be regarded as integral or substantive part of original contract, and other party can be compensated in damages, contractor does not lose his right of action; *Schindler v. Green (Cal. App.)*, 82 Pac. 343, unworkmanlike failure of contractor to place the front windows in basement story of small house directly underneath front windows of upper portion of house does not constitute trivial imperfection; *Lichty v. Houston Lumber Co.*, 39 Colo. 56, 88 Pac. 847, fact that owner accepted building from principal contractor, and that he had completed his contract, does not start statute running as against one who had furnished materials to contractor, where, at time of such acceptance, there had not been placed in building certain grate, mantle and tiling, subsequently placed there by another contractor.

In Absence of Any Statutory Qualifications, "completion" would be construed to mean actual completion, and would be question of fact to be determined in each case.

Approved in *Schallert-Ganahl Lumber Co. v. Sheldon (Cal.)*, 32 Pac. 235, lien filed before doors of house were hung, plumbing fin-

ished, and closets and bathroom are completed, ventilators placed and moldings put in, is premature.

Occupancy or Use Which is Deemed Conclusive Evidence of completion must be determined from facts of case.

Approved in *Farnham v. California etc. Trust Co.*, 8 Cal. App. 269, 96 Pac. 790, occupation of upper part of building by owners before work was half completed, which was not inconsistent with further progress and completion of improvements, could not have effect to start time running for filing of liens.

Under Section 1184 of Code of Civil Procedure, the contract must provide that at least twenty-five per cent of whole contract price shall be payable at least thirty-five days after final completion of contract.

Approved in *Burnett v. Glass*, 154 Cal. 256, 97 Pac. 426, provision in contract reserving only twenty per cent is not compliance with section 1184 of Code of Civil Procedure; *Merced Lumber Co. v. Bruschi*, 152 Cal. 374, 92 Pac. 845, where it was provided that final payment should be at completion of building instead of at least thirty-five days after, a person otherwise entitled to lien does not forfeit his right thereto by payment to him pro rata, with others entitled to liens, of balance due on contract price; *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 715, 118 Pac. 113, where contract for hotel building provided that contractors should be paid seventy-five per cent as work progressed, the balance of twenty-five per cent "of the commissions" for purchasing should be payable thirty-five days after final completion of contract, it is void.

Under Section 1183 of Code of Civil Procedure, failure to file contract or memorandum containing statements and matters required by statute renders contract wholly void for all purposes.

Approved in *Burnett v. Glas*, 154 Cal. 255, 97 Pac. 425, where building contract specifically refers to plans and specifications, same constitute part of contract and must be filed with it, though contract itself does not refer to them as being annexed, but refers to them as being kept in architect's office, or in some other place; *Coghlan v. Quartararo*, 15 Cal. App. 667, 115 Pac. 666, where there were two contracts, one to erect two-story building and other to add third story thereto, each for more than one thousand dollars, and each providing that work should be done according to certain plans and specifications, as to first of which contracts no specifications were signed, and as to second none filed, both contracts were void; *Hartwell v. Ganahl Lumber Co.*, 8 Cal. App. 736, 97 Pac. 902, where contract signed by both parties, filed by owner, with plans and specifications attached signed by contractor only, recited that building was to be erected conformably to plans and specifications attached thereto, which showed on their face that they were made as contemplated by parties, and are ones referred to in contract, identification of them is complete.

Where Building Contract Refers to Plans and specifications, they must be filed in recorder's office.

Reaffirmed in *Burnett v. Glas*, 154 Cal. 255, 97 Pac. 425.

Distinguished in *Howe v. Schmidt*, 151 Cal. 439, 90 Pac. 1057, where contract provides that building shall be conformable to drawings and specifications "hereunto annexed," reference is fully satisfied by

pages of such fastened together and annexed to contract and signed on last page thereof by parties.

Recorded Memorandum of Building only describing building as "three stories high" is insufficient.

Approved in *Blyth v. Torre* (Cal.), 38 Pac. 640, memorandum of building contract in which only description of building is that it is to be a frame building, is defective.

94 Cal. 241-254, 29 Pac. 635, GAGE v. DOWNEY.

Where Decision upon Former Appeal by inadvertence determines two principles of law standing in such opposition to each other as to be incapable of harmonious construction, effect can be given to neither upon subsequent appeal.

Approved in *Dunaway v. Hodge*, 127 Ga. 692, 55 S. E. 484, where court, by inadvertence, prescribes two limits of time within which to pay fine, which are so conflicting as to be irreconcilable, such conflict will render ineffectual attempt to prescribe definite time, and neither provision should be regarded.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 346.

Where No Title Vests Under Probate Sale, and no possession is taken by purchaser under his purchase, limitation prescribed by section 1573 of Code of Civil Procedure does not affect question of title, or confer title upon purchaser, but title still remains in heirs and their grantees.

Approved in dissenting opinion in *O'Keefe v. Behrens*, 73 Kan. 482, 85 Pac. 559, 8 L. R. A. (n. s.) 354, majority holding section 16 of Code of Civil Procedure applies to sales which are void for want of notice to heirs of proceedings upon which deed is based.

94 Cal. 254-255, 29 Pac. 774, EX PARTE HART.

Decree of Divorce for Husband's Offense, where alimony is allowed divorced wife without specifying period during which it is to be paid, will be construed as intending payment during her life or until modified by court.

Approved in *Soule v. Soule*, 4 Cal. App. 106, 87 Pac. 208, decree using term "permanent alimony" does not preclude court from modifying "permanent alimony" awarded.

Contempt Proceedings to Enforce Payment of Alimony. See note, 137 Am. St. Rep. 885.

Whether Alimony Terminates on Death of Husband. See note, 2 L. R. A. (n. s.) 239.

Contempt Proceedings to Compel Payment of Alimony. See note, 24 L. R. A. 439.

94 Cal. 255-260, 29 Pac. 504, PEOPLE v. DIXON.

Practice of Giving in Criminal Prosecutions, at request of prosecution, charge in nature of hypothetical question, embracing practically prosecution's theory of case, and including large portion of evidence, is not to be commended.

Approved in *State v. Buralli*, 27 Nev. 55, 71 Pac. 536, court having charged jury to consider carefully all facts, circumstances and evidence, refusal of instructions singling out, and laying stress upon, particular points in testimony, was not error.

94 Cal. 260-269, 29 Pac. 508, GLASSELL v. COLEMAN.

Sureties Who Guarantee Payment of note or obligation given by purchaser of land on account of purchase money are bound only by obligations they have expressly assumed.

Approved in *Van Valkenburgh v. Oldham*, 12 Cal. App. 578, 108 Pac. 45, though guarantor's liability is limited to terms of agreement, yet this requirement as to maker's guaranty is fully met by testimony of witnesses for plaintiff as to amount advanced thereunder.

Liability of Sureties Who Guarantee Payment of note or obligation given by purchaser cannot, in any contingency, exceed liability of purchaser upon contract guaranteed.

Approved in *Parrish v. Rosebud Min. & Mill. Co. (Cal.)*, 71 Pac. 695, where, pending controversy as to liability of several insurance companies for loss, L. Company paid insured ninety-five per cent of face of its policy, and took bond for repayment in case judgment should be rendered adverse to insured in any of actions against other companies, such bond was guaranty, and no recovery could be had thereon if principal obligation was void for any cause other than personal disability of principal obligor.

94 Cal. 269-284, 29 Pac. 481, 18 L. R. A. 124, KAUFFMAN v. MAIER.

Upon Appeal from Order Granting New Trial, appellate court will review entire record upon which order was based, and if record discloses any error which would have justified trial court in making order, order will be affirmed.

Approved in *Morgan v. Robinson Co.*, 157 Cal. 351, 352, 107 Pac. 697, *Brett v. Frank*, 153 Cal. 270, 94 Pac. 1051, and *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 428, 83 Pac. 439, all following rule; *Higgins v. Los Angeles Gas etc. Co.*, 159 Cal. 655, 115 Pac. 314, where order grants new trial on sole ground that court erred in allowing jury to take certain exhibit with them into their consultation-room, and denies motion as to all other grounds, on appeal from order granting new trial, question of sufficiency of evidence to support verdict is eliminated; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 134, 85 Pac. 153, 5 L. R. A. (n. s.) 1509, specification of particular ground on which new trial was granted, which does not in express terms exclude other grounds, does not limit appellate court upon appeal from order; *Thompson v. Cal. Construction Co.*, 148 Cal. 38, 82 Pac. 369, action of trial court in limiting ground for granting new trial to erroneous instruction does not restrict appellate court in examining record to ascertain any other ground for granting new trial except insufficiency of evidence where it is conflicting; *Hughes Bros. v. Rawhide Gold Min. Co.*, 16 Cal. App. 297, 116 Pac. 971, granting of new trial for insufficiency of evidence is not open to review, if there is any appreciable conflict in evidence; *Bouchard v. Abrahamsen*, 4 Cal. App. 432, 88 Pac. 384, erroneous ground stated in opinion accompanying order that complaint is insufficient cannot justify reversal of order granting new trial, where other sufficient grounds of new trial are stated in motion, and it does not affirmatively appear that order was not supported on such grounds; *Boca etc. R. R. Co. v. Sierra Valleys R. R. Co.*, 2 Cal. App. 551, 84 Pac. 300, upon appeal from order granting new trial of action to condemn two railroad crossings in which only ground specified was error of law in admitting in evidence third amended articles of incorporation of appellant made after filing of

amended complaint, limitation in order does not preclude appellate court from inquiry as to other grounds to support findings, where case does not fall within any exception to rule; *Baldwin v. Napa etc. Wine Co.*, 1 Cal. App. 216, 81 Pac. 1038, where one of grounds of motion for new trial was insufficiency of evidence to justify verdict, motion on that ground was addressed to sound discretion of court, and order granting new trial will not be reversed if no abuse of discretion appears; *Martin v. Markarian & Company*, 1 Cal. App. 689, 82 Pac. 1072, in reviewing order granting new trial, appellate court is not limited to ground expressed by trial judge, but order will be sustained upon any tenable ground assigned; *Warner v. Thomas Parisian etc. Cleaning Works (Cal.)*, 37 Pac. 153, action of court in granting new trial must be affirmed where grounds for granting same are not stated; *Boyd v. Western Union Tel. Co.*, 117 Iowa, 339, 90 N. W. 711, where motion for new trial was based on thirteen separate grounds and sustained by court, with remark, "Of the grounds I consider none of serious importance except the one numbered 13," this does not limit consideration on appeal to ground sustaining it; *Vincent v. Ellis*, 116 Iowa, 618, 80 N. W. 839, supreme court, on appeal from judgment sustaining demurrer to petition, is not limited to reasons given by trial court, but decision below will be affirmed, if petition states no cause of action, even if reasons assigned by trial court are erroneous.

It is Province of Jury to Weigh Evidence and find facts in case, and instruction by court that any particular evidence which has been laid before them is not entitled to receive weight or consideration from them is invasion of such province.

Approved in *Davis v. Hearst*, 160 Cal. 177, 116 Pac. 545, discussing liability of newspaper proprietor for exemplary damages for libel; *Goss v. Steiger Terra Cotta etc. Works*, 148 Cal. 156, 82 Pac. 682, it is not error to refuse requested instruction in language of subdivision 4 of section 2061 of Code of Civil Procedure that evidence of oral admission of party ought to be viewed with caution; *People v. Davenport*, 13 Cal. App. 636, 110 Pac. 319, while instruction that testimony of oral declaration of witness or party is to be received with caution is as to matter of fact, yet it is harmless as stating mere commonplace matter within general knowledge of jury, giving of which is not ground of reversal; *People v. Corey*, 8 Cal. App. 728, 97 Pac. 911, instructions improperly relating to inferences of fact which are matters for jury, in so far as they relate to commonplace matter which jury must be presumed to know about in absence of instructions, are not ground of reversal; *Wood v. Los Angeles Traction Co.*, 1 Cal. App. 477, 82 Pac. 548, where plaintiff called physician who regularly attended her, her failure to summon mere consulting physicians, who saw patient but once or twice, was not such as to warrant requested instruction that where party offers weaker and less satisfactory evidence, where it appears that stronger and more satisfactory evidence was within his power, evidence offered should be viewed with distrust; *State v. Marren*, 17 Idaho, 788, 107 Pac. 1000, where court comments upon or argues relative weight of circumstantial evidence as compared with positive evidence, instruction is erroneous; *State v. Henderson*, 186 Mo. 495, 85 S. W. 583, in prosecution for homicide, where there was evidence of witnesses, almost wholly disinterested, of defendant's confessions of his guilty participation in crime, and

were in no sense casual, but were direct and positive statements, fully corroborated by facts outside his admissions, refusal and failure to give cautionary instruction as to duty of jury in considering evidence of alleged confessions was not cause for reversal.

Distinguished in *Estate of Budan*, 156 Cal. 234, 235, 104 Pac. 444, instruction as to weight of oral statements, though erroneous as abstract proposition, is harmless in absence of anything in record as to testimony of oral statements.

Whether It is More Dangerous for Shaft with rough surface or end to project into room than it would be if shaft were smooth, and as to whether towel could be more safely taken from one than from other, are not proper subjects for expert testimony.

Approved in *Parkin v. Grayson-Owen Co.*, 157 Cal. 45, 106 Pac. 212, in action for damages for injury caused by running away of horses, alleged to have resulted from failure of defendant to properly hitch same while left standing, in violation of city ordinance, it is not permissible for witness for plaintiff to testify as expert that method employed by defendant in hitching horses was not a safe and proper one for tying of horses; *People v. Heacock*, 10 Cal. App. 454, 102 Pac. 545, where evidence tending to connect death of deceased with defendant as criminal cause was wholly circumstantial, it was error to allow physician who had testified as to character and position of wounds, to state his opinion as medical expert that cause of death was not accidental.

Master is Under No Obligation to His Servant to make machinery suitable for purpose not designed.

Approved in *St. Louis etc. R. Co. v. Conway*, 156 Fed. 239, where brakeman was injured by fall from pilot of engine, which was not provided for place to stand safely and was not intended to be so used, and engine was provided with steps with handholds, on which he could have stood, and he passed by such steps in going to pilot, railroad not chargeable with negligence in not equipping pilot with footboard and grab-irons to make it safe place to ride on.

Liability for Injury to Servant in Using Appliance for purpose other than for which primarily intended. See note, 16 L. R. A. (n. s.) 986.

Where Act of Servant had No Connection with service for which he was employed, but was his own voluntary act, done by him for his own convenience, he is not entitled to recover from master for injury received by him as result of such act.

Approved in *Lindquist v. King's Crown Plaster Co.*, 139 Iowa, 113, 117 N. W. 48, boy who leaves work for which he was employed, and in disobedience to foreman's orders goes up ladder to hold belt for one who was mending it, is guilty of contributory negligence, relieving master from any liability because of ladder breaking, entangling him in machinery.

In Action by Servant Against Master for injuries from defective shaft, it is proper, for purpose of showing that master had knowledge of condition of shaft, to allow witness to testify that previous to injury to servant he had informed foreman of condition of shaft.

Approved in *Bundy v. Sierra Lumber Co.*, 149 Cal. 778, 87 Pac. 624, testimony of brakeman as to conversation before accident with agent of defendant, whose duty it was to examine condition of trestle, and report any need of repairs, and in which conversation such agent said

that same was in bad shape, and requested him to ask trestleman to go to work on trestle, was admissible, as part of *res gestae*, to show defendant's knowledge of defective condition of trestle.

94 Cal. 284-291, 28 Am. St. Rep. 122, 29 Pac. 640, MONTGOMERY v. PACIFIC COAST LAND BUREAU.

Purchaser of Land must Take Risk of soundness of advice of counsel upon which he acts.

Approved in *Reed v. Sefton*, 11 Cal. App. 90, 103 Pac. 1097, opinion of attorney is not admissible in determining question whether or not title is marketable; *Buswell v. Kerr*, 112 Minn. 396, 128 N. W. 462, when it appears that all facts upon which opinion of attorney was based are before court, admission of opinion is not necessarily prejudicial error; *Howe v. Coates*, 97 Minn. 400, 114 Am. St. Rep. 723, 107 N. W. 404, 4 L. R. A. (n. s.) 1170, holding adverse opinion of counsel is material fact in determining marketability.

What is a Marketable Title. See note, 132 Am. St. Rep. 1044.

Law of Auction Sales. See note, 131 Am. St. Rep. 496, 498.

94 Cal. 291-297, 29 Pac. 404, HEATHMAN v. HOLMES.

Use of Building Partly, or Even Chiefly, for business purposes, or renting of part of it, does not deprive owner of benefit of his exemption of building as homestead, if building is, and continues to be, bona fide residence of family.

Approved in *Hohn v. Pauly*, 11 Cal. App. 730, 106 Pac. 268, fact that plaintiff used her home, not exceeding one thousand dollars in value, by using same for hotel purposes, will not defeat her homestead claim thereto, it appearing that business, rather than home, was mere incident; *Harlan v. Schulze*, 7 Cal. App. 296, 94 Pac. 382, incidental use by wife of home for purposes of prostitution does not destroy right of homestead; dissenting opinion in *Smith v. Guckenheimer & Sons*, 42 Fla. 49, 27 So. 904, majority holding where building had five stores on lower story, one used by owner and others leased, and residence of owner in second story, whole building was not exempt as homestead.

Abandonment of Homestead. See note, 102 Am. St. Rep. 398.

94 Cal. 297-304, 29 Pac. 505, GOODLETT v. ST. ELMO INVESTMENT CO.

Under Judgment of Trial Court Directing Foreclosure of mortgage, mortgagee could exercise his absolute right to sell mortgaged premises, given thereby, without prejudice to his right to appeal from that part of decree fixing personal liability for deficiency of proceeds of such sale.

Approved in *Robinson v. Muir*, 151 Cal. 125, 90 Pac. 524, on appeal from order denying new trial, in action to quiet title to several pieces of property with respect to which issues are entirely separate, and as to which new trial was properly denied as to some and erroneously as to others, order should be reversed and new trial granted only so far as may be necessary to correct error in order.

Right to Appeal from Unfavorable While Accepting favorable part of decree, judgment, or order. See note, 29 L. R. A. (n. s.) 12.

Miscellaneous.—Cited in *Flagg v. St. Elmo Investment Co. (Cal.)*, 30 Pac. 580, and *Palmer v. St. Elmo Investment Co. (Cal.)*, 29 Pac. 508, both companion cases.

94 Cal. 304-308, 28 Am. St. Rep. 129, 29 Pac. 642, PEOPLE v. NY SAM CHUNG.

Defendant, Charged With and Tried upon Charge of petit larceny, is placed in jeopardy, even though court, believing him guilty of grand larceny, refuses to render judgment, and dismisses action of its own motion, and such trial is bar to subsequent prosecution upon charge of grand larceny involving same facts.

Approved in *People v. Bunkers*, 2 Cal. App. 204, 84 Pac. 368, witnesses on trial for bribery, in violation of Penal Code, section 86, who did not advise or encourage accused to receive bribe, but who assisted in procuring money given to accomplice, were not accomplices; *Gillespie v. State*, 168 Ind. 317, 80 N. E. 836, where accused, having been duly indicted, pleaded not guilty, and jury was drawn, accepted and sworn, after which state moved to set aside submission in order to re-examine juror, which was granted, and upon his removal by peremptory challenge, jury was completed and tried and convicted accused, all over his objection, jeopardy attached from time jury was impaneled and sworn.

Identity of Offenses on Plea of Former Jeopardy. See note, 92 Am. St. Rep. 112, 149, 150.

94 Cal. 308-313, 29 Pac. 647, PEOPLE v. FLEMING.

In Order to Find Defendant Guilty of Assault with intent to commit rape, assault must have been made with intent to perpetrate crime at all events, notwithstanding all possible resistance that could be made by prosecutrix.

Approved in *State v. Neil*, 13 Idaho, 551, 90 Pac. 863, reaffirming rule; *State v. Thompson*, 31 Nev. 216, 101 Pac. 559, 560, under prosecution for grand larceny an attempt to commit crime contains three elements—intent, performance of some act toward its commission, and failure of consummation.

Distinguished in *People v. Babcock*, 160 Cal. 540, 117 Pac. 550, if female is under age of consent, neither force nor violence is essential, nor fact that female offers no resistance, or even expressly consented to all done, to constitute assault with intent to commit rape; *Ross v. State*, 16 Wyo. 301, 93 Pac. 303, assault with intent to commit rape upon female under age of consent is committed though female did not resist or was willing to perform sexual act.

Conviction of Assault With Intent to Commit Rape will be sustained upon evidence of prosecuting witness alone, if sufficient to prove such crime.

Approved in *People v. Moore*, 155 Cal. 241, 100 Pac. 690, rule applying when assault and its brutal and indecent character must be considered established and only question is as to what defendant intended; *People v. Fernandez*, 4 Cal. App. 325, 87 Pac. 1115, rule should be so stated in an instruction as not to charge with respect to matters of fact; *People v. Ah Lung*, 2 Cal. App. 280, 83 Pac. 297, though testimony of prosecutrix be contradictory and corroboration slight, appellate courts will not interfere, unless preponderance of evidence against verdict makes reversal a duty; *Reeves v. Territory*, 2 Okl. Cr. 360, 101 Pac. 1042, in prosecutions for rape, court should not instruct that defendant cannot be convicted unless testimony of prosecutrix is corroborated.

Criminality of Solicitation to Crime not consummated. See note, 25 L. R. A. 434.

94 Cal. 314-316, 29 Pac. 710, SELIGMAN v. ARMANDO.

In Action of Claim and Delivery, where evidence shows that goods were confused and mixed with other goods belonging to defendant, so that they were not distinguishable, it is not necessary that judgment for plaintiff should be in alternative form.

Approved in *Donovan v. Aetna Indemnity Co.*, 10 Cal. App. 728, 729, 103 Pac. 366, 367, where, in action upon replevin bond, it appears that delivery of property cannot be had, judgment for value without alternative is proper.

94 Cal. 317-321, 29 Pac. 643, TREGEE v. OWENS.

Assessment upon Property Within Irrigation District organized under Wright Act, levied under section 37 thereof, is "special assessment" under section 41 of act, which must be previously authorized by vote of electors within district.

Cited in *Decker v. Berry* (Cal.), 35 Pac. 1019, *arguendo*.

94 Cal. 326-332, 29 Pac. 645, MARTIN v. CALIFORNIA CENT. RY. CO.

In Action for Death of Employee while attempting to couple cars, question of negligence is for jury under all evidence in case, even if it appears that deceased knew character, kind and dangerous nature of couplings.

Approved in *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 683, 84 Pac. 260, where plaintiff was injured by accident due to percolation of water through untimbered slate roof in stope used as passageway by miners, timbering of which was not in scope of plaintiff's employment, question as to whether defendants were negligent in failing to support roof, and whether plaintiff was guilty of contributory negligence or had knowledge of danger, were for jury.

Plaintiff has Right to Go to Jury on question whether he was, under circumstances, justified in going on with his work.

Approved in *Hawley v. Los Angeles Creamery Co.*, 16 Cal. App. 53, 116 Pac. 86, where master, through vice-principal, has expressly promised to repair defect, servant can recover for injury caused thereby within such period of time after promise as it would be reasonable to allow for its performance.

If Character of Coupling Used by Defendant was in general use among railroad companies, such use was evidence tending to show ordinary care in selection of coupling, but not conclusive.

Approved in *Atchison etc. Ry. Co. v. Kingscott*, 65 Kan. 136, 69 Pac. 185, in action for injury caused by explosion of oil barrel while being cleaned by compressed air, evidence that care used in inspection is that usually exercised by railway company is not conclusive upon proposition that due care has been used by company; *Wilson v. New York etc. R. R. Co.*, 29 R. I. 166, 69 Atl. 373, while evidence of usage among well-managed railroads is admissible to show due care on part of railroad in maintaining post close to track, it is not conclusive upon question, and witnesses testifying to such usage may be cross-examined as to safety of customary construction shown by their testimony.

Instruction to Effect That Notwithstanding Deceased was engaged in dangerous business, requiring constant watchfulness, still, if he did not always bear this in mind and act thereon, and was thereby injured, he could recover, is erroneous, where there is no evidence showing sudden danger or emergency, and only danger was ever-present one incident to business.

Approved in *Brett v. Frank*, 153 Cal. 274, 94 Pac. 1053, where employee maintained open shaft-hole in floor of tannery, which operated elevator, existence of which was fully known to adult servant, if he in temporary forgetfulness stepped into shaft-hole, such forgetfulness did not raise question of fact for jury; *Southern Pac. Ry. Co. v. Winton*, 27 Tex. Civ. App. 514, 66 S. W. 483, where railroad starts over its road train of cars having coupling appliances so mismatched as to engender brakeman's life, and deceased did not know, or could not learn by ordinary observation, of such danger, risk was not one ordinarily incident to employment, and not one assumed by him.

Contributory Negligence in Entering or remaining in an employment. See note, 49 L. R. A. 45.

Liability of Employer for Injuries to servants owing to want of blocking at switches. See note, 48 L. R. A. 71.

94 Cal. 333-334, 29 Pac. 622, **EX PARTE ABBOTT.**

Section 1205 of Penal Code as Amended in 1891 does not apply to cases of contempt.

Approved in *Ex parte Karlson*, 160 Cal. 380, 117 Pac. 448, court imposing fine for contempt may direct party to be imprisoned until fine is paid at rate of one day's imprisonment for each two dollars of fine.

Disapproved in dissenting opinion in *Ex parte Karlson*, 160 Cal. 387, 117 Pac. 451, majority holding court imposing fine for contempt may direct party to be imprisoned until fine is paid at rate of one day's imprisonment for each two dollars of fine.

94 Cal. 334-340, 29 Pac. 714, **IN RE SCHMIDT.**

Under Section 1465 of Code of Civil Procedure, court must select, designate and set apart homestead to family of deceased, if deceased, has not so set apart one.

Approved in *Estate of Hessler*, 2 Cof. Prob. 359, it is of no consequence that widow is old and will not require homestead for many years, or that she will receive three-fourths of estate upon distribution, but court's duty is to award homestead to her.

Under Section 1468 of Code of Civil Procedure as amended in 1881, court cannot set homestead apart absolutely, but only for limited period.

Approved in *Estate of Leahy*, 3 Cof. Prob. 369, reaffirming rule; *Estate of Hayes*, 1 Cof. Prob. 554, right to have probate homestead set aside does not become estate until decree is made setting aside homestead and title then vests in beneficiaries.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 49.

94 Cal. 341-346, 29 Pac. 712, **MALONE v. ROY.**

Where Evidence Shows That Deed, absolute on face, was intended by both parties as mere security for debt, it is conclusion of law

that instrument was mortgage from fact that at time it was executed it was intended merely as security for debt of defendant.

Reaffirmed in *Malone v. Roy*, 134 Cal. 345, 66 Pac. 313.

94 Cal. 347-351, 29 Pac. 869, MASTICK v. SUPERIOR COURT.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 36, 108.

94 Cal. 352-353, 29 Pac. 719, IN RE WALKERLY.

Appeals in Probate Proceedings can Only be Taken from such judgments or orders as are mentioned in subdivision 3 of section 963 of Code of Civil Procedure.

Approved in *Estate of Wittmeier*, 118 Cal. 256, 50 Pac. 393, where executrix contumaciously disobeyed decree ordering sum of money to be distributed and paid to assignee of legatee, and was adjudged guilty of contempt therefor, appeal taken by her from such order adjudging her guilty of contempt must be dismissed.

In All Cases in Which Superior Court, when sitting as probate court, is authorized to entertain motion for new trial, appeal will lie from its order thereon.

Approved in *Estate of Sutro*, 152 Cal. 257, 92 Pac. 490, motion for new trial is proper in proceedings for partial distribution, and appeal will lie from order denying new trial.

94 Cal. 354-357, 29 Pac. 716, SHERER v. SUPERIOR COURT.

Certiorari Does not Lie Where There is Adequate Remedy by appeal.

Approved in *St. Paul etc. Ry. Co. v. Blakemore*, 17 N. D. 73, 114 N. W. 732, under code, certiorari will not be granted, unless inferior court, officer, board or tribunal has exceeded its jurisdiction, and there is no appeal, nor, in judgment of court, any other plain, speedy and adequate remedy.

Constitutional Provision Limits Exercise of appellate jurisdiction of superior court to extent and mode which legislature may prescribe.

Approved in *Maxson v. Superior Court (Cal.)*, 54 Pac. 521, on appeal from justice court, superior court has no jurisdiction, on reversing, to remand case to justice court, effect of order vacating justice's judgment being to dismiss action without prejudice; *Lansdon v. State Board of Canvassers*, 18 Idaho, 604, 111 Pac. 135, denying certiorari to review action of board of election canvassers.

Upon Certiorari in Supreme Court to review action of superior court in entering judgment in case appealed from justice's court, only acts of superior court done in excess of its jurisdiction can be considered.

Approved in *Chattanooga v. Keith*, 115 Tenn. 589, 94 S. W. 63, where Constitution does not define specific limits of appellate jurisdiction, this may be abridged or extended by legislature as public policy requires, or even in absence of legislative provision, establishment of appellate court by Constitution is implied declaration that some right of appeal exists which cannot be unreasonably restricted by statute law.

Upon Certiorari in Supreme Court to review action of superior court in entering judgment in case appealed from justice's court,

irregularities or errors committed in justice's court will not be examined.

Approved in *Maxson v. Superior Court* (Cal.), 54 Pac. 520, following rule; *Olcese v. Justice's Court*, 156 Cal. 86, 103 Pac. 318, if, on appeal from justice's court, superior court affirms judgment, judgment of superior court estops defendant from proceeding in supreme court to review on certiorari judgment of justice's court.

94 Cal. 357-362, 29 Pac. 774, **McMILLAN v. HAYWARD.**

Purpose of Section 353 of Code of Civil Procedure is to secure to party who has cause of action against decedent one year after appointment of legal representative within which to bring his action, though general limitation may have expired.

Approved in *Miller v. Lewiston Nat. Bank*, 18 Idaho, 143, 108 Pac. 908, following rule.

94 Cal. 362-367, 28 Am. St. Rep. 132, 29 Pac. 717, **STEINHART v. NATIONAL BANK OF D. O. MILLS CO.**

Where Bank Received Note from Payee for collection, and maker, upon presentation, requested that it be charged to his account, and bank, supposing him of good credit, it did so, and marked note canceled, but afterward, on same day, learning that he was insolvent, indorsed upon note "charged in error" and "canceled in error," and procured from postoffice and canceled check drawn in favor of bank through which plaintiffs sent note, transaction did not constitute a payment of note.

Approved in *Interstate Nat. Bank v. Ringo*, 72 Kan. 129, 115 Am. St. Rep. 176, 83 Pac. 124, 3 L. R. A. (n. s.) 1179, if bank holding note for collection surrenders it to maker in exchange for his worthless check on another bank, and upon dishonor of latter immediately regains possession of note, no liability arises against collecting bank in favor of owner of note from facts that upon being orally promised payment by mistake on part of bank on which check is drawn, it gives such owner credit for amount, mails him settlement to that effect, and gives him notice of dishonor of check next day.

Where Creditor Takes Note or Check for antecedent debt, it does not operate to extinguish debt, unless it is received by express agreement as payment.

Approved in *Menzel v. Primm*, 6 Cal. App. 211, 91 Pac. 757, where there was agreement for purchase and working of mine, which was modified by subsequent agreement, and party holding option was paid one thousand dollars in cash on purchase money, and still later, parties further agreed that in lieu of further payment of money then due, that secured note be executed by purchaser and third party, payable sixty days after date, presumption is against secured note having been received as payment of debt.

Right to Stop Payment of Check. See note, 30 L. R. A. 846.

94 Cal. 370-376, 28 Am. St. Rep. 137, 29 Pac. 707, 15 L. R. A. 707, **KRAUSE v. SPIEGEL.**

Where One Maliciously, Without Reasonable Cause, institutes, in court having jurisdiction of matter, criminal proceeding against another, proceeding, when terminated in favor of accused, furnishes basis for action for malicious prosecution.

Approved in *Runk v. San Diego Flume Co.* (Cal.), 43 Pac. 519, complaint against flume company alleging that defendant had plaintiff arrested and imprisoned and tried on charge of interfering with its flume meters without authority, on which charge he was acquitted, and that by reason of these acts he suffered great anxiety and damage in certain sum, sufficiently states cause of action for malicious prosecution.

Lack of Jurisdiction of Court in which malicious prosecution begun as affecting right of action therefor. See note, 2 L. R. A. (n. s.) 1105.

94 Cal. 376-379, 29 Pac. 775, **IN RE HEWITT.**

Gifts to Religious Societies. See note, 5 Cal. Prob. 288.

Enforcement of General Bequest for charity or religion. See note, 14 L. R. A. (n. s.) 92.

94 Cal. 379-387, 29 Pac. 776, **PEOPLE v. LEE YUNE OHONG.**

In Prosecution for Murder, Verdict of guilty must designate degree of crime.

Approved in *People v. Bannister* (Cal.), 34 Pac. 710, under Penal Code, section 1157, jury are not excused from finding degree, though indictment was for burglary, and court instructed that if jury found defendants guilty they could find them guilty of no higher offense than second degree.

Where Jury have Rendered Verdict, and have been discharged and have dispersed after record of their verdict, control of court and jury over verdict is at end.

Approved in *Petitti v. State*, 2 Okl. Cr. 134, 100 Pac. 1123, where jury have returned verdict of not guilty, it is error, after jury have been discharged, for court to recall members of jury and permit them to impeach verdict returned by testifying that they really intended to find defendant guilty.

Correction of Verdict in Criminal Cases. See note, 23 L. R. A. 732, 733.

Question of Jeopardy can Only Arise after issue has been made by plea of once in jeopardy.

Approved in dissenting opinion in *People v. Bennett* (Cal.), 50 Pac. 706, majority holding where, on charge of assault with intent to commit murder, defendant was convicted of assault with deadly weapon, and on new trial he was convicted of higher offense, and obtained motion for new trial on sole ground of jeopardy where people appealed therefrom, and this judgment was reversed because he did not plead former jeopardy, and trial court, on return of remittitur, pronounced judgment on verdict, supreme court could not, on defendant's appeal from such judgment, review its former decision.

94 Cal. 387-393, 29 Pac. 783, **EX PARTE GREEN.**

Municipal Corporation of Fifth Class has power to enforce by imprisonment payment of fine imposed for violation of its municipal ordinance.

Cited in *Territory v. Whitney*, 17 Haw. 182, act authorizing county boards of supervisors to make and to affix penalty for violation of ordinances governing local police authorizes county supervisors but not people of county to make ordinances against gambling, but not to impose imprisonment as penalty.

Municipal Ordinance Providing That Violation thereof shall be punishable by imprisonment and by fine, and that judgment of fine shall direct that in default of payment of fine, or any part thereof, defendant shall be imprisoned until fine is satisfied at rate of one day's imprisonment for each two dollars remaining unpaid, is not unreasonable.

Cited in *In re Johnson*, 6 Cal. App. 738, 93 Pac. 201, when judgment follows terms of ordinance and provides for imprisonment, and fine less than maximum provided for, with alternative of imprisonment for nonpayment of fine, at rate of two dollars per day, it is sufficient for denial of writ of habeas corpus.

Miscellaneous.—Cited in *Ex parte Smith* (Cal.), 29 Pac. 785.

94 Cal. 393-398, 29 Pac. 867, FRITTS v. CAMP.

When One of Purposes of Action is to quiet claim to real estate, action must be originally brought in county where land is situated.

Approved in *Robinson v. Williams*, 12 Cal. App. 519, 107 Pac. 706, action to cancel contract of purchase for nonpayment, and to determine that payments belong to plaintiff, and that defendant has no right, title or interest in land, and that plaintiff is owner and entitled to possession thereof, is action involving determination of right in real property; *Grangers' Bank v. Superior Court* (Cal.), 33 Pac. 1096, granting prohibition to restrain action for real estate outside county, though accounting is also asked as to rents and profits; dissenting opinion in *Miller & Lux v. Kern County Land Co.*, 140 Cal. 139, 140, 73 Pac. 838, majority holding section 5 of article VI of Constitution does not include action to recover for injury to canal, where there is nothing in complaint to indicate that defendant claims any right or title to easement of canal.

Distinguished in *Miller v. Kern County Land Co.* (Cal.), 70 Pac. 184, answer, as well as complaint, may be looked to, to determine whether action is one to quiet title, within Constitution, article VI, section 5.

94 Cal. 399-405, 29 Pac. 785, SAN JOAQUIN LAND ETC. CO. v. WEST.

Liability of Corporations on Contracts of Promoters. See note, 26 L. R. A. 551.

94 Cal. 406-419, 29 Pac. 1101, ESTATE OF CARPENTER.

In Order to Constitute Undue Influence, it must amount to force and coercion, destroying free agency as to very act.

Approved in *Turner v. Gumbert*, 19 Idaho, 349, 114 Pac. 35, from fact that deed was made by parent in favor of child, it will not be presumed that it was unjust or unfair.

Undue Influence Which Invalidates Will. See notes, 1 Cof. Prob. 251; 2 Cof. Prob. 95.

Where Suppression, by Copartner, of testator's letters from his relatives is not one of charges specifically averred, and there is no proof that he received or suppressed them, beyond suspicion that he might have done so, such evidence does not prove fraud exercised by copartner in procuring will in favor of his children.

Approved in *Painter v. Painter* (Cal.), 36 Pac. 868, 869, where, upon death of one partner, business was carried on by other, in suit for

accounting, books showed many errors and erasures, the same method of bookkeeping was pursued, and some irregularities found, both before and after death of deceased, books being kept by same bookkeeper, who testified that he had never made fraudulent entry, evidence did not sustain finding of fraud.

Presumption Against the Destroyer (Spoliator) of evidence. See note, 34 L. R. A. 589.

Subdivision 10 of Section 10 of Code of Civil Procedure excludes evidence respecting mental sanity of person by others than intimate acquaintances.

Approved in *State v. Penna*, 35 Mont. 541, 90 Pac. 789, in prosecution for homicide, two newspaper reporters, whose only acquaintance with defendant consisted of their conversation with him for half hour shortly after homicide, are not "intimate acquaintances" with him who are authorized to testify to their opinion on issue of insanity of accused.

Expert Opinions as to Sanity or Insanity. See note, 39 L. R. A. 316.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 730, 733.

Since **Statutory Rule of Subdivision 10 of section 1870 of Code of Civil Procedure** is more or less indefinite, and large discretion must be conceded to trial court, if conclusion reached is one which can be reasonably entertained consistently with idea of intimacy of acquaintance, appellate court will not review it.

Approved in *Estate of Budan*, 156 Cal. 234, 104 Pac. 443, trained nurse, in attendance on testator every hour of day for three days prior to his death, and who remained with him, during that interval, for periods of from few minutes to hour or more, during which they conversed on different subjects, may become "intimate acquaintance" of testator, within meaning of subdivision 10 of section 1870 of Code of Civil Procedure; *People v. Overacker*, 15 Cal. App. 630, 115 Pac. 759, in receiving evidence as to mental condition of deceased, trial judge has discretion to determine whether witnesses were intimate acquaintances of defendant or not, where no plain abuse of such discretion is shown.

Fact of Testator's Mistaken Belief that relatives had mistreated him does not, as matter of law, amount to insane delusion.

Approved in *Estate of Scott*, 1 Cal. Prob. 326, where there was at least one instance in conduct of husband which might arouse in wife's mind suspicion as to his constancy, fact that her suspicions may have been unjust and her inferences too general is merely error of logic and not evidence of insanity or of insane delusion.

People may Hate Their Relatives for bad reasons, and yet not be deprived of testamentary power.

Approved in *Estate of Riordan*, 13 Cal. App. 319, 109 Pac. 631, if testator had, after divorce granted to wife, who obtained largest part of property, made will disinheriting children who sided with mother, as to residue, it could not be said to be without reason.

Aversion to Relatives as Affecting Mental Capacity to make will. See note, 117 Am. St. Rep. 582.

Where Only Evidence of Testator's Declaration about his sister was that if he knew where she was he would go and visit her, hypothetical question to medical expert on subject of mental sanity,

in which it is assumed that he referred to sister dead thirty years, and not living one, should be disallowed.

Cited in *Yaeger v. Southern Cal. Ry. Co.* (Cal.), 51 Pac. 193, *arguendo*.

What are Insane Delusions. See note, 37 L. R. A. 265, 277.

What is Testamentary Capacity. See note, 27 L. R. A. (n. s.) 80.

Miscellaneous.—Cited in *Estate of Carpenter*, 127 Cal. 583, 60 Pac. 162, reciting history of litigation.

94 Cal. 420-424, 29 Pac. 706, MOULTON v. HARRIS.

Taking of Actual Possession of Land by vendee, with consent of vendor, and making valuable improvements thereon on faith of contract, is sufficient part performance of verbal contract for sale of land to take it out of operation of statute of frauds.

Approved in *Brown v. Town of Sebastopol*, 153 Cal. 709, 96 Pac. 365, 19 L. R. A. (n. s.) 178, where parol contract was made for valuable consideration for land to be used as street, irregularity that contract rested in parol is obviated where contract was fully or partly performed, and town was let into possession of land by grantor, and induced to spend money on faith of contract, and grantor disclaimed title thereto before town trustees, and was relieved from paying taxes thereon.

94 Cal. 425-429, 29 Pac. 954, NEALE v. DEPOT RAILWAY CO.

Right to Recover Damages for Personal Injury, as well as money received, if acquired by wife during coverture is community property.

Approved in *Justis v. Atchison etc. Ry. Co.*, 12 Cal. App. 642, 108 Pac. 329, reaffirming rule; *Henley v. Wilson*, 137 Cal. 277, 70 Pac. 22, 92 Am. St. Rep. 160, 58 L. R. A. 941, husband is liable in damages for assault and battery committed by wife, though not committed in his presence, and though committed without his knowledge or consent.

What is Community Property. See note, 126 Am. St. Rep. 120; 4 *Conf. Prob.* 62.

In Action by Husband and Wife to recover damages for personal injury to wife, judgment may properly be rendered in favor of husband and wife jointly.

Approved in *Gomez v. Scanlan*, 155 Cal. 530, 102 Pac. 13, in action for damages for false imprisonment of married woman, wife is necessary party.

94 Cal. 430-432, 29 Pac. 870, WIDBER v. SUPERIOR COURT.

Writ of Error is New and Original Suit, in which original process is issued, which must be served upon defendants in error, and which can only affect parties or strangers from service of citation.

Approved in *State v. Preston*, 30 Nev. 310, 97 Pac. 389, following rule; *Wingfield v. Neall*, 60 W. Va. 114, 116 Am. St. Rep. 882, 54 S. E. 50, 10 L. R. A. (n. s.) 443, one who purchases subject of litigation between time of entry of final judgment and suing out of writ of error is not purchaser pendente lite.

94 Cal. 435-437, 29 Pac. 871, MURRAY v. COLGAN.

Validity of Statute or Ordinance Authorizing Levy of taxes, incurring indebtedness, or appropriation of money for two or more purposes. See note, 14 L. R. A. (n. s.) 520, 521.

94 Cal. 438-442, 29 Pac. 770, FORSYTHE v. DUNNAGAN.

Where Owners of Land Recorded Map showing streets, and united in deed to county by which they conveyed roads so laid out, upon express consideration that county should accept and use same as public highways, and terms were never accepted or complied with until lapse of ten years after offer had been effectually revoked, dedication to public as highway was not shown.

Approved in *Myers v. Oceanside*, 7 Cal. App. 92, 93 Pac. 688, where evidence showed no express dedication of land claimed as park, and nothing beyond implied offer of dedication by deeds bordering on proposed park, which was revoked by inconsistent acts of private ownership, before any attempted acceptance by city, which made no improvements thereon at any time, findings against dedication are sufficiently supported by evidence.

94 Cal. 465-470, 29 Pac. 771, LANDREGAN v. PEPPIN.

Section 738 of Code of Civil Procedure includes all adverse interests, from claim of title in fee to smallest leasehold.

Approved in *Mossman v. Dole*, 14 Haw. 369, in statutory action to quiet title, judgment may include award of possession, and be enforced by writ of possession.

If One has Adverse Claim which will support issue at law upon which he desires jury trial, he must set out that claim, make that issue, and demand jury trial.

Approved in *Elbing v. Hastings*, 3 Alaska, 133, trial by jury in equity is not demandable by either party as matter of right; *Burleigh v. Hecht*, 22 S. D. 308, 117 N. W. 370, when plaintiff claims to own property, and defendant is in possession, and plaintiff seeks to recover such possession, as well as to determine defendant's adverse claims, action is legal one, and parties are entitled to jury trial; *Kenny v. McKenzie*, 25 S. D. 489, 127 N. W. 599, code provision abolishing all distinctions between actions at law and suits in equity, and providing that there shall be but one form of action to be denominated civil action, does not in any degree abridge or change substantive private rights, whether recognized under system of equity rules formerly administered in chancery courts, or formerly cognizable in courts of law.

Distinguished in *Shields v. Johnson*, 10 Idaho, 482, 79 Pac. 393, where action is brought by party actually in possession for purpose of quieting title to his leasehold estate, under provisions of statute, it is suit in equity, and neither party, as matter of right, is entitled to jury.

Merits of Defendant's Claim of Title cannot be considered upon application for writ of possession.

Approved in *Fox v. Stubenrauch*, 2 Cal. App. 93, 83 Pac. 84, proceeding for writ of assistance does not determine title, but grantee who may have title not adjudicated in action may establish it in independent action.

94 Cal. 470-480, 28 Am. St. Rep. 142, 29 Pac. 873, 18 L. R. A. 221, COWDEN v. PACIFIC COAST S. S. CO.

Under Common Law, Carrier may Carry for favored individuals at unreasonably low rate, or even gratis, law requiring only that he shall not charge any more than is reasonable.

Approved in *Fairford Lumber Co. v. Tombigbee Valley R. R. Co.*, 165 Ala. 285, 51 So. 772, upholding complaint in action to recover for freight overcharge; *State v. Standard Oil Co.*, 218 Mo. 440, 116 S. W. 1039, giving of rebates to customers, pursuant to agreement in restraint of trade to fix and maintain prices of commodity, violates statute prohibiting combinations and agreements to fix and maintain prices and limit trade; *Railroad Commission v. Weld*, 96 Tex. 405, 406, 73 S. W. 531, 532, under statute authorizing action against railroad commission by party dissatisfied with rate made by it, in which such party must show that rate is unreasonable and unjust to him, inquiry is not limited to whether rate is so unreasonable and unjust as to amount to taking of property without due process of law.

Right of Carrier at Common Law to discriminate between passengers or shippers. See note, 18 L. R. A. 105.

Admiralty Jurisdiction Over Contracts. See note, 66 L. R. A. 226.

94 Cal. 481-485, 29 Pac. 1026, **PEOPLE v. BARRY.**

As to Acts Which Constitute Crime of burglary, that is matter left entirely to policy of legislature, within its constitutional powers.

Approved in *State v. Stewart*, 194 Mo. 354, 112 Am. St. Rep. 529, 92 S. W. 881, legislature has power to make criminal and provide for punishment of cohabitation in state founded on bigamous marriage contracted beyond state.

Under Section 459 of Penal Code, offense of burglary is perfect and complete when entry is made with intent to commit larceny.

Approved in *Pinson v. State*, 91 Ark. 440, 121 S. W. 753, one who in night-time enters saloon, through open door during business hours, with intent formed before or at moment he enters to commit felony, is guilty of burglary, though fraud or deception was not practiced on owner in making entry.

In Order to Constitute Burglarious Entry, act of entering must be itself trespass.

Approved in *State v. Mish*, 36 Mont. 170, 122 Am. St. Rep. 343, 92 Pac. 460, under statute providing that person entering building with intent to commit larceny or any felony is guilty of burglary, information must negative idea that defendant at time of entry had right to enter, though ownership of room or building need not be specifically alleged.

Breaking and Entry in Burglary. See note, 139 Am. St. Rep. 1061.

94 Cal. 489-493, 29 Pac. 875, **SAN BERNARDINO ETC. RY. CO. v. HAVEN.**

Elements of Damages Allowable in eminent domain proceedings. See note, 85 Am. St. Rep. 308.

Right to Set Off Benefits Against Damages on condemnation. See note, 9 L. R. A. (n. s.) 829.

94 Cal. 494-497, 29 Pac. 858, **YOST v. BANK OF SANTA ANA.**

Where Certificate Required by Section 2957 of Civil Code to chattel mortgage on part of mortgagee showed in its body that secretary who signed certificate was secretary of bank named therein as

mortgagee, signature of his name with word "secretary" alone appended is not defective.

Approved in *Old Settlers' Investment Co. v. White*, 158 Cal. 247, 110 Pac. 927, following rule; *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 728, 127 Am. St. Rep. 822, 68 Atl. 1081, 16 L. R. A. (n. s.) 703, affidavit of consideration on mortgage, made and recited to be made by vice-president of corporate holder, was affidavit of corporation, and valid without allegation of specific authority.

Effect of Failure to Execute and record chattel mortgages. See note, 137 Am. St. Rep. 485.

94 Cal. 497-502, 29 Pac. 950, PEOPLE v. WALLACE.

Where Complaint Filed Before Magistrate charged defendant with larceny of three steers, property of Wright and Jones, and information charged stealing of two steers, property of Wright, variance is fatal.

Approved in *Republic of Hawaii v. Nenchiro*, 12 Haw. 199, where accused is committed for trial, indictment against him must be for offense charged in complaint upon which he was examined or one included therein, but prosecuting officer is not limited by it in mode of charging offense, but may, so long as he does not proceed against accused for different transaction, put indictment in such form as will enable him to try offense on its merits; *State v. Ham*, 21 S. D. 602, 114 N. W. 715, where information charged stealing of twenty-two head of cattle, all being of value of seven hundred dollars, owned and in possession of Coppersmith and Reid, copartners, evidence that one Comer was also part owner of property constituted fatal variance.

In Indictment or Information for Larceny, where stolen property is not otherwise described so as to identify offense, allegation of ownership is material part of description of offense charged.

Approved in *State v. Rathbone*, 8 Idaho, 173, 67 Pac. 189, information charging larceny of two mares from G. M. B. is sufficient, though proof shows that they were property of G. M. B. and R. L. B.

Order Holding Defendant to Answer must be in writing.

Approved in *People v. Siemsen*, 153 Cal. 390, 95 Pac. 864, order holding defendant to answer upon charge of murder is prerequisite to filing of information against him.

Order in Writing, Holding Defendant to answer upon charge for which information is filed, is, in fact and in law, made when it is entered upon docket of justice.

Approved in *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 479, 107 Pac. 716, order of commitment is not required to be indorsed upon depositions, as condition of authority of district attorney to file information; *People v. Kilvington* (Cal.), 36 Pac. 14, *arguendo*.

94 Cal. 502-509, 29 Pac. 951, BROWN v. PREWETT.

Whether Delay of Party in Presenting Bill of Exceptions is excusable, being question of fact to be determined by judge acting judicially upon evidence submitted, his decision cannot be controlled by mandamus, unless his refusal to act involves abuse of discretion.

Approved in *People v. Blis*, 3 Cal. App. 168, 84 Pac. 678, when defendant, in criminal action, seeks to obtain extension of time within which to have his bill of exceptions settled, he must proceed substantially as directed by statute, and action of judge would be disturbed only where its abuse is made to appear.

Rule of Statute as to Time of Presenting bills of exceptions in criminal cases is directory.

Distinguished in *People v. Blis*, 3 Cal. App. 165, 166, 84 Pac. 676, 677, sections 1171 and 1174 of Penal Code, as amended in 1905, provisions are mandatory.

94 Cal. 509-515, 29 Pac. 953, PEOPLE v. McNAMARA.

Presumption of Innocence Operates until jury arrives at verdict.

Approved in *People v. Davenport*, 13 Cal. App. 638, 110 Pac. 320, following rule; *People v. T. Wah Hing*, 15 Cal. App. 199, 114 Pac. 418, instruction that, after full deliberation of all evidence in case, any one or more of jury should believe that defendant was guilty of crime charged to moral certainty and beyond reasonable doubt, those holding that opinion should vote for guilty and adhere to their opinion until convinced beyond reasonable doubt that they were wrong, was erroneous.

Instructions Argumentative in Form are properly refused.

Approved in *State v. Burali*, 27 Nev. 55, 71 Pac. 536, following rule; *State v. Marren*, 17 Idaho, 788, 107 Pac. 1000, when court comments upon or argues relative weight of circumstantial evidence as compared with positive evidence, instruction is erroneous.

Matter of Re-examination of Prosecuting Witness, of same character and upon same topic as that previously given in direct and cross-examination, is in discretion of court.

Approved in *People v. Rigby*, 11 Cal. App. 276, 104 Pac. 841, upon trial for rape upon young girl, where she had become confused upon cross-examination, it was within discretion of trial court to permit district attorney to permit prosecutrix to be re-examined as to matters testified to by her in chief.

94 Cal. 515-522, 29 Pac. 956, 30 Pac. 106, PENNIE v. BOACH.

Under Present Constitution, Superior Court has jurisdiction both in matters of equity and in matters of probate.

Approved in *In re Burton*, 5 Cal. Prob. 238, superior court sitting in probate has full jurisdiction to hear and determine every matter necessary or proper in proceeding.

94 Cal. 523-526, 29 Pac. 961, IN RE FISCHER.

Chattel Mortgage Executed in Good Faith is not rendered void in toto as against creditors of insolvent mortgagor, because of embracing personal property not subject to chattel mortgage, but if not intended to defraud creditors, is void only as to property not subject to mortgage.

Approved in *Old Settlers' Investment Co. v. White*, 158 Cal. 242, 110 Pac. 925, where chattel mortgage comprised principally furniture and household goods, fact that it also included articles which were not subject to mortgage cannot affect validity of mortgage as to property falling within statute; *Bank of Ukiah v. Gibson* (Cal.), 39 Pac. 1071, act of 1893, amending section 2955 of Civil Code, so as

to authorize mortgages on sheep and cattle does not entitle mortgage on such stock, executed before passage of such act, to be recorded, so as to render its record, made after passage of act, constructive notice.

94 Cal. 526-533, 29 Pac. 962, IN RE ROGERS.

Where Legacy is Given to Person to be paid at future time, it vests immediately.

Approved in Estate of Blake, 157 Cal. 459, 108 Pac. 292, following rule; Harris v. Cook, 98 Mo. App. 43, 71 S. W. 1127, will bequeathing certain sum to legatee when he shall reach age of twenty-six, said sum to be loaned and interest accruing therefrom to be paid him, confers legacy vesting at testator's death, payment merely being postponed until legatee reaches age named.

Vesting of Legacies. See note, 4 Cal. Prob. 450.

94 Cal. 546-550, 29 Pac. 1105, SALFIELD v. SUTTER COUNTY LAND ETC. CO.

Corporation can Confer Authority upon agent to sell its lands only through its board of directors.

Approved in Black v. Harrison Home Co., 155 Cal. 127, 99 Pac. 497, president of corporation has no power merely because he is president to bind it by contract for sale of its real estate under by-law whereby his power in regard to contracts of that character was limited to signing of such contracts as had first been approved by directors.

Distinguished in Stockwell v. Barnum, 7 Cal. App. 418, 94 Pac. 402, where trustee was corporation, which, upon demand for sale, duly advertised sale, under corporate seal, fixing time and place, it might conclude sale by one of its agents generally authorized to conduct sales for it as auctioneer, and no special resolution of directors appointing him as auctioneer is required.

Payment of Part of Purchase Money is not sufficient part performance to authorize specific performance of oral agreement to convey land.

Approved in Cooley v. Miller & Lux, 156 Cal. 514, 105 Pac. 982, where devisee, prior to distribution of estate, grants his interest in estate, decree distributing such interest to devisee, where there is no express issue involving such transfer in probate court, and rights of grantee were never actually considered or passed on, does not divest grantee of his rights in property acquired under grant.

Distinguished in Stewart v. Smith, 6 Cal. App. 161, 91 Pac. 671, where all children, at mother's request, conveyed to her all of their interest in estate of deceased father, including real estate, in consideration of her contract to will all residue of estate at her death to them, such contract is enforceable in equity at suit of surviving children and children of deceased child who were omitted from her will.

94 Cal. 550-557, 29 Pac. 1106, PEOPLE v. MITCHELL.

Upon Trial for Murder Where Witness for defendant testified, without objection, that person who had been tried for same offense, and had been acquitted, told him he killed deceased, and that he got gun from another person, testimony of such other person, in rebuttal, that he did not loan pistol to person acquitted is incompetent.

Approved in *Bollinger v. Bollinger*, 154 Cal. 706, 99 Pac. 201, where witness for respondents, called to prove declarations of appellant and his grantor, gave no affirmative testimony, but denied that he heard any declarations of either, it was error to permit respondents, over objection, to prove independent statements made by such witness to two different witnesses that he heard appellant say that he was holding property in trust for brothers and sisters; dissenting opinion in *Greene v. United States*, 154 Fed. 415, 85 C. C. A. 251, majority not discussing point.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 60, 62.

Right to Impeach One's Own Witness. See note, 21 L. R. A. 423.

94 Cal. 558-562, 29 Pac. 1111, **YANOV v. MORTON.**

Under Contract for Erection of Building, provision that balance of twenty-five per cent shall be paid in thirty-five days after completion, but may be paid at any time between date of completion and such thirty-five days if contractors show receipts and give special bonds that all bills will be paid and that no liens and other claims exist, such payment to be optional with owner, is in substantial compliance with section 1184 of Code of Civil Procedure.

Approved in *Burnett v. Glas*, 154 Cal. 256, 97 Pac. 426, provision in building contract reserving only twenty per cent of contract price for thirty-five days after completion of building is not compliance with section 1184 of Code of Civil Procedure; *Merced Lumber Co. v. Bruschi*, 152 Cal. 375, 92 Pac. 845, provision making whole of contract price due and payable at completion of building is substantial departure from provisions of section 1184 of Code of Civil Procedure; *Stimson Mill Co. v. Riley (Cal.)*, 42 Pac. 1074, fact that building contract, in providing for payments, retains, until thirty-five days after completion, about fifteen dollars less than twenty-five per cent of contract price required by statute, is too trivial.

Failure of Contractor to File in Recorder's Office drawings and specifications, which contract recites are signed and attached thereto, renders contract void.

Reaffirmed in *Lucas v. Rea*, 10 Cal. App. 644, 102 Pac. 823.

Contract for Erection of Building need not contain description of property upon which building is to be erected.

Approved in *Stearns-Roger Co. v. Aztec Co.*, 14 N. M. 321, 93 Pac. 710, following rule; *Dunlop v. Kennedy (Cal.)*, 34 Pac. 96, contract for erecting building, and also for improvements on adjoining lot running "westerly," is not avoided by fact that recorded memorandum of contract erroneously uses word "easterly."

In Action to Foreclosure Lien, original contract being void, where claimants sue for value of materials furnished at special instance and request of owner, it is not necessary that complaint set out original contract or allege its invalidity.

Approved in *Lucas v. Rea*, 10 Cal. App. 644, 102 Pac. 823, where contract is void, plaintiff may set out contract and allege its invalidity and aver direct agreement with owners; *Lucas v. Rea (Cal. App.)*, 101 Pac. 538, materialman furnishing materials to contractor may aver direct agreement with owner if contract between owner and contractor is void; *Lucas v. Gobbi*, 10 Cal. App. 650, 103 Pac. 158, where

building contract is void, it is sufficient to allege in complaint that materials were furnished through contractor as agent of owner.

Owner of Building is Estopped from Setting Up illegality of formation of partnership by two corporations which furnished material for building, in action to foreclose lien therefor, by assignee of partnership.

Approved in *Tutt v. Davis*, 13 Cal. App. 719, 110 Pac. 692, where defendant, as vendor, dealt with partnership, consisting of two partners, one of whom witnessed his signature to contract, defendant cannot question authority of partnership to enter into original contract sought to be specifically enforced; *Lucas v. Gobbi*, 10 Cal. App. 653, 103 Pac. 159, where lien was claimed for materials by partnership setting forth names of both in full, and was assigned by both, and both names appear in complaint besides their partnership name, and partnership is not denied in answers, assignment of their lien is valid without reference to admitted partnership; *Willey v. Crocker-Woolworth Nat. Bank (Cal.)*, 72 Pac. 833, bank receiving deposits from, and doing business with, partnership consisting of individual and corporation, is estopped to deny validity of partnership, when sued by it for deposit.

94 Cal. 564-566, 29 Pac. 1109, NORTON v. WALSH.

Action Instituted by Party on One Side for individual rights, against herself as administratrix of her husband's estate, is irregular.

Approved in *In re Wickersham's Estate (Cal.)*, 70 Pac. 1079, on appeal from order of sale of community property under power in husband's will on ground that wife's interest in property was erroneously included, executors of husband could not represent wife's estate.

94 Cal. 566-568, 29 Pac. 1108, IN RE WOODS.

Upon Appeal from Order Appointing Administrator, undertaking on appeal, under section 941 of Code of Civil Procedure, stays all proceedings upon order appealed from during pendency of appeal.

Approved in *Estate of McGinn*, 3 Cal. Prob. 129, undertaking in double amount of costs, taxed in case where no undertaking is required to stay execution, cannot be enforced.

94 Cal. 568-573, 29 Pac. 1110, McCOY v. SOUTHERN PAC. CO.

Licensee of Lessees of Land cannot Recover from railroad for loss of sheep which strayed upon track through opening in fence, made by lessees for their own convenience.

Approved in *Johnson v. Chicago etc. Ry. Co.*, 96 Minn. 317, 104 N. W. 962, where farm crossing required by statute was intended for benefit of owner of farm through which railroad extends, company is under no obligation to maintain crossing as it extends over track in good condition for general public use.

Private Action for Violation of Statute not expressly conferring it. See note, 9 L. R. A. (n. s.) 349.

94 Cal. 573-575, 29 Pac. 1027, PEOPLE v. PERINI.

Under Section 496 of Penal Code, offense is felony or misdemeanor according to nature of judgment.

Approved in *In re O'Shea*, 11 Cal. App. 574, 105 Pac. 778, where one is imprisoned under section 353a of Penal Code, which makes

offense either felony or misdemeanor, same offense may constitute either, according to judgment rendered.

Assistant Foreman of Warehouse, who has authority to deliver property stored in warehouse upon proper orders presented to him, but who has no authority to sell any of property, is guilty of larceny in selling property.

Approved in *Michaelson v. Fish*, 1 Cal. App. 119, 81 Pac. 662, one employed as general manager in distillery has no lien on manufactured brandy in part product of his labor, and subsequent storage by employer of same in employee's cellar, with latter's consent, does not authorize him to retain possession thereof against employer until wages are paid.

Larceny. See note, 88 Am. St. Rep. 581.

Embezzlement. See note, 87 Am. St. Rep. 33.

Cruel and Unusual Punishments. See note, 35 L. R. A. 577.

94 Cal. 581-587, 29 Pac. 1113, **BEAN v. TRAVELERS' INS. CO.**

What Constitutes Total Disability of Insured. See note, 38 L. R. A. 531.

94 Cal. 588-592, 28 Am. St. Rep. 149, 29 Pac. 1025, **HUDEPOHL v. LIBERTY HILL WATER ETC. CO.**

Sale of Property Under Execution will not be set aside because sold en masse, unless it is made apparent to court that larger sum would have been realized from sale if property had been sold in parcels.

Approved in *Bechtel v. Wier*, 152 Cal. 447, 93 Pac. 77, 15 L. R. A. (n. s.) 459, where decree of foreclosure under note secured by two mortgages, covering separate tracts, one executed by principal debtor and other by surety, directed that land of former should be first sold, and if proceeds were insufficient, then land of latter, and at sale no bids were received for either offered separately, sale en masse is valid; In *re Nichols' Estate* (Cal.), 50 Pac. 1073, proper remedy, where personal property is sold by assignee of insolvent en masse, and would have brought larger price if sold in parcels, is to move court to set aside sale; *Georgeson v. Consumers' Lumber Co.* (Cal.), 31 Pac. 257, where, in proceeding by judgment defendant to set aside sheriff's sale, it appeared that six hundred thousand feet of lumber of execution defendant were sold for seven hundred dollars, and that sale was made in lump for grossly inadequate sum, sale was properly set aside.

94 Cal. 595-601, 30 Pac. 7, **PEOPLE v. HALL.**

Trial Court has Right to Amend imperfect instruction.

Reaffirmed in *People v. Sherman* (Cal.), 32 Pac. 880.

Under Information for Burglary, charging intent to commit grand and petit larceny, prosecution need only prove that defendant entered building with intent to commit grand or petit larceny.

Approved in *People v. Bunkers*, 2 Cal. App. 209, 84 Pac. 370, where defendant was charged conjunctively with asking and receiving bribe and jury found him guilty as charged in indictment, instruction that either asking or receiving bribe would justify verdict of guilty is not erroneous.

Proof of Declarations of Another Person that he committed crime is mere hearsay evidence, and not admissible.

Approved in *People v. Schmitz*, 7 Cal. App. 356, 94 Pac. 414, upon trial for extorting money from witnesses of prosecution, to secure liquor licenses, previously withheld, it was error to allow such witnesses to testify to conversations between them in absence of defendant and his codefendant, as to necessity of employing codefendant, and amount of money to be paid him, and proportion of each.

Admissibility of Confessions or Admissions of third persons in criminal cases. See note, 131 Am. St. Rep. 779, 789.

Admissibility of Dying Declarations. See note, 86 Am. St. Rep. 640, 668; 56 L. R. A. 365, 367, 369, 399. .

94 Cal. 601-636, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, DOUGHERTY v. AUSTIN.

Provision of Section 211 of County Government Act of 1883, as amended in 1887, is void, as it prevents County Government Act from having "uniform operation."

Approved in *Johnson v. Gunn* (Cal. App.), 84 Pac. 371, 373, County Government Act, section 184, subdivision 13, as amended in 1901, in regulating compensation of justices of peace contravenes Constitution, article IV, section 25; dissenting opinion in *Ex parte Fedderwitz* (Cal.), 62 Pac. 942, majority not discussing point.

Order of Supervisors, Allowing County Clerk a deputy at salary of fifty dollars a month, made after election of clerk, is in effect increase of his compensation after election, and void, as in conflict with section 9 of article XI of Constitution.

Approved in *Smith v. Matthews*, 155 Cal. 756, 103 Pac. 201, law increasing compensation of county officer remains in abeyance as to incumbents until beginning of next regular term of office affected by increase; *Hanson v. Underhill*, 12 Cal. App. 547, 107 Pac. 1017, law passed during term of county officer, providing for payment of deputies' expenses from county treasury, is invalid, as attempting to increase compensation of such officer during his term, where law at beginning of his term required him to pay deputies from his salary; *Orange County v. Harris* (Cal.), 32 Pac. 595, Statutes of 1883, page 361, section 164, operates as repeal of that portion of Political Code, section 3770, which gives one-half of certain additional fees collected on delinquent tax lists to collector for preparing list; *State v. Goldthait*, 172 Ind. 224, 87 N. E. 138, under constitutional provision that county officers shall perform such duties as may be directed by law, county assessors being required to search records, maps, returns, etc., of county to discover omitted property, tax ferret contract for such purpose is against public policy.

Distinguished in *Newman v. Lester*, 11 Cal. App. 579, 105 Pac. 786, where statute provides fixed salary for officer, and separate allowance is made for expenses of his office or for certain number of deputies, all payable out of county treasury, increase of such separate allowance for expenses is not violation of section 9 of article XI of Constitution.

Provision of Section 211 of County Government Act of 1883, as amended in 1887, is void, as attempt to delegate to supervisors duty imposed upon it by section 5 of article XI of Constitution.

Distinguished in *Brookings County v. Murphy*, 23 S. D. 318, 121 N. W. 796, statutory provision, that in counties of population of twelve thousand or over, county commissioners may in their discre-

tion allow salary not exceeding fifteen hundred dollars annually to county auditor, is not delegation of legislative power.

Miscellaneous.—Cited in *Burr v. Johnson* (Cal.), 29 Pac. 1100.

94 Cal. 636-641, 30 Pac. 8, HEINLEN v. HEILBRON.

Upon Notice to Dismiss Appeal, Because Notice of appeal was served by mail and was not properly addressed to attorney, where latter's affidavit showed that it was forwarded and was received at his office, affidavit is equivalent to admission of service indorsed by him upon original notice, establishing that there has been personal service upon him of such notice.

Distinguished in *Prefumo v. Russell*, 148 Cal. 454, 455, 83 Pac. 811, 812, acknowledgment by proponent of bill of exceptions by letter of receipt of proposed amendments cannot operate to deprive proponent of extension of time given him by statute in which to deliver bill and amendments to clerk, nor constitute waiver thereof.

94 Cal. 642-650, 30 Pac. 4, DOLLIVER v. DOLLIVER.

Upon Appeal from Judgment Taken from judgment-roll alone, if judgment is supported by findings which are made, failure of court to make findings upon other issues presented by pleadings is not ground for reversal, unless it shall appear that evidence was offered thereon, and that finding thereon from such would countervail findings actually made to such extent as to invalidate judgment.

Approved in *Bailiff v. Powers* (Cal.), 37 Pac. 509, following rule; *Schoonover v. Birnbaum*, 150 Cal. 737, 89 Pac. 1109, on appeal from judgment on judgment-roll alone, judgment will be affirmed if supported by findings actually made, and want of finding on issue will be presumed, in absence of showing to contrary, to be result of failure to offer any evidence in support of such issue; *Reed & Co. v. Harshall*, 12 Cal. App. 701, 108 Pac. 721, alleged error in failing to find upon material issue as to counterclaim of defendant cannot be reviewed in absence of evidence from record; *Downing v. Donegan*, 1 Cal. App. 712, 82 Pac. 1112, in action on note where all other issues are sufficiently covered by findings, omission to find upon equitable defense pleaded in answer will not invalidate judgment for plaintiff where it does not appear by statement or bill of exceptions that evidence was submitted in relation to such issue; *Roberts v. Ball* (Cal.), 38 Pac. 950, failure to find on certain issues raised by pleadings, and making findings outside issues, is harmless error, where findings made on material issues warrant judgment whatever findings on other issues.

Undue Influence Consists in Use, by one in whom confidence is reposed by another, or who holds real or apparent authority over him, of such confidence or authority for purpose of obtaining unfair advantage over him, or in taking grossly unfair advantage of another's necessities or distress.

Approved in *Estate of Welch*, 6 Cal. App. 47, 91 Pac. 337, following rule; *Yordi v. Yordi*, 6 Cal. App. 28, 91 Pac. 352, undue influence will not be presumed in any transaction between husband and wife from mere existence of marital relation, nor will want of consideration of conveyance of wife to husband raise presumption of undue influence from mere fact of marital relation alone.

Relation of Husband and Wife creates personal trust and confidence between them, which precludes either one from obtaining any advan-

tage over other by means of any misrepresentation, concealment, or adverse pressure.

Approved in *Heinrich v. Heinrich*, 2 Cal. App. 484, 84 Pac. 328, husband who fraudulently obtained his wife's money and made purchases of land and personal property therewith, for his own benefit, is involuntary trustee thereof for her benefit by breach of his fiduciary relation to his wife, under Civil Code, sections 158 and 2219.

94 Cal. 653-664, 28 Am. St. Rep. 151, 30 Pac. 1, DE FRIEZE v. QUINT.

If Any Title is Acquired by Grantor after his deed of grant, bargain and sale, through tax deed, such title inures to benefit of grantee alone.

Approved in *Younger v. Moore*, 155 Cal. 773, 103 Pac. 224, where, at time of execution of deed and trust agreement, grantor had only certain undivided interest in land, and trust agreement contained recital of execution of deed whereby she conveyed all her right, title and interest in property, only interest acquired afterward by grantor inures to benefit of grantee, and is held by him subject to trust agreement; *Van Husen v. Omaha etc. Ry. Co.*, 118 Iowa, 377, 92 N. W. 51, parol evidence is not admissible to show that deed by railroad was not intended to convey embankment and right of way on land, there being no ambiguity in deed.

In Order to Set Statute in Motion against owner of land, occupancy thereof must be sufficiently open and notorious to notify ordinarily prudent owner of its existence, and of its hostile character, unless he is otherwise actually notified of these facts.

Approved in *Silva v. Hawn*, 10 Cal. App. 551, 102 Pac. 955, where adverse user of ditch extending across defendant's land for irrigation of plaintiff's land was so open and notorious that defendant and his agent could not have failed to note same, or be put on inquiry as to plaintiff's adverse user of easement or right of way for ditch, they are chargeable with notice thereof; *Millett v. Lagomarsino* (Cal.), 38 Pac. 310, where, in 1873, plaintiff's grantor entered into possession of certain lots, under three years' lease, and retained possession until 1892, receiving deed in 1882 from tax sale purchaser thereof, which was duly recorded, but performing no act to change character of possession, and giving no notice that it was hostile, lot being used by him prior to 1882 as cow pasture, in subordination to owner's title, such possession did not constitute notice to owner of adverse character thereof.

Burden of Proving All Essential Elements of adverse possession, including its hostile character, is upon party relying upon it.

Approved in *Jensen v. Hunter* (Cal.), 41 Pac. 17, title to ditch diverting water from stream on land of plaintiff's decedent cannot be claimed by adverse possession by one who, after using water for three years, acknowledged decedent's title by offering to pay for grant thereof.

Distinguished in *Alper v. Tormey*, 7 Cal. App. 11, 93 Pac. 404, where it appears without question that use of easement was open, notorious, peaceable and continuous, for statutory period, and with knowledge and acquiescence of defendants, but appellant claims that use was permissive and not adverse, and was license exercised in subordination to appellant's ownership, question of support in favor of title by pre-

scription in respondents is one of fact, not depending upon burden of proof, and only question is whether there is any evidence to support findings.

94 Cal. 670-676, 30 Pac. 99, IN RE LADD.

Codicil is Never Construed to Disturb Disposition of will further than is absolutely necessary for purpose of giving effect to codicil.

Approved in Estate of Dominici, 151 Cal. 190, 90 Pac. 452, following rule; Estate of Barclay, 152 Cal. 759, 93 Pac. 1015, where will made absolute disposition of certain property to married daughter of testatrix, and subsequent codicil subjected property so given to trust, of which daughter was beneficiary, so long as she remained wife of her then husband, two documents are to be construed together as devising property absolutely to daughter, subject only to execution of trust.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 95 CALIFORNIA.

95 Cal. 1-17, 29 Am. St. Rep. 85, 30 Pac. 96, CONSOLIDATED NAT. BANK v. PACIFIC COAST S. S. CO.

Acts and Declarations of Agent are incompetent to prove extent of power to bind principal.

Approved in Chicago etc. Ry. Co. v. Chickasha Nat. Bank, 174 Fed. 929, 98 C. C. A. 535, following rule.

95 Cal. 17-34, 30 Pac. 101, ESTATE OF McDEVITT.

General Influence not Brought to bear directly on act of making will is not undue influence.

Approved in Estate of Snowball, 157 Cal. 307, 107 Pac. 601, upholding finding of undue influence; Estate of Higgins, 156 Cal. 262, 263, 104 Pac. 8, 9, and In re Weber, 15 Cal. App. 237, 114 Pac. 602, both holding undue influence not shown.

Undue Influence Which Invalidates Will. See notes, 1 Cof. Prob. 251, 252; 2 Cof. Prob. 95, 96.

Uncle is Under No Obligation, ordinarily, to provide for his nephews, either when living or by will.

Approved in Estate of Dolbeer, 3 Cof. Prob. 246, niece is under no obligation, ordinarily, to provide for uncles or aunts, and failure to name them in will raises no presumption they were forgotten.

Circumstances may be Such That Failure to provide by will for stranger in blood may seem inequitable.

Approved in Estate of Dolbeer, 3 Cof. Prob. 254, upholding bequest to stranger living in family; Estate of Tobin, 3 Cof. Prob. 544, 545, upholding will giving estate to strangers and ignoring relatives.

Will cannot be Set Aside Because Jury think it unjust.

Approved in Estate of Higgins, 156 Cal. 265, 104 Pac. 10, In re Murphy's Estate, 43 Mont. 370, 116 Pac. 1008, and Hunt v. Phillips, 34 Wash. 370, 75 Pac. 972, all following rule; Estate of Harris, 3 Cof. Prob. 10, holding will could not be contested on ground it was foolish, capricious or unjust; Taylor v. McClintock, 87 Ark. 274, 112 S. W. 411, holding stupid error of testator making will unjust could not be held by jury to amount to lack of testamentary capacity; King v. Rowan, 82 Miss. 16, 34 So. 327, holding instruction that jury might

consider "reasonableness or unreasonableness of will" in determining testator's capacity was reversible error.

Caprice of Testator as Invalidating Will. See note, 1 Cof. Prob. 532.

Effect of Unnatural Testamentary Disposition on question of undue influence. See note, 6 L. R. A. (n. s.) 203.

Discretion of Court in Refusing to Dismiss Cause on ground of failure to enter judgment within six months after verdict will not be disturbed on appeal.

Approved in *Rickey Land etc. Co. v. Glader*, 153 Cal. 181, 94 Pac. 769, holding court abused discretion in dismissing cause for failure to enter judgment for six months when findings had been signed and filed; *Robertson v. Wilson*, 59 Fla. 403, 138 Am. St. Rep. 128, 51 So. 849, holding delay in prosecution of suit sufficiently excused when occasioned solely by official negligence.

Distinguished in *Estate of Daly*, 15 Cal. App. 337, 114 Pac. 791, discussing rules governing determination of motion for nonsuit; *Neihans v. Morgan* (Cal.), 45 Pac. 256, motion to dismiss action on ground plaintiff neglected to have judgment entered for more than six months after decision is not proper where neither party is entitled to judgment at time, because findings have not been prepared and approved, or waived.

95 Cal. 39-41, 30 Pac. 202, GREEN v. HEBBARD.

Appeal Lies from Order Denying Motion of one not party of record, to vacate or modify order for writ of possession.

Distinguished in *Title Ins. etc. Co. v. California Dev. Co.*, 159 Cal. 487, 488, 114 Pac. 839, 840, dismissing appeals by intervener, against whom orders were not addressed, from orders authorizing issuance of receiver's certificates.

Mandamus Lies to Compel Court to fix appeal bond necessary to prevent operation of writ of possession on appeal from order granting writ.

Approved in *Gordan v. Graham*, 153 Cal. 299, 95 Pac. 146, holding mandamus lay to compel court to fix appeal bond, on appeal by party in possession from ex parte order for writ of assistance; *Winsor Pottery Works v. Superior Court*, 13 Cal. App. 362, 109 Pac. 844, mandamus lies to compel court to fix stay bond on appeal from order appointing receiver.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 894.

95 Cal. 41-48, 30 Pac. 134, NILES v. EDWARDS.

Order of Supreme Court Modifying Judgment is not rendered nugatory by failure of clerk to enter it on minutes within thirty days.

Approved in *People v. Ruef*, 14 Cal. App. 626, 114 Pac. 51, reaffirming rule; *State v. Baudoin*, 115 La. 777, 40 So. 43, holding defendant could not, after acquiescing during trial in performance of functions of clerk by one not sworn, object that court was not properly organized.

Distinguished in *Ex parte Monckros Von Vetsera*, 7 Cal. App. 139, 93 Pac. 1037, holding court had power to vacate oral order not reduced to writing nor entered on minutes, discharging prisoner on habeas corpus.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 622.

95 Cal. 48-57, 24 Pac. 841, 30 Pac. 132, REDD v. MURRY.

Where Deed Refers to Plat for Description, parol evidence is admissible to identify plat.

Approved in *St. Paul Fire etc. Ins. Co. v. Balfour*, 168 Fed. 216, 93 C. C. A. 498, holding parol evidence admissible to identify insurance policy referred to in memorandum of insurance.

Where Complaint in Quiet Title Suit alleges plaintiff's ownership, and answer denies ownership generally to land described, fact is not thereby admitted that land is correctly described in complaint.

Approved in *Hebden v. Bina*, 17 N. D. 243, 138 Am. St. Rep. 700, 116 N. W. 88, holding defendant's denial of plaintiff's title in quiet title suit not limited to such denials only as are coupled with allegations setting forth origin, nature, and extent of his own claim to property.

95 Cal. 57-63, 30 Pac. 94, 20 L. R. A. 595, VANDERHURST v. DE WITT.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 432.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 1041.

95 Cal. 63-75, 30 Pac. 301, KOPP v. GUNTHER.

Mistake, Fraud, Undue Influence, etc., as ground for relief from voluntary trust. See note, 19 L. R. A. 768.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 801.

95 Cal. 78-87, 30 Pac. 129, BLOOD v. WOODS.

Toll Road Constructed Under Franchise becomes public highway at end of term of franchise.

Approved in *State v. Scott etc. Road Co.*, 207 Mo. 82, 105 S. W. 760, following rule.

Right to Take Tolls Without Franchise. See note, 37 L. R. A. 716.

95 Cal. 92-105, 30 Pac. 380, DIETZ v. MISSION TRANSFER CO.

Phrase "Other Personal Property" Used after list of articles includes only personal property not previously mentioned of same kind and nature.

Approved in *In re Third Ave., Seattle*, 54 Wash. 464, 103 Pac. 808, holding act authorizing assessment for street improvements of "lots, blocks, tracts and parcels of land, or other property" did not authorize assessment on franchise of railway to lay tracks in street.

95 Cal. 105-116, 30 Pac. 197, SANTA CRUZ v. ENRIGHT.

Private Property may be Taken for any use specified in section 1238, Code of Civil Procedure.

Approved in *Northern Light etc. Co. v. Stacher*, 13 Cal. App. 412, 109 Pac. 904, holding riparian rights included by necessary implication in section 1238, Code of Civil Procedure.

Judgment Condemning Waters of Creek for water supply of city upheld.

Distinguished in *Northern Light etc. Co. v. Stacher*, 13 Cal. App. 423, 109 Pac. 901, holding riparian rights subject to condemnation for use of light and power company.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 63.

Acquisition of Water Supply by Eminent Domain. See note, 58 L. R. A. 243.

Power to Condemn Riparian Rights apart from land to which appurtenant. See note, 17 L. R. A. (n. s.) 1007.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 440.

95 Cal. 129-134, 29 Am. St. Rep. 97, 30 Pac. 136, **TATUM v. ROSENTHAL.**

Where Complaint in Action in Nature of creditor's bill does not show on face there are other creditors not joined, objection cannot be raised by general demurrer.

Approved in *Farmer v. Behmer*, 9 Cal. App. 779, 100 Pac. 903, in action to enjoin nuisance, objection that tenant of premises was not joined could not be raised by general demurrer; *Conde v. Dreisam Gold Min. Co.*, 3 Cal. App. 590, 86 Pac. 828, holding in absence of special demurrer no objection could be raised on appeal to joinder of two living mortgagees with administrator of deceased mortgagee in foreclosure of mortgage.

95 Cal. 154-160, 30 Pac. 200, **JATUNN v. SMITH.**

Grants to Central Pacific Railroad in 1862 and 1864 passed title to company as soon as sections were identified by legal survey and definite location of road.

Approved in *Charlton v. Southern Pac. R. Co. (Cal.)*, 33 Pac. 1120, and *Sage v. Rudnick*, 91 Minn. 332, 100 N. W. 107, both following rule.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 715.

95 Cal. 160-170, 27 Pac. 160, 30 Pac. 196, **TYLER v. MAYRE.**

Upon Death of Trustee Under Assignment in trust to secure certain obligations, trust devolves upon administrator of his estate.

Approved in *Kauffman v. Foster*, 3 Cal. App. 745, 86 Pac. 1110, holding investment of trust fund by husband to maintain burial lot presumed to continue and devolved upon his administrator on his death.

Fact That Assignee of Note is One of the beneficiaries does not prevent assignment from creating trust.

Approved in *Estate of Spreckels*, 5 Cal. Prob. 330, holding beneficiary may be trustee.

Plaintiff may be Competent as Witness to establish and enforce trust against personal representatives, even though it incidentally tends to establish contract between plaintiff and deceased during lifetime.

Distinguished in *Delmoe v. Long*, 35 Mont. 150, 88 Pac. 781, holding plaintiff in suit to enforce trust in mining claim against executors of alleged co-owner could not testify as to matters occurring before death of latter, and to declarations of decedent that plaintiff was one of grantees of his patent.

Miscellaneous.—Cited in *Kline v. Gingery*, 25 S. D. 19, 124 N. W. 959, to point that "claim against estate" as used in Probate Code refers to such demands as might have been enforced against decedent in his lifetime by personal action in which only money judgment could be recovered.

95 Cal. 171-184, 30 Pac. 298, 16 L. R. A. 660, **BARNES v. BARNES.**

Filing of Dismissal by Plaintiff does not deprive court of jurisdiction until dismissal is entered by clerk.

Approved in *Truett v. Onderdonk* (Cal.), 50 Pac. 396, following rule; *Wolters v. Rossi* (Cal.), 57 Pac. 76, holding on entry of judgment on order of plaintiff dismissing action before answer seeking affirmative relief had been filed, court lost jurisdiction; *State v. Hines*, 148 Mo. App. 306, 307, 128 S. W. 252, 253, holding where plaintiff had merely filed dismissal, suit was still pending and was available as plea in abatement of second action.

Court has Discretion to Refuse Application for continuance when circumstances cast suspicion on good faith of application.

Approved in *Sheldon v. Landwehr*, 159 Cal. 781, 116 Pac. 45, following rule; *Abrook v. Ellis*, 6 Cal. App. 454, 92 Pac. 397, holding motion for continuance properly denied; *Boehm v. Gibson* (Cal.), 35 Pac. 1015, upholding judgment for defendant rendered in absence of plaintiff's attorney, who had failed to ask continuance and ignored calling of case; *Gulland v. Gulland*, 62 W. Va. 673, 59 S. E. 612, holding continuance in divorce case asked by defendant to procure evidence was improperly refused.

Course of Conduct Which Entails Grievous mental suffering is extreme cruelty justifying divorce.

Approved in *McDonald v. McDonald*, 155 Cal. 668, 669, 670, 672, 102 Pac. 929, 930, 25 L. R. A. (n. s.) 45, holding false and malicious charge of wife against moral character of husband constituted cruelty warranting divorce; *Avery v. Avery*, 148 Cal. 244, 82 Pac. 969, upholding judgment of divorce based on finding of extreme cruelty causing grievous mental suffering; *Ring v. Ring*, 118 Ga. 194, 44 S. E. 866, 62 L. R. A. 878, holding habitual use of morphine, not accompanied by acts of cruelty, was not ground for divorce; *Bartlett v. Bartlett*, 13 Haw. 709, 710, holding false and malicious charges of adultery amounted to extreme cruelty; *Zweig v. Zweig*, 46 Ind. App. 595, 596, 93 N. E. 234, 235, holding conduct of husband in refusing for some years to speak to his wife, or permit her to associate with neighbors, was cruelty warranting divorce; *Kapp v. District Court*, 31 Nev. 453, 103 Pac. 239, holding complaint in divorce sufficiently alleged extreme cruelty.

Making Charges of Adultery as Ground for Divorce. See note, 18 L. R. A. (n. s.) 306, 312.

95 Cal. 184-206, 30 Pac. 213, 16 L. R. A. 646, **ALLEN v. ALLEN.**

When Action on Note Secured by Mortgage of even date upon real property is barred by limitations, remedy on mortgage is also barred.

Approved in *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 199, 106 Pac. 718, holding where note and mortgage on land in this state were executed in foreign state, fact that limitations barred action on note in such state barred remedy on mortgage in this state; *Green v. Thornton*, 8 Cal. App. 165, 166, 96 Pac. 384, 385, holding when mortgage by deed absolute was given before enactment of section 430, Code of Civil Procedure, and debt was barred by limitations, right of redemption was also barred.

Effect of Debt Becoming Barred upon rights and remedies under conveyance absolute on face, intended as mortgage. See note, 11 L. R. A. (n. s.) 826.

When Statute of Limitations will Govern action in another state or country. See note, 48 L. R. A. 637.

Right to Redeem from Mortgage Foreclosure is governed by laws in force in this state at time of redemption though instrument executed in another state.

Approved in *Johnson v. Taylor*, 150 Cal. 207, 119 Am. St. Rep. 181, 88 Pac. 906, 10 L. R. A. (n. s.) 818, discussing effect of change in law prior to execution of tax deed.

Overruled Decisions Declaring Conveyance absolute in form but intended as security did not pass legal title cannot be considered as part of conveyance executed after making of earlier decisions and before they were overruled.

Approved in *Crigler v. Shepler*, 79 Kan. 840, 101 Pac. 621, 23 L. R. A. (n. s.) 500, holding person who was not party nor privy in action could not have vested right in erroneous decision therein; *Falconer v. Simmons*, 51 W. Va. 176, 41 S. E. 195, holding party to action in justice's court had no vested right to writ of certiorari sued out before decision sustaining such practice was overruled.

Change of Decision of State Court as unconstitutional impairment of contract. See note, 5 L. R. A. (n. s.) 860.

95 Cal. 206-220, 30 Pac. 208, **REAY v. BUTLER.**

Finding of Court as to Fact Decided upon weight of evidence will not be reviewed.

Reaffirmed in *Stevenson v. Woodward*, 3 Cal. App. 756, 86 Pac. 990.

Rule that Appellate Court will not Disturb Finding of trial court on conflicting evidence is founded on distinction that trial court is to determine questions of fact, and appellate court questions of law.

Approved in *Whitaker v. California Door Co.*, 7 Cal. App. 758, 95 Pac. 911, rule not affected by fact that trial was before one judge, and motion for new trial was denied by another, who did not hear evidence.

Rule as to Finding on Conflicting Evidence applies though all evidence was written.

Approved in *Crisman v. Lanterman*, 149 Cal. 655, 117 Am. St. Rep. 167, 87 Pac. 92, upholding finding based on agreed statement of facts setting forth merely evidentiary matter from which ultimate fact might be found either way; *Rounthwaite v. Rounthwaite* (Cal.), 68 Pac. 304, holding rule controlled though most of plaintiff's evidence was by depositions; *Meyerink v. Barton* (Cal.), 62 Pac. 506, holding rule controlled when much of evidence raising conflict was in shape of ex parte affidavits and depositions made by citizens of foreign country.

Where Deed is Taken With Knowledge that holder has no title, possession thereunder is not in good faith.

Approved in *Lindt v. Uihlein*, 116 Iowa, 56, 89 N. W. 217, holding deed given in payment for liquors intended to be sold in violation of law was void and gave no color of title.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 786.

95 Cal. 220-224, 30 Pac. 218, SPRING VALLEY WATERWORKS v. DRINKHOUSE.

Section 1254, Code of Civil Procedure, providing party seeking to condemn land may pay fund into court and be authorized to take possession, is valid.

Approved in *County of San Luis Obispo v. Simas*, 1 Cal. App. 181, 81 Pac. 975, and *Heilbron v. Superior Court*, 151 Cal. 275, 90 Pac. 707, both holding court could authorize plaintiff to go into possession upon payment of fund into court, pending appeal by defendant; *Davidson v. Texas etc. Ry. Co.*, 29 Tex. Civ. App. 60, 67 S. W. 1096, upholding similar statute.

Where Erroneous Judgment is Reversed, appellate court, under section 957, Code of Civil Procedure, cannot be compelled to make restitution of property lost by such judgment.

Approved in *Purser v. Cady* (Cal.), 49 Pac. 181, holding in such case, where no order of restitution of property sold on execution was made, purchaser's title was not affected by reversal.

95 Cal. 224-226, 30 Pac. 193, THEILMAN v. SUPERIOR COURT.

Attorneys for Plaintiff in Divorce cannot insist that cause be retained until fees are paid against express wish of client that action be dismissed.

Approved in *Paulson v. Lyson*, 12 N. D. 360, 97 N. W. 535, holding defendant alone could make binding stipulation with plaintiff's attorneys for dismissal of action with prejudice and without costs.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 899.

95 Cal. 227-234, 30 Pac. 378, PEOPLE v. DEVINE.

When Inapplicable Instruction Tends to Mislead Jury, it is ground for reversal.

Approved in *People v. Maughs*, 149 Cal. 261, 86 Pac. 191, reversing judgment of conviction when instruction was given as to right to pursue and kill assailant, though no evidence as to pursuit was introduced; *People v. Cain*, 7 Cal. App. 168, 93 Pac. 1039, holding giving of instruction not pertinent to evidence was harmless error when no prejudice was shown; *People v. Roberts*, 1 Cal. App. 450, 82 Pac. 625, holding instruction not pertinent to evidence was confusing to jury and amounted to reversible error; *Ft. Smith etc. R. R. Co. v. Collins*, 26 Okl. 86, 108 Pac. 552, holding such instruction properly refused.

Remarks and Questions of District Attorney referring to incompetent proposed evidence of similar offenses calculated to prejudice jury are ground for reversal.

Approved in *People v. Herbert*, 138 Cal. 471, 71 Pac. 565, reversing judgment of conviction because of repeated questions by district attorney against ruling of court, calculated to impress jury that defendant had committed other crimes and had changed his name; *State v. Irwin*, 9 Idaho, 44, 71 Pac. 611, 60 L. R. A. 716, holding improper questions of prosecutor repeatedly asked to amount to reversible error.

Rights and Liabilities of Finder of Property. See note, 37 L. R. A. 126.

Larceny. See note, 88 Am. St. Rep. 604.

95 Cal. 234-236, 30 Pac. 384, FOX v. SOUTHERN PACIFIC CO.

Court may Grant Nonsuit After Evidence is all in, where, if motion had been denied and verdict found for plaintiff, it would have been set aside as contrary to evidence.

Approved in Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 624, 91 Pac. 116, holding in action for wrongful death, nonsuit was properly granted at close of evidence, when it clearly appeared deceased was guilty of contributory negligence.

95 Cal. 239-244, 30 Pac. 385, HILL v. VENTURA COUNTY.

In Proceedings upon Petition to lay out public road, fact that bond is approved, though sureties have not justified according to law, is mere irregularity, not affecting validity of proceedings.

Approved in County of Santa Barbara v. Yates, 13 Cal. App. 47, 108 Pac. 727, holding alleged defect in addition to bond to be mere irregularity.

Validity of Proceedings of Board of Supervisors cannot be made to depend upon correctness of its judgment as to whether justification of surety was in accordance with statute.

Approved in State v. Superior Court, 47 Wash. 14, 91 Pac. 242, holding that decision of county commissioners that petition for road had sufficient number of signers could not be collaterally attacked.

95 Cal. 244-248, 30 Pac. 526, DOTY v. O'NEIL.

Where Instructions as a Whole Correctly state law of case, inference is precluded that jury was misled.

Approved in De Witt v. Floriston Pulp etc. Co., 7 Cal. App. 781, 96 Pac. 400, holding instructions as to duty of employer, taken as whole, correctly stated law.

95 Cal. 249-252, 30 Pac. 527, WADDINGHAM v. TUBBS.

Actual Notice of Decision of Court, and action thereon in open court, constitute waiver of written notice of decision to start time for motion for new trial.

Approved in Estate of Keating, 158 Cal. 114, 110 Pac. 111, holding actual notice of order appealed from stated time within which to file with clerk required notice requesting preparation of transcript.

95 Cal. 257-262, 30 Pac. 528, TOWNSEND v. TUFTS.

Complaint to Recover Purchase Money paid on contract of sale, on ground vendor refused to tender deed, must allege payment or tender of deferred installments, and rescission of contract.

Approved in Washington v. Mining & Milling Co., 28 Tex. Civ. App. 434, 67 S. W. 462, holding burden on plaintiffs to show they were ready within stipulated time or had performed such acts, or shown their ability to carry out contract of purchase under option given them, to recover damages for refusal to sell.

95 Cal. 262-267, 29 Am. St. Rep. 111, 30 Pac. 538, BROWN v. O'NEAL.

Where Co-owner of Personal Property, who has not possession thereof, disposes of his interest to third party, immediate delivery is not essential to make sale valid as to creditors.

Reaffirmed in Love v. Schmidt, 26 Okl. 652, 110 Pac. 666.

95 Cal. 272-278, 30 Pac. 535, WOODWARD v. SUPERIOR COURT.

Where Court has Jurisdiction of Subject Matter and parties, it has power to appoint receiver.

Approved in Dahlgren v. Superior Court, 8 Cal. App. 628, 97 Pac. 683, holding appointment of stranger as special administrator instead of daughter of decedent, who petitioned therefor, was within jurisdiction of court and could not be annulled on certiorari; Raine v. Lawlor, 1 Cal. App. 487, 82 Pac. 689, holding prohibition did not lie to prevent court from vacating appointment of special administrator, inadvertently made.

Writ of Prohibition. See note, 111 Am. St. Rep. 953, 956.

Miscellaneous.—Cited in Woodward v. Superior Court (Cal.), 30 Pac. 537, companion case.

95 Cal. 279-301, 30 Pac. 529, SMITH v. WHITTIER.

Written Stipulation, Acted upon by Attorneys to such extent that it would be inequitable not to recognize binding effect, is valid, though not filed with clerk.

Approved in Continental Bldg. etc. Assn. v. Woolf, 12 Cal. App. 729, 108 Pac. 730, upholding oral stipulation made in open court for judgment; Soule v. Soule, 4 Cal. App. 104, 87 Pac. 207, holding oral stipulation between attorneys as to payment of alimony during life was not so agreed upon that it could be enforced; Spencer v. Arlington, 54 Wash. 263, 103 Pac. 31, upholding service of notice on attorney of adverse party to use testimony of witnesses on former trial by dropping through transom of office in evening during his absence.

Distinguished in Danen v. Gazzola, 2 Cal. App. 355, 83 Pac. 457, holding special admission of execution and delivery of deed, made at former trial in ignorance and mistake as to facts, could be withdrawn before second trial.

Verdict of Thirty Thousand Dollars Damages for personal injury held not excessive under circumstances of case.

Approved in Louisville etc. R. R. Co. v. Melton, 127 Ky. 291, 108 S. W. 369, upholding verdict of twenty-two thousand dollars for spinal injuries; Dupuis v. Saginaw Valley Traction Co., 146 Mich. 154, 109 N. W. 414, upholding verdict for thirty thousand dollars damages for personal injury; Clay v. Chicago etc. Ry. Co., 104 Minn. 14, 115 N. W. 955, upholding verdict of thirty-five thousand dollars for injuries resulting in death.

95 Cal. 304-307, 30 Pac. 540, JOHNSON v. SWEENEY.

Where Oral Agreement for Extension of Time to answer or demur is admitted and has been relied on by defendant, judgment by default taken in violation of its terms should be set aside.

Approved in Allmeroth v. Bertram Cady Co., 102 Mo. App. 158, 76 S. W. 701, following rule.

95 Cal. 308-310, 30 Pac. 541, CORKER v. CORKER.

Intent of Grantor as to Delivery of Deed rather than mode of executing it is crucial point.

Approved in Drinkwater v. Hollar, 6 Cal. App. 121, 91 Pac. 666, holding deed delivered to third person and by him delivered to grantee but without consent of grantor was not delivered.

Delivery of Deed to Third Person or record, or delivery for record, by grantor. See note, 54 L. R. A. 875.

95 Cal. 311-316, 30 Pac. 550, AMESTOY v. ELECTRIC RAPID TRANSIT CO.

Assignment of Void Franchise confers no rights.

Approved in *O'Sullivan v. Griffith*, 153 Cal. 507, 95 Pac. 875, holding grant of franchise to be in effect quitclaim deed, and grantee not excused from paying purchase price because grantor had no title.

Railroad Constructed on Street without authority is public nuisance.

Approved in *City Store v. San Jose-Los Gatos etc. Ry. Co.*, 150 Cal. 278, 88 Pac. 977, following rule

Agreement not to Prevent Illegal Laying of railway track in street is void as being agreement not to institute public prosecution.

Approved in *Stanard v. Sampson*, 23 Okl. 32, 99 Pac. 803, holding note given in consideration of agreement to discontinue prosecution for crime was void and could not be satisfied.

Distinguished in *Walterman v. Norwalk*, 145 Wis. 670, 130 N. W. 481, upholding instrument giving village privilege of constructing building in front of certain lots, declaring it to be for grantor, heirs, executors and assigns.

Contracts, Consideration for Which has partly failed or is partly illegal. See note, 117 Am. St. Rep. 524.

Ambiguity in Complaint can Only be Reached by special demurrer.

Approved in *Hunt v. Jones*, 149 Cal. 300, 86 Pac. 688, on appeal from judgment on general demurrer, grounds of special demurrer for uncertainty could not be considered; *Krieger v. Feeny*, 14 Cal. App. 543, 112 Pac. 903, upholding uncertain count in complaint as against general demurrer; *Bank of Anderson v. Home Ins. Co. of N. Y.*, 14 Cal. App. 213, 111 Pac. 508, upholding complaint, as against general demurrer, which alleged certain condition existed because of certain fact, on theory such fact was alleged by necessary implication; *The Union Ice Co. v. Doyle*, 6 Cal. App. 288, 92 Pac. 114, upholding uncertain complaint, but which stated cause of action, as against general demurrer; *Tustin Fruit Assn. v. Earl Fruit Co. (Cal.)*, 53 Pac. 696, uncertain allegation of facts held good as against general demurrer.

95 Cal. 317-323, 29 Am. St. Rep. 115, 30 Pac. 545, LATTIN v. GILLETTE.

Section 339, Code of Civil Procedure, providing action on contract, obligation or liability, not founded upon instrument in writing, must be brought within two years, applies to all actions at law not specifically mentioned in other portions of statute.

Approved in *Smith's Cash Store v. First Nat. Bank*, 149 Cal. 34, 84 Pac. 664, 5 L. R. A. (n.s.) 870, holding action by depositor against bank for damage for refusing to pay check to be on contract not founded on instrument in writing and barred in two years.

Upon Breach of Contract, Limitations begin to run from date of breach.

Approved in *Brackett v. Martens*, 4 Cal. App. 256, 87 Pac. 413, holding limitation began to run against action for breach of warranty of sale of trees from time of sale, and not from time of death of trees; *Steen v. Santa Clara Valley etc. Co.*, 4 Cal. App. 451, 88 Pac. 501, holding application for relief from default in failing to serve notice of intention to move for new trial within ten days properly denied after lapse of six months; *Bancroft v. San Francisco Tool Co. (Cal.)*, 47 Pac. 686, holding cause of action for breach of warranty of pas-

senger elevator accrued when elevator was completed; dissenting opinion in *Gillette v. Tucker*, 67 Ohio St. 136, 137, 93 Am. St. Rep. 639, 65 N. E. 873, majority holding limitations did not begin to run against action against physician for malpractice until his relation to case terminated, though more than a year after act causing injury.

Operation of Statute of Limitations where cause of action for nominal damages subsequently ripens into right to actual damages. See note, 126 Am. St. Rep. 949, 951.

Whether Limitations Commence to Run at time of breach of contract, or at time actual damages sustained. See note, 15 L. R. A. (n. s.) 160.

Liability of Title Abstractor. See note, 12 L. R. A. (n. s.) 455.

Miscellaneous.—Cited in *Wolters v. Thomas* (Cal.), 32 Pac. 567.

95 Cal. 323-328, 30 Pac. 547, DIMMICK v. DIMMICK.

Real Estate Acquired by Purchase During Life of community is presumed to be community property, whether deed be taken in name of either spouse.

Approved in *Mitchell v. Moses*, 16 Cal. App. 598, 117 Pac. 687, *Malstrom v. People's Ditch Co.*, 32 Nev. 260, 107 Pac. 102, *Estate of Schade*, 4 Cal. Prob. 442, and *State v. Langan*, 32 Nev. 181, 105 Pac. 570, all following rule.

Where Money of Wife has Become so Commingled with funds of husband that it is impossible to say it passed into particular tract of land, such land is community property.

Approved in *Title Insurance etc. Co. v. Ingersoll*, 158 Cal. 484, 111 Pac. 364, holding trust in separate funds of wife which could not be traced to particular parcel could still be enforced by personal judgment against husband.

What is Community Property. See notes, 126 Am. St. Rep. 120; 4 Cal. Prob. 62.

Where Deed was Delivered With Intent to vest title in grantee, fact that grantor requested grantee to refrain from recording instrument until after grantor's death is immaterial.

Approved in *Hammond v. McCollough*, 159 Cal. 647, 115 Pac. 219, holding deed from wife to husband, not recorded during his life, and destroyed by her after his death, conveyed title to husband.

Miscellaneous.—Cited in *Dimmick v. Dimmick* (Cal.), 30 Pac. 548, companion case.

95 Cal. 329-334, 30 Pac. 544, GREEN v. COUNTY OF FRESNO.

Section 188, County Government Act, as amended March 16, 1889, fixing fees of constables in counties of twenty-sixth class, is not repugnant to constitutional provision that compensation must be in proportion to duties.

Approved in *Fleckenstein v. Placer County* (Cal.), 37 Pac. 932, upholding act limiting fees of constables.

What Compensation of Officer Should be Deemed in proportion to duties is matter of fact to be determined by legislature, and not by courts.

Approved in *De Merritt v. Weldon*, 154 Cal. 551, 98 Cal. 539, holding city trustees could fix compensation of city officer when so authorized by legislature, and their action could not be reviewed by courts; *Board of Commissioners of Perry Co. v. Lindeman*, 165 Ind. 190, 73

N. E. 914, upholding act of 1903 providing for payment of salaries of officers of county regardless of amount of fees turned in by them.

95 Cal. 334-338, 30 Pac. 542, MERRILL v. MERRILL.

Tender of Purchase Money and Demand for deed under contract for purchase of land are excused as condition for suit to recover purchase money paid, when facts show such tender and demand would have been of no avail.

Approved in *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 233, 90 Pac. 41, holding where agent was guilty of breach of duty in failing to notify principal of money collected, demand before suit was unnecessary.

Miscellaneous.—Cited in *Merrill v. Merrill*, 103 Cal. 289, 35 Pac. 768, on another appeal.

95 Cal. 343-353, 28 Pac. 265, 30 Pac. 549, DIEFENDORFF v. HOPKINS.

Judgment for Defendant for Costs upon findings in his favor in action for conversion is not rendered erroneous by absence of express finding on issue of value and damage.

Approved in *Lewis v. First Nat. Bank*, 46 Or. 188, 78 Pac. 992, holding, in action by one claiming to be assignee of claim, court need not find on question of assignment when it found other facts supporting judgment for defendant.

Where Wife Carries on Separate Business with her own property, which husband refuses to have anything to do with, proceeds of such business are her separate estate.

Approved in *Estate of Pepper*, 158 Cal. 624, 112 Pac. 64, holding proceeds of nursery business conducted on separate land of husband were "issues and profits" and separate property of husband.

What is Community Property. See notes, 126 Am. St. Rep. 101; 4 Cof. Prob. 43.

95 Cal. 353-359, 30 Pac. 555, KLAUBER v. SAN DIEGO STREET-CAR CO.

Interference Injunction Sued Out by Third Person will not excuse performance of contract.

Approved in *Union etc. Co. v. Campbell*, 2 Cal. App. 535, 84 Pac. 305, following rule; *Carlson v. Sheehan*, 157 Cal. 697, 109 Pac. 30, holding performance of building contract not excused by reason of landslide on property when danger of such was apparent at time of making contract.

Miscellaneous.—Cited in *Klauber v. San Diego St. Car Co.*, 98 Cal. 106, 32 Pac. 876, on another appeal.

95 Cal. 364-369, 30 Pac. 551, WALL v. HEALD.

Written Notice of Overruling Demurrer is waived by presence in court of attorney of demurring party, and time to amend runs from time of such actual notice.

Approved in *Estate of Keating*, 158 Cal. 114, 110 Pac. 111, where party had actual notice of order appealed from and failed within ten days thereafter to file request for preparation of transcript as required, he lost right to appeal; *Bell v. Thompson*, 8 Cal. App. 486, 97 Pac. 159, holding written notice of filing of cost bill waived by actual notice thereof and appeal from judgment which was solely for costs.

95 Cal. 374-378, 30 Pac. 561, EX PARTE GORDAN.

Jurisdiction of Superior Court to Order provision for minors in divorce action does not depend upon specific allegations of pleadings as to unfitness or unwillingness of parties to care for children, nor upon any prayer for custody.

Approved in *Van Horn v. Van Horn*, 5 Cal. App. 721, 91 Pac. 261, holding court had discretion to award custody of minor to father when mother was guilty of adultery.

Wife may Forfeit Her Own Claim to be supported by husband, but cannot forfeit claims of their children for such support.

Reaffirmed in *Evans v. Evans*, 154 Cal. 646, 98 Pac. 1045.

Party Ordered to Pay Alimony and found to have ability may be imprisoned until he pays.

Approved in *Cline v. Langan*, 31 Nev. 244, 101 Pac. 554, holding court could not punish as contempt violation of void order by referees; *Lutz v. District Court*, 29 Nev. 153, 86 Pac. 445, holding court had no jurisdiction to order imprisonment for contempt when affidavit for order did not allege defendant's ability to pay.

Contempt Proceedings to Enforce Payment of Alimony. See note, 137 Am. St. Rep. 878.

95 Cal. 378-385, 30 Pac. 562, CITY OF SANTA BARBARA v. EL-DRED.

Where Cause is Tried by Police Court, which has no jurisdiction, and is appealed to superior court, which has jurisdiction of such matters, such court acquires original jurisdiction by proceeding to trial of issues without objection to its jurisdiction as appellate.

Approved in *Groom v. Bangs*, 153 Cal. 459, 96 Pac. 505, holding where original complaint was by husband and wife for injury to wife, and new complaint was filed by husband alone, and defendant demurred to new pleading without objection, irregularity in procedure was waived; *Riverside Heights etc. Co. v. Trust Co.*, 148 Cal. 469, 83 Pac. 1008, holding objection to jurisdiction waived when court had jurisdiction of subject matter, and parties appeared and stipulated to submission of particular question arising on cross-complaint; *Johnson v. Erickson*, 14 N. D. 417, 105 N. W. 1105, where justice of peace dismissed case, instead of certifying it as required by statute, and plaintiff appealed generally from judgment, district court had jurisdiction to try action.

Distinguished in *Lane v. Superior Court*, 5 Cal. App. 765, 91 Pac. 406, holding superior court acquired no jurisdiction of appeal from justice's court when sureties on appeal bond failed to justify when required to do so.

Special Law Applicable to Certain City only excepts city from general law on same subject, and when special law is repealed, operation of general law is resumed.

Approved in *Tilden v. Esmeralda Co.*, 32 Nev. 325, 107 Pac. 882, holding act of March 15, 1905, fixing salary of district attorney in certain county, suspended as to such county general law authorizing fees in addition to salary.

95 Cal. 390-397, 30 Pac. 564, REBMAN v. SAN GABRIEL VALLEY LAND ETC. CO.

Contract in Writing is Essential Basis for mechanic's lien under section 1183, Code of Civil Procedure.

Approved in Louisiana etc. *Lumber Co. v. O'Connell*, 87 Mo. App. 676, holding written contract between contractor and owner necessary as foundation of lien of subcontractor.

95 Cal. 397-408, 30 Pac. 568, IN RE LAMB.

Where Husband Before Marriage Applies for homestead, legal title acquired after marriage is his separate estate.

Reaffirmed in *Estate of Pepper*, 158 Cal. 623, 112 Pac. 64.

What is Community Property. See notes, 126 Am. St. Rep. 102, 107; 4 Cof. Prob. 44, 49.

Husband may by Deed Executed by himself alone convey his title to homestead property to wife, subject to homestead.

Approved in *Loomis v. Loomis*, 148 Cal. 152, 82 Pac. 680, 1 L. R. A. (n. s.) 312, holding husband could not affect wife's right of survivorship in homestead by conveying it to her upon promise that after she was through with it it should be given to her brother; *Wright v. Wright* (Cal.), 41 Pac. 696, holding conveyance to wife at direction of husband of property purchased with community funds with intent it should be her separate property operated as gift to her.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 924, 925.

Effect of Conveyance by Husband to Wife. See note, 69 L. R. A. 379.

When Statute Speaks of Selection of homestead "from separate property of person selecting or joining in selection," it refers to status of property at time of selection.

Approved in *Pryal v. Pryal* (Cal.), 71 Pac. 804, holding deed by husband to wife did not destroy his right to homestead selected from community property.

On Appeal from Decision Made before bill of exceptions was settled, court can allow amendment to bill by inserting specifications of particulars in which it is claimed findings and decree are not supported by evidence.

Approved in *Merced Bank v. Price*, 152 Cal. 699, 93 Pac. 867, and *Clark v. Rauer*, 2 Cal. App. 260, 83 Pac. 292, both following rule.

Abandonment of Homestead. See note, 102 Am. St. Rep. 395.

What Constitutes a "Family" Under Homestead and exemption laws. See note, 4 L. R. A. (n. s.) 367, 390.

Miscellaneous.—Cited in *Mendocino County v. Peters*, 2 Cal. App. 27, 82 Pac. 1123, to point that bill of exceptions authenticated by trial court cannot be altered by appellate court.

95 Cal. 420-425, 30 Pac. 523, LOS ANGELES CEMETERY ASSN. v. LOS ANGELES.

Example of Dedication of Land for city street by corporation.

Approved in *People v. Eel River etc. Co.* (Cal.), 33 Pac. 729, holding dedication by railway corporation of portion of its land for a public road was not ultra vires.

Miscellaneous.—Cited in *Los Angeles Cemetery Assn. v. City of Los Angeles* (Cal.), 32 Pac. 241, on another appeal.

95 Cal. 425-430, 30 Pac. 581, **PEOPLE v. VINCENT.**

Under Section 226, Code of Civil Procedure, court may at any time direct sheriff to summon jurors from body of county, though there are names of properly selected regular jurors in jury-box.

Approved in *Elias v. Territory*, 9 Ariz. 8, 76 Pac. 608, holding court could order special venire when of opinion sufficient number of jurors were not present.

In Murder Case, Instruction That Evidence of drunkenness can only be considered for purpose of determining degree of crime is correct.

Approved in *People v. Hower*, 151 Cal. 645, 647, 648, 91 Pac. 509, 510, 511, holding instruction, on trial for assault with deadly weapon, that defendant should be acquitted if he had arrived at such advanced stage of intemperance he was unable to distinguish right from wrong was too favorable to defendant; *State v. Johnny*, 29 Nev. 223, 87 Pac. 9, approving similar instruction.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 475.

95 Cal. 430-435, 29 Am. St. Rep. 124, 30 Pac. 566, **FLEMING v. FLEMING.**

What Acts Constitute Extreme Cruelty warranting divorce depend upon peculiar circumstances of each case.

Approved in *Kapp v. District Court*, 31 Nev. 453, 103 Pac. 239, holding complaint in divorce charged extreme cruelty.

Bringing Another Woman into Home as cruel and inhuman treatment. See note, 2 L. R. A. (n. s.) 670.

95 Cal. 435-441, 29 Am. St. Rep. 128, 30 Pac. 583, **MORE v. CALKINS.**

Instrument Considered and Held to be trust deed.

Approved in *Younger v. Moore*, 155 Cal. 772, 103 Pac. 224, holding deed of trust executed for sole purpose of securing grantor's debt and giving trustee power to sell to pay debt, valid as trust deed.

Distinguished in *In re Jersey Island Packing Co.*, 138 Fed. 626, 71 C. C. A. 75, 2 L. R. A. (n. s.) 560, holding trust deeds to secure debts not then due were not absolute conveyances, but interest of trustor passed to trustee in bankruptcy.

Promise to Pay Certain Sum to trustee besides his debts held to be without consideration.

Distinguished in *Baldwin v. Hart*, 136 Cal. 230, 68 Pac. 701, holding finding that note was not supported by consideration not supported by evidence.

Construction Placed on Deed of Trust in former decision is law of case on later appeal.

Approved in *Adams v. Thornton*, 5 Cal. App. 457, 90 Pac. 714, holding decision on former appeal that lease was cropping contract was law of case on second appeal.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 324.

Power of Sale in Mortgage or Deed of trust as conferring an interest preventing its revocation by death of mortgagor. See note, 70 L. R. A. 136, 145.

95 Cal. 442-443, 30 Pac. 578, **FORNI v. YOELL.**

Stipulation Waiving Filing of Undertaking on appeal must be given within time limited for filing undertaking to be valid.

Approved in *Village of Hailey v. Riley*, 13 Idaho, 755, 92 Pac. 757, holding where no undertaking on appeal was filed in lower court, requirements of statute could not be complied with by filing undertaking in appellate court.

Miscellaneous.—Cited in *Forni v. Yoell*, 99 Cal. 173, 33 Pac. 887, on another appeal.

95 Cal. 444-446, 30 Pac. 590, BOHNERT v. BOHNEET.

Where There is No Specification of Error in statement on motion for new trial, errors alleged to have been committed during trial cannot be considered on appeal.

Approved in *Nishkian v. Chisholm*, 2 Cal. App. 500, 84 Pac. 313, where there was no specification of insufficiency of evidence to support verdict as against any particular defendant, objection could not be raised joint verdict was erroneous.

95 Cal. 447-450, 30 Pac. 587, BROWNLEE v. RIFFENBURG.

Issuance and Return of Execution is condition precedent to right to commence action upon undertaking given to release attachment.

Approved in *Kanouse v. Brand*, 11 Cal. App. 671, 106 Pac. 121, and *Rosenthal v. Perkins* (Cal.), 53 Pac. 445, both following rule.

95 Cal. 450-454, 30 Pac. 580, WIEDWALD v. DODSON.

Writ of Mandamus Lies to Considerable Extent in discretion of court, and should not issue to compel technical compliance with letter of law in violation of its intent.

Approved in *Bashore v. Superior Court*, 152 Cal. 3, 91 Pac. 802, holding appellate court could refuse to issue mandate to compel setting of cause when costs imposed on continuance remained unpaid; *New York Mortgage Co. v. Secretary of State*, 150 Mich. 205, 114 N. W. 84, holding mandamus would not issue to compel admission to state of foreign corporation; *State v. United States Express Co.*, 95 Minn. 445, 104 N. W. 558, holding mandamus did not lie to compel express company to carry packages for lottery; *Godwin v. Telephone Co.*, 136 N. C. 260, 103 Am. St. Rep. 941, 48 S. E. 636, 67 L. R. A. 251, denying mandamus to compel installment of telephone in bawdy-house.

Distinguished in *Lukens v. Nye*, 156 Cal. 507, 105 Pac. 596, holding mandamus lay to enforce payment of entire sum appropriated by legislature to satisfy claim against state, notwithstanding agreement between beneficiaries and governor to release part of claim; *Gordan v. Graham*, 153 Cal. 300, 95 Pac. 146, holding mandamus lay to compel trial judge to fix bond on appeal by tenant in possession to stay proceedings under writ of restitution.

Duties, Performance of Which may be compelled by mandamus. See note, 125 Am. St. Rep. 496.

95 Cal. 454-457, 30 Pac. 588, O'SHEA v. WILKINSON.

On Appeal from Judgment, it will be presumed, in absence of showing to contrary, that pleadings, order, minutes, findings, and judgment, contained in transcript and certified by clerk as correct, constitute judgment-roll.

Approved in *State Bank v. Plummer*, 46 Colo. 74, 102 Pac. 1083, where certificate of clerk of district court purporting to authenticate

transcript of record of judgment appealed from stated it to be "true, perfect, and complete transcript of all files and orders entered in case," copy of record of judgment was included in certificate; *Armstrong v. Henderson*, 16 Idaho, 575, 102 Pac. 364, where judgment-roll shows amended pleadings, court will presume pleadings contained in transcript and certified as correct are those which constitute judgment-roll.

95 Cal. 457-460, 30 Pac. 593, DEHAIL v. MORFORD.

In Proceedings for Widening Street every requirement of statute which may in any way benefit owners must be observed in order to give jurisdiction to municipality.

Approved in *Southwick v. City of Santa Barbara*, 158 Cal. 21, 109 Pac. 613, holding in proceedings for street improvements, dimensions and area of subdivisions to be assessed shown on map should be specified in engineer's report to give validity to proceedings.

95 Cal. 461-462, 30 Pac. 596, IN RE GATES.

Contracts for Transfer of Parental Custody and responsibility. See notes, 88 Am. St. Rep. 870; 27 L. R. A. 60.

95 Cal. 463-471, 30 Pac. 591, SMITH v. SAN LUIS OBISPO.

Road Held to be Dedicated to Public by fencing off by owner, his declaration it was for public road, and user for fifteen years.

Approved in *German Bank v. Brose*, 32 Ind. App. 87, 69 N. E. 303, holding evidence of user and admissions of former owners showed dedication of street.

Distinguished in *Smith v. Glenn* (Cal.), 62 Pac. 183, holding where use by public merely continued as before after filing map showing road, such user did not show acceptance of dedication.

Miscellaneous.—Cited in *Smith v. San Luis Obispo* (Cal.), 34 Pac. 830, on another appeal.

95 Cal. 471-475, 31 Pac. 611, PEOPLE v. JOHNSON.

Allegation of Answer on Material Issue raised by pleadings is admitted by motion of plaintiff for nonsuit.

Reaffirmed in *Kelley v. Sersanous* (Cal.), 46 Pac. 299.

95 Cal. 475-479, 30 Pac. 595, CARTER v. BALDWIN.

Contract of Attorney and Client Considered and client held liable for fees as retainer, though suit was never brought, client having waived performance.

Approved in *Blair v. Columbian Fireproofing Co.*, 191 Mass. 337, 77 N. E. 763, holding certain payments made to attorney by client were retainer, though there was no express stipulation they should be so considered.

95 Cal. 479-489, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745, BATES v. BABCOCK.

Where Objection to Complaint is That Fact essential to recovery is defectively alleged, evidence received under such averment, if sufficient, will sustain judgment.

Approved in *Mini v. Mini* (Cal.), 45 Pac. 1044, holding uncertain allegation in complaint in divorce as to defendant's property was

sufficient to admit evidence of definite description in absence of special demurrer; *West v. Johnson*, 15 Idaho, 689, 99 Pac. 711, and *Hollister v. State*, 9 Idaho, 659, 77 Pac. 341, both holding uncertain allegation could only be attacked by proper demurrer and not on appeal from judgment.

Partnership may be Formed for Dealing in lands generally or it may be limited to single venture.

Approved in *Williamson v. Nigh*, 58 W. Va. 636, 53 S. E. 127, applying rule to partnership for dealing in timber.

What Constitutes a Partnership to Deal in real estate. See note, 5 L. R. A. (n. s.) 510.

Partnership Agreement for Purpose of dealing in lands may be made by parol only.

Approved in *Koyer v. Willmon*, 150 Cal. 787, 90 Pac. 136, *Garth v. Davis*, 120 Ky. 110, 117 Am. St. Rep. 571, 85 S. W. 692, *Norton v. Brink*, 75 Neb. 569, 106 N. W. 670, 7 L. R. A. (n. s.) 945, and *Bond v. Taylor*, 68 W. Va. 327, 69 S. E. 1004, all following rule; *Jones v. Patrick*, 140 Fed. 406, 409, agreement to share in profits of contemplated speculation in realty need not be in writing.

Distinguished in *Nester v. Sullivan*, 147 Mich. 503, 504, 111 N. W. 88, 89, 9 L. R. A. (n. s.) 1106, holding void parol agreement of partnership for purchase and sale of timber lands.

Validity of Parol Partnership to Deal in real property. See note, 4 L. R. A. (n. s.) 428, 429.

Contract for Sale of Land within statute of frauds. See note, 102 Am. St. Rep. 239.

Where Under Parol Partnership Agreement for dealing in lands equitable rights are acquired by acts of parties superior to legal title they will be protected in equity.

Approved in *Bree v. Wheeler*, 4 Cal. App. 112, 87 Pac. 256, upholding rights acquired under executed parol agreement for partition of water right.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 408, 409.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 992.

When Real Estate will be Considered partnership property. See note, 27 L. R. A. 466.

Miscellaneous.—Cited in *People's Home Savings Bank v. Stadtmuller*, 150 Cal. 109, 88 Pac. 282, to point that holder of corporate stock cannot be proceeded against by creditors of corporation until stock is transferred to him on books, but he is bound to indemnify his transferrer in such action; *Nash v. Rosesteel*, 7 Cal. App. 510, 94 Pac. 852, to point that judgment for plaintiff should be reversed when complaint based on fraud failed to allege plaintiff believed false representations.

95 Cal. 490-494, 30 Pac. 577, ALHAMBRA ADDITION WATER CO. v. RICHARDSON.

Judgment That Party is Entitled to Waters "equal to constant flow of two and one-third inches" and use of certain reservoirs, pipes, etc., does not entitle him to accumulate head of water greater than two and one-third inches at one time, so as to make average flow of that amount.

Approved in *Perrine v. San Jacinto Valley Water Co.*, 4 Cal. App. 378, 88 Pac. 294, holding mandamus did not lie to compel accumulation of water for periodic use in any other manner or times than prescribed in water certificate.

95 Cal. 501-509, 30 Pac. 601, MORGAN v. SOUTHERN PACIFIC CO.

Damages for Wrongful Injury are to be measured by what shall fairly seem pecuniary loss or injury of plaintiff.

Approved in *The Dauntless*, 121 Fed. 422, and *In re California Nav. & Imp. Co.*, 110 Fed. 676, both following rule; *Young v. Gormley*, 120 Iowa, 380, 94 N. W. 924, holding damages for illegal arrest to be within discretion of jury; *Nichols v. Oregon Short Line R. R. Co.*, 28 Utah, 330, 78 Pac. 868, holding in action for injuries to passenger, loss of memory and impairment of mental power were proper elements of damage.

Verdict will not be Disturbed because excessive, unless amount of damages is so disproportionate to injury as to justify conclusion jury acted under influence of passion or prejudice.

Approved in *James v. Oakland Traction Co.*, 10 Cal. App. 800, 103 Pac. 1089, *Gomez v. Scanlan*, 155 Cal. 533, 102 Pac. 15, and *Kimie v. San Jose, Los Gatos etc. Ry. Co.*, 156 Cal. 277, 104 Pac. 314, all holding verdict not excessive; *Sclally v. Garratt*, 11 Cal. App. 147, 104 Pac. 329, upholding verdict for seven thousand five hundred dollars for permanent injury to hand and arm of boy of twelve while working at dangerous machinery; *Pensacola Electric Co. v. Bissett*, 59 Fla. 385, 52 So. 375, holding where trial judge had reduced damages found by jury, appellate court would make no further reduction; *Maloney v. Winston Bros. Co.*, 18 Idaho, 766, 111 Pac. 1089, holding fifteen thousand dollars damage for injury to miner, reducing earning capacity one-half, was excessive; *Christensen v. Floriston Pulp etc. Co.*, 29 Nev. 572, 92 Pac. 218, holding verdict of ten thousand dollars for death of man without family who contributed nothing to parents to be excessive.

Negligence of Passenger in Going upon Platform or steps of car just before reaching station. See note, 21 L. R. A. (n. s.) 720.

95 Cal. 510-521, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71, MORGAN v. SOUTHERN PACIFIC CO.

Pecuniary Injury to Parent is measure of damages for wrongful death of child.

Approved in *Bond v. United Railroads*, 159 Cal. 277, 283, 113 Pac. 369, 371, and *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 710, 87 Pac. 378, both following rule; *Christensen v. Floriston Pulp etc. Co.*, 29 Nev. 570, 571, 92 Pac. 217, upholding instruction that punitive damages cannot be given in action for negligent injury; *Scherer v. Schlaberg*, 18 N. D. 427, 122 N. W. 1002, holding measure of damages for death of child is probable value of services during minority to father, considering cost of support and maintenance during helpless part of its life.

Mental Suffering of Parent as Element of damages in action for death of child. See note, 2 L. R. A. (n. s.) 899.

Evidence of Family Circumstances and Relations of deceased is admissible as bearing on pecuniary loss in action for wrongful death.

Approved in *Ruppel v. United Railroads*, 1 Cal. App. 670, 82 Pac. 1074, following rule; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 521, 99 Pac. 93, holding degree of intimacy existing between father and child and loss of companionship could be shown in estimating damage to father for wrongful death of child.

Sorrow and Mental Anguish caused by loss of child are not elements of damage recoverable for its wrongful death.

Distinguished in *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 535, 129 Am. St. Rep. 659, 100 Pac. 974, holding deprivation of comfort, society, and companionship of husband could be considered in estimating damage to widow by his wrongful death.

Distinguished in *Melone v. Sierra Ry. Co.*, 151 Cal. 116, 91 Pac. 523, holding suffering of person injured was element of damages.

Loss of Services of Deceased Child is not special damage necessary to be averred in action for wrongful death.

Reaffirmed in *Bond v. United Railroads*, 159 Cal. 286, 113 Pac. 373.

Action by Parent for Death of minor child. See note, 90 Am. St. Rep. 319.

Common-law Right of Action of Parent for loss of services of child killed. See note, 41 L. R. A. 809.

Recovery, in Administrator's Action for benefit of estate, of probable accumulations of deceased as damages for death. See note, 15 L. R. A. (n. s.) 452.

95 Cal. 521-523, 31 Pac. 591, BLONDEAU v. SNYDER.

Erroneous Default Judgment Held to be within relief demanded in complaint, and not void, and could be corrected on appeal, but could not be stricken out by court after lapse of time to amend record.

Approved in *Forrester v. Lawler*, 14 Cal. App. 173, 111 Pac. 285, holding court could not, under pretense of correcting record, amend erroneous judgment, rendered in fact, after right to correct it in any form had become final; *Lange v. Superior Court*, 11 Cal. App. 5, 103 Pac. 909, holding wrong decision as to pleading could not be inquired into upon prohibition to restrain judgment for contempt in violating injunction; *Lemon v. Hubbard*, 10 Cal. App. 475, 102 Pac. 556, holding error of court in rendering judgment for sale of machine in absence of proper averments could be corrected only on appeal or under method provided in section 473, Code of Civil Procedure.

95 Cal. 524-535, 29 Am. St. Rep. 149, 30 Pac. 765, PLANO v. PAYMASTER MINING CO.

Fraudulent Grantor is Proper but not necessary party defendant in action to subject to lien of judgment property alleged to have been fraudulently conveyed.

Approved in *California etc. Min. Co. v. Manley*, 10 Idaho, 800, 801, 81 Pac. 54, following rule.

In Action on Assumpsit Against Nonresident Corporation, only valid judgment which can be rendered is one in nature of judgment in rem against property under attachment.

Approved in *Merchants' Nat. Union v. Buisseret*, 15 Cal. App. 447, 115 Pac. 59, following rule.

Where No Findings Appear of Record, presumption is that court found all facts necessary to support judgment.

Approved in *Bruce v. Bruce*, 16 Cal. App. 357, 116 Pac. 996, following rule.

Clerk in Store of Foreign Mining Corporation is not managing agent referred to in section 542, Code of Civil Procedure, upon whom summons to corporation may be served.

Approved in *Buckingham v. North German etc. Ins. Co.*, 149 Fed. 623, holding affidavit of insurance agent showed he was not such agent of foreign corporation as service could be made on; *Karns v. State Bank & T. Co.*, 31 Nev. 179, 101 Pac. 567, holding service on assistant cashier of branch bank who had limited powers was not service on banking corporation.

Who may be Served With Process in Suit against foreign corporation. See note, 23 L. R. A. 496.

Where Insolvent Corporation Transfers all its property without consideration to new corporation, such new corporation will be regarded in equity as continuation of former, and held liable for its debts to extent of property received.

Approved in *Magic Packing Co. v. Stone Ordean etc. Co.*, 158 Ind. 541, 64 N. E. 12, following rule.

Effect of Consolidation, Merger or Absorption of corporation, on unsecured liabilities, in absence of statutory or contract provision. See note, 11 L. R. A. (n. s.) 1127.

Conditions Precedent to Equitable Remedies of creditors. See note, 23 L. R. A. (n. s.) 98.

Foreign Judgments. See note, 94 Am. St. Rep. 553.

95 Cal. 535-539, 30 Pac. 772, **JEFFERSON v. HEWITT.**

Statements Made by Agent at Time of securing subscription to railroad stock as to time of completion of road, being matters of opinion, do not render subscription upon faith of them voidable.

Distinguished in *Dickinson v. Zubiarte Mining Co.*, 11 Cal. App. 664, 106 Pac. 126, upholding conditional contract for subscription of stock when conditions were set forth in contemporaneous written agreement.

Liability of Corporate Officer for misrepresentations which induce sale or purchase of stock. See note, 1 L. R. A. (n. s.) 260.

Rescission for Fraud or Misrepresentation in procuring subscription to stock. See note, 33 L. R. A. 731.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 471.

Miscellaneous.—Cited in *Jefferson v. Hewitt*, 103 Cal. 626, 37 Pac. 638, on another appeal.

95 Cal. 539-541, 30 Pac. 761, **SWITZER v. BAKER.**

Agreement to Pay Debt of Another cannot be inferred from doubtful language.

Approved in *Goldring v. Thompson*, 58 Fla. 253, 51 So. 47, holding note ordering goods to be shipped to another with statement, "Your money is good," was original promise to pay; *Kenneweg Co. v. Finney*, 98 Md. 118, 56 Atl. 484, reply of brokers to inquiry of purchaser concerning responsibility of seller considered and held not to amount to guaranty contract would be carried out.

Contract of Guaranty. See note, 105 Am. St. Rep. 503.

Right to Control Discretion Vested in one person to determine whether or when another is fit to receive legacy or devise. See note, 25 L. R. A. (n. s.) 421.

95 Cal. 541-548, 30 Pac. 770, CHURCHILL v. BAUMANN.

Any Matter Which Does not Discharge or avoid cause of action theretofore existing but which shows alleged cause of action never did exist is not new matter which must be specially pleaded.

Approved in Hogen v. Klabo, 13 N. D. 324, 100 N. W. 849, "new matter" of codes admits all material allegations of complaint, and consists of facts not alleged therein which destroy right of action.

95 Cal. 548-553, 30 Pac. 1102, COMBINATION LAND CO. v. MORGAN.

Notice to Second Vendee of Land before his payment that his vendor has not fully paid original vendor is equivalent to notice before purchase, and he is affected pro tanto as to amount remaining unpaid by his vendor.

Approved in Lindley v. Blumberg, 7 Cal. App. 146, 93 Pac. 897, holding where husband gave deed for value to wife, which was unrecorded, and later gave lease with option to purchase without her knowledge to another, and wife gave notice of her deed to lessee before he exercised option to purchase, lessee could not enforce specific performance of option against her; Kuschel v. Hunter (Cal.), 50 Pac. 398, holding priority of vendor's lien over subsequent mechanic's lien acquired with knowledge of vendor's lien was not affected by failure of vendor to post notice of nonliability.

95 Cal. 553-568, 30 Pac. 1108, LILLIS v. EMIGRANT DITCH CO.

Judgment Concludes Parties Only as to facts in issue and is not conclusive as to any matters which come only collaterally in issue.

Approved in Collins v. Gray, 154 Cal. 135, 97 Pac. 144, holding finding outside issues and not carried into judgment was immaterial and could prejudice party in no future action; Ahlers v. Smiley, 11 Cal. App. 347, 104 Pac. 998, holding judgment not conclusive as to collateral issue; Simmons v. Rowe, 4 Cal. App. 758, 89 Pac. 624, holding judgment in foreclosure conclusive as to all matters embraced within issues and which might have been litigated in case, though findings were waived; dissenting opinion in Gardner v. Springfield Gas etc. Co., 154 Mo. App. 685, 135 S. W. 1029, majority holding judgment on merits in former action conclusive in later action when parties, subject matter and claim were same in both.

In Action for Diversion of Water, where issue is right to divert, findings as to amount to which plaintiff's right extends are not conclusive against defendant, and he is not precluded in subsequent action from proving right to greater amount.

Approved in Rogers v. Overacker, 4 Cal. App. 340, 87 Pac. 1110, holding judgment enjoining diversion of water, in such quantity, in such manner, and at such times as would prevent flow to lands of plaintiff in such amount as should be necessary for his uses, was too uncertain to act as estoppel upon main subject of litigation.

95 Cal. 568-572, 30 Pac. 773, BEALL v. FISHER.

When Terms of Agreement have Been Reduced to writing by parties, it is to be considered as containing all those terms, and as between parties there can be no other evidence of terms of agreement, except in cases mentioned in section 1856, Code of Civil Procedure.

Approved in *Peterson v. Chaix*, 5 Cal. App. 534, 90 Pac. 951, holding section 1860, Code of Civil Procedure, must be restricted in meaning so as to harmonize with section 1856.

95 Cal. 572-577, 30 Pac. 774, PHELPS v. BROWN.

Where Firm of Real Estate Agents received first payment on purchase from vendee and took receipt from vendor, and upon rescission received back amount, signing receipt as agent for vendee, they were estopped to deny agency for vendee, who could recover from them amount so received.

Approved in *Cox v. Borstadt*, 49 Colo. 89, 111 Pac. 66, holding agent who contracted for sale of realty, but before authority was given to bind vendor, was bound personally on failure of title to refund deposit made by vendee.

Where Contract of Sale of Land is abandoned or rescinded, vendee may recover back purchase money paid less damages to vendor occasioned by vendee's breach.

Approved in *Lytle v. Scottish-American Mortgage Co.*, 122 Ga. 471, 50 S. E. 408, and *Green v. Barney* (Cal.), 36 Pac. 1027, both reaffirming rule.

Distinguished in *Cleary v. Folger* (Cal.), 33 Pac. 878, holding where vendee notified vendor he would not complete purchase, vendor's failure to offer to perform did not authorize vendee to consider contract rescinded so he could recover purchase money.

95 Cal. 578-581, 30 Pac. 777, POTTER v. DEAR.

Judgment Creditor Who has Exhausted legal remedies against corporation may maintain creditors' suit against one or more stockholders to recover amount due corporation on unpaid subscriptions to stock.

Approved in *Daggett v. Southwest Packing Co.*, 155 Cal. 765, 103 Pac. 205, following rule; *Daggett v. Southwest Packing Co.*, 155 Cal. 765, 103 Pac. 205, holding judgment creditor could maintain action against corporation and stockholders to compel application to judgment of amount due on unpaid subscriptions, though no assessment had been made, or demand on directors to make assessment; *Blood v. La Serena Land etc. Co.*, 150 Cal. 768, 89 Pac. 1092, holding court of equity had jurisdiction to compel stockholders of corporation to pay subscriptions to satisfy corporate debts; *Welch v. Sargent*, 127 Cal. 84, 59 Pac. 323, holding creditor's bill could be filed against one or any number of stockholders of insolvent corporation to compel payment of subscriptions.

Distinguished in *Turner v. Fidelity Loan Concern*, 2 Cal. App. 137, 83 Pac. 68, holding only remedy of creditors against stockholders was by assessment on stock by court or corporation.

95 Cal. 581-593, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776, BAINES v. BABCOCK.

Judgment Creditor Who has Exhausted legal remedies against corporation may maintain action against stockholders to recover, for all creditors who come in, amount due on unpaid subscriptions, when corporation neglects or refuses to collect same.

Approved in *Fletcher v. Bank of Lonoke*, 71 Ark. 3, 69 S. W. 580, following rule; *Baines v. West Coast Lumber Co.*, 104 Cal. 7, 37 Pac. 768, holding in such action only creditors of class to which plaintiff

belongs are entitled to intervene under section 387, Code of Civil Procedure.

Distinguished in *Miller v. Lane*, 160 Cal. 93, 116 Pac. 60, holding in suit on stockholder's liability under Colorado law, brought against stockholder resident in California, law of *lex fori* prevailed as to form of action; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 137, 83 Pac. 68, holding remedy of judgment creditors to reach subscriptions could only be had by assessment on stock by corporation, or court.

Court of Equity has Jurisdiction to compel stockholders of corporation to pay subscription to satisfy corporate debts.

Approved in *Blood v. La Serena Land etc. Co.*, 150 Cal. 768, 89 Pac. 1092, following rule.

In Creditor's Suit to Enforce Payment of stock subscriptions it is not necessary to join all stockholders.

Approved in *Blood v. La Serena Land etc. Co.*, 150 Cal. 770, 771, 89 Pac. 1092, 1093, following rule.

Distinguished in *Turner v. Fidelity Loan Concern*, 2 Cal. App. 140, 83 Pac. 69, holding in action by judgment creditor of corporation against stockholders to enforce payment of subscriptions, all stockholders should be joined.

Right to Resort to Equitable Remedy against stockholders accrues when execution on judgment against corporation is returned unsatisfied.

Approved in *Watkins v. Wilhoit (Cal.)*, 35 Pac. 649, holding right to bring creditor's bill to set aside assignment as in fraud of plaintiff's right accrued when execution on judgment was returned unsatisfied.

Pledgee of Corporate Stock Appearing on books as owner is liable to creditors for corporate debts.

Approved in *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 447, 84 Pac. 330, following rule; *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 28, 108 Pac. 873, holding liability of person in whose name stock stands on books, but who is not owner, is based on his estoppel to deny ownership; *American Steel etc. Co. v. Eddy*, 138 Mich. 409, 101 N. W. 581, holding person who held stock in his name and acted as director liable for corporate debts, though stock was purchased with money of another.

Distinguished in *Shattuck & Desmond etc. Co. v. Gillelen*, 154 Cal. 782, 99 Pac. 350, holding pledgee could not be made liable by issuance of stock to him without his consent.

Rights, Remedies and Liabilities of pledgees of corporate stock. See note, 121 Am. St. Rep. 197.

Liability of Pledgee of Stock as shareholder. See note, 19 L. R. A. (n. s.) 251.

Effect of Transfer of Stock upon liability for unpaid subscription. See note, 47 L. R. A. 254.

Effect as Against Stockholders of judgment against corporation. See note, 97 Am. St. Rep. 465.

Miscellaneous.—Cited in *Baines v. Story (Cal.)*, 30 Pac. 777, *Baines v. Story (Cal.)*, 27 Pac. 676, and *Potter v. Dear (Cal.)*, 27 Pac. 676, all companion cases.

95 Cal. 594-597, 30 Pac. 963, PEOPLE v. McNULTY.

Order Made After Affirmance of Capital Conviction fixing time and place of execution is appealable.

Approved in *People v. O'Brien*, 4 Cal. App. 726, 89 Pac. 440, holding appealable ex parte order correcting record after judgment of conviction so as to make recorded plea of guilty correspond to facts.

Distinguished in dissenting opinion in *People v. Durrant*, 119 Cal. 211, 51 Pac. 186, majority holding order fixing date of execution of death sentence after original time fixed by sentence had elapsed is appealable.

95 Cal. 598-601, 30 Pac. 836, GUTZEIL v. PENNIE.

Seal of Corporation Affixed to Instrument is prima facie evidence of authority of officers to execute it.

Reaffirmed in *Stone v. Gray*, 10 Cal. App. 610, 103 Pac. 156.

Effect on Insurance of Failure of foreign insurer to comply with statutory requirements. See note, 20 L. R. A. 409.

Powers and Privileges of Surety and trust companies. See note, 48 L. R. A. 593.

95 Cal. 601-605, 30 Pac. 779, RECLAMATION DIST. NO. 124 v. GRAY.

In Action to Recover Assessment Levied by de facto irrigation district, validity of organization cannot be questioned.

Approved in *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 409, 105 Pac. 281, and *Reclamation District v. McPhee*, 13 Cal. App. 388, 109 Pac. 1109, both applying rule to reclamation district.

Legislative Recognition may be Sufficient proof of existence of drainage district.

Approved in *People v. Levee Dist. No. 6 (Cal.)*, 63 Pac. 342, holding legislative recognition gave legal existence to drainage district which was irregularly created.

Procedure for Establishment of Drains and sewers. See note, 60 L. R. A. 169, 171.

95 Cal. 606-615, 30 Pac. 780, BALL v. KEHL.

Burden of Proving Uninterrupted User of water with knowledge of owner is on party claiming prescriptive right.

Distinguished in *Alper v. Tormey*, 7 Cal. App. 11, 93 Pac. 404, holding where use of easement was open, notorious and peaceable, with acquiescence of defendants, but claimed to be license, only question of prescriptive right was one of fact not depending on burden of proof.

Use of Water by Permission of Owner is not adverse.

Approved in *Anderson v. Bassman*, 140 Fed. 26, holding defendant's use of water not adverse until it became injurious to plaintiff and amounted to actionable invasion of his rights.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 720, 730.

95 Cal. 615-626, 30 Pac. 783, 19 L. R. A. 92, SOUTHERN PAC. R. R. CO. v. DUFOUR.

Waters Collecting by Seepage from Swampy Ground into pool, not fed by any stream, are not subject to appropriation nor can they be acquired by adverse user.

Reaffirmed in *Dickey v. Maddux*, 43 Wash. 414, 93 Pac. 1091.

Subterranean Waters not Running Through channel are part of soil and are owned where the soil is and are not subject to appropriation.

Approved in *Fayter v. North*, 30 Utah, 186, 83 Pac. 753, 6 L. R. A. (n. s.) 410, following rule; *Western Md. R. Co. v. Martin*, 110 Md. 566, 73 Atl. 272, holding one could not be held liable for diversion of underground water without showing such water was accustomed to flow in uniform direction; *Gagnon v. French Lick Springs etc. Co.*, 163 Ind. 696, 72 N. E. 852, holding same rules apply to underground streams as to surface streams.

Disapproved in *Le Quime v. Chambers*, 15 Idaho, 413, 98 Pac. 417, 21 L. R. A. (n. s.) 76, holding seepage and percolating waters subject to appropriation.

No Action will Lie for Injuries caused by cutting off subterranean waters percolating soil or running through unknown channels and without distinct or defined course.

Approved in *Miller v. Black Rock etc. Co.*, 99 Va. 757, 86 Am. St. Rep. 924, 40 S. E. 30, following rule; dissenting opinion in *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 352, 128 Am. St. Rep. 555, 87 N. E. 514, 23 L. R. A. (n. s.) 436, majority holding owner pumping excessive amount of gas producing water from its wells, for purpose of marketing gas, and letting water run to waste, to detriment of neighboring wells, would be enjoined.

Land Owner's Right in Percolating Waters. See note, 99 Am. St. Rep. 69.

Appropriation of Percolating Waters on public lands. See notes, 30 L. R. A. 186, 187; 21 L. R. A. (n. s.) 77.

Correlative Rights in Percolating Water. See notes, 64 L. R. A. 236; 23 L. R. A. (n. s.) 331.

Where Finding of Certain Fact necessarily controls judgment, failure to find on other issues does not constitute reversible error.

Approved in *Downing v. Donegan*, 1 Cal. App. 712, 82 Pac. 1112, holding failure to find on equitable defense to action on note did not invalidate judgment, when it did not appear by statement that any evidence was submitted on such issue.

Miscellaneous.—Cited in *Quinlan v. Calvert*, 31 Mont. 119, 77 Pac. 430.

95 Cal. 626-629, 30 Pac. 789, 17 L. R. A. 207, **CHURCH v. SHANK-LIN.**

Where Parties to Contract Fix upon Umpire and agree to abide by his decision, neither can, without consent of other, withdraw question from umpire and submit it to court or jury.

Approved in *Mackenzie v. Minis*, 132 Ga. 329, 63 S. E. 903, 23 L. R. A. (n. s.) 1003, holding where employee entered into contract for services for three years as gardener and agreed to perform services to satisfaction of employer, he was subject to be discharged whenever employer became dissatisfied, regardless of grounds therefor; *Hollingsworth v. Colthurst*, 78 Kan. 457, 130 Am. St. Rep. 382, 96 Pac. 851, holding requirement in contract that abstract showing satisfactory title be furnished meant that vendee must be satisfied; *Mulcahy v. Diendonne*, 103 Minn. 358, 115 N. W. 639, holding under agreement for sale of machine to work satisfactorily, upon failure to so work purchaser need not return it, but need only notify vendor that it does not work satisfactorily and decline to accept it; *Thurman v.*

Omaha, 64 Neb. 494, 90 N. W. 254, where contract made opinion of purchaser's legal adviser conclusive, such opinion was binding when not palpably at variance with plain principles of law.

Distinguished in *Marlow v. Southern Pacific Co.*, 151 Cal. 386, 121 Am. St. Rep. 127, 90 Pac. 929, holding agents of railroad were not absolute arbiters as to identity of passenger under terms of ticket.

What Constitutes "Satisfactory Title" within requirement of agreement relating to land. See note, 18 L. R. A. (n. s.) 741.

Effect of Judgment in Action Against Part of obligors on joint or joint and several contract upon liability of others. See note, 43 L. R. A. 219.

95 Cal. 630-635, 30 Pac. 786, **GINDERY v. GREEN.**

Court Should Show Great Liberality in allowing amendments to pleadings so as to allow party to properly present his course of action or defense.

Approved in *Link v. Jarvis* (Cal.), 33 Pac. 207, following rule; *Bergerow v. Parker*, 4 Cal. App. 172, 87 Pac. 249, allowing unverified answer to verified complaint to be amended on motion for judgment on pleadings; *Hibernia Sav. etc. Society v. Laidlaw*, 4 Cal. App. 628, 88 Pac. 731, holding amendment to answer setting up new defense properly allowed after sustaining of demurrer to original answer; *Rose v. Doe*, 4 Cal. App. 685, 89 Pac. 137, holding court properly allowed defendant to amend answer by setting up new defenses after denial of motion for nonsuit.

Party Sued on Written Agreement can Show by parol that subsequent written agreement was executed upon consideration former agreement should be canceled and all claims thereunder waived.

Approved in *Pearsall v. Henry*, 153 Cal. 316, 95 Pac. 160, following rule; *Bradley v. Bush*, 11 Cal. App. 293, 104 Pac. 847, admitting parol evidence in action on notes to show agreement between defendant and plaintiff's agent as to surrender of notes.

In Action upon Written Agreement, parol agreement which formed its consideration may be shown.

Approved in *O'Brien v. Garibaldi*, 15 Cal. App. 524, 115 Pac. 252, holding evidence tending to show consideration for acceptance of order could not have effect to modify or vary terms and conditions expressed in order on which acceptance was based; *Heskelt v. Border Queen Mill etc. Co.*, 80 Kan. 359, 105 Pac. 433, holding incomplete memorandum of agreement could be completed by parol evidence so as to show all terms; *Burns v. Loftus*, 32 Nev. 69, 104 Pac. 248, holding consideration for lease could be shown by parol in addition to, or contradiction of, consideration stated in instrument.

Distinguished in *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 595, 96 Pac. 322, parol evidence inadmissible to introduce into written contract for sale of fruit term warranting quality; *Pierce v. Edwards*, 150 Cal. 654, 89 Pac. 602, holding written contract could not be varied by contemporaneous oral understanding whose terms did not agree with those of contract; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 753, 103 Pac. 940, parol evidence inadmissible to vary terms of written option by proof of oral agreement defendant should have one year from past date fixed in which to accept same in writing; *Dodd v. Pasch*, 5 Cal. App. 689, 91 Pac. 167, holding parol evidence in-

admissible to vary terms of lease by showing lease from month to month.

95 Cal. 640-644, 30 Pac. 791, PEOPLE v. CHOYNSKI.

Language of Threatening Letter must be Adapted to imply one or more of threats mentioned in section 519, Penal Code, or no offense is committed.

Approved in *Schultz v. State*, 135 Wis. 649, 114 N. W. 507, holding threat to defame not in contravention of Statutes of 1898, section 4380.

What Constitutes Extradition. See note, 116 Am. St. Rep. 460, 474.

95 Cal. 644-646, 30 Pac. 795, SELICK v. DE CARLOW.

Cost Bill Filed Before Filing of Findings and entry of judgment is filed before time authorized by law and should be stricken out.

Approved in *State v. District Court*, 33 Mont. 533, 85 Pac. 368, striking out memorandum of costs when other party was not given statutory notice of its filing; *Smith v. Alford*, 31 Utah, 352, 88 Pac. 18, holding plaintiff's objection to defendant's cost bill filed before findings were made by court, but after special findings by jury, waived objection to time of filing.

95 Cal. 650-651, 30 Pac. 800, SACHSE v. AUBURN.

In Action to Foreclose Mechanic's Lien, decree ordering sale will not be reversed because it does not appear that finding was made that land directed to be sold was necessary for convenient use of building.

Reaffirmed in *Newell v. Brill*, 2 Cal. App. 64, 83 Pac. 77.

Extent of Land to Which Mechanic's Lien will attach. See note, 26 L. R. A. (n. s.) 838.

95 Cal. 652-654, 30 Pac. 762, WILLIAMSON v. CUMMINGS ETC. DRILL CO.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 265.

95 Cal. 654-656, 30 Pac. 796, PEOPLE v. AH SING.

Information Charging Defendant With Taking of property by force from person of prosecutor, against his will, and that property was his, sufficiently shows possession of property by him, and states facts constituting crime of robbery.

Approved in *People v. Howard*, 3 Cal. App. 37, 84 Pac. 462, holding information for robbery need not state assault was made, nor kind of fear produced; *People v. Cleary*, 1 Cal. App. 53, 81 Pac. 754, holding defective indictment for robbery which did not allege property taken belonged to someone other than defendant; *State v. Fordham*, 13 N. D. 500, 101 N. W. 889, upholding indictment for robbery charging defendant "unlawfully, wrongfully, and feloniously did take and carry away," etc.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 682.

95 Cal. 657-660, 30 Pac. 797, PEOPLE v. AH SING.

Perjury cannot be Committed unless false testimony was material to issue.

Approved in *McClelland v. People*, 49 Colo. 544, 113 Pac. 642, 32 L. R. A. (n. s.) 1069, following rule.

95 Cal. 666-671, 29 Am. St. Rep. 165, 30 Pac. 800, 17 L. R. A. 626,
PEOPLE v. LEE KONG.

Where Criminal Result of Attempt is not accomplished simply because of obstruction in way of thing to be operated on, and these facts are unknown to aggressor at time, criminal attempt is committed.

Approved in *People v. Piercy*, 16 Cal. App. 15, 116 Pac. 322, holding that accused was thwarted in attempt to kill before he committed actual violence was no defense, where, when he made attempt, he had ability to execute attempt.

What Amounts to Attempt to Commit Crime. See note, 93 Am. St. Rep. 600.

In Order to be Guilty of Assault, there must be unlawful attempt coupled with present ability to accomplish act intended.

Approved in *People v. Collins*, 5 Cal. App. 655, 91 Pac. 159, upholding information charging assault with intent to commit rape on child; *State v. Mitchell*, 139 Iowa, 460, 116 N. W. 810, holding indictment alleging intent to shoot another, though it did not allege gun was loaded, sufficiently charged ability to commit felony.

Court will not Draw Nice Distinctions between attempt to commit offense and assault with intent to commit offense.

Approved in *State v. Stone*, 40 Mont. 91, 105 Pac. 90, holding assault with intent to commit felony was different offense from attempt to commit felony.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 96 CALIFORNIA.

96 Cal. 1-4, 31 Am. St. Rep. 171, 30 Pac. 798, COBBOGAN v. BENICIA.

Municipality is not Liable for Damages caused by gathering of surface waters not running in natural channel produced by raising grade of street.

Approved in Adams v. Oklahoma City, 20 Okl. 531, 95 Pac. 980, following rule.

Distinguished in Hume v. Des Moines, 146 Iowa, 628, 641, 642, 125 N. W. 847, 852, holding city liable for damage caused by filling drain in raising street grade.

Rights as to Flow of Surface Water. See note, 21 L. R. A. 599.

96 Cal. 4-7, 30 Pac. 803, READING v. READING.

Particular Acts of Intemperance on which action for divorce is grounded need not be set forth in complaint.

Approved in Hubbell v. Hubbell, 7 Cal. App. 665, 95 Pac. 665, holding complaint alleging cruelty as ground for divorce sufficiently alleged facts as against general demurrer.

Drunkenness as Affecting Divorce. See note, 34 L. R. A. 452.

96 Cal. 13-14, 30 Pac. 798, DANIELS v. CHURCH.

Order Refusing Change of Venue to county defendant claims to reside in will not be disturbed if evidence is conflicting.

Approved in Nicholson v. Nicholson, 16 Cal. App. 755, 117 Pac. 1039, and Bradley v. Davis, 156 Cal. 268, 104 Pac. 303, both following rule; Doak v. Bruson, 152 Cal. 19, 91 Pac. 1002, holding when order was based on conflicting affidavits, those in favor of prevailing party would be taken as true.

96 Cal. 14-17, 31 Am. St. Rep. 172, 30 Pac. 961, WILLIAMS v. FRESNO CANAL ETC. CO.

Where Person Makes Independent Contract with another for work necessarily injurious to third persons, such person is liable for damages resulting from such injury.

Approved in Thomas v. Hammer Lumber Co., 153 N. C. 357, 69 S. E. 277, holding lumber company liable for injury caused by foul

condition of right of way of private railroad, though road was being operated by independent contractor.

Liability for Acts of Independent Contractor where injury is direct result of work contracted for. See note, 65 L. R. A. 750, 752.

96 Cal. 17-21, 30 Pac. 837, **PEOPLE v. FAULKE**.

When Defendant in Criminal Case Testifies in his own behalf, jury may be instructed they should consider position of defendant and how he would be affected by verdict, in considering credibility of his testimony.

Approved in *People v. Ryan*, 152 Cal. 368, 92 Pac. 855, upholding similar instruction.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 818, 822.

96 Cal. 21-33, 30 Pac. 957, **LOCKE v. MOULTON**.

Deed Absolute on Face may be shown by parol evidence to be mortgage.

Reaffirmed in *Wagg v. Herbert*, 19 Okl. 562, 92 Pac. 264.

96 Cal. 33-38, 30 Pac. 839, **STINCHFIELD v. GILLIS**.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 794.

Veins Intersecting, Crossing, or Uniting. See note, 50 L. R. A. 211.

96 Cal. 47-53, 30 Pac. 967, **COUNTY OF SAN JOAQUIN v. BUDD**.

Board of Supervisors has Exclusive Power to assign rooms of courthouse among county officers.

Reaffirmed in *Werts v. Feagle*, 83 S. C. 136, 65 S. E. 229.

Power of Courts to Provide Necessary Places and equipment for their business. See note, 22 L. R. A. 399.

96 Cal. 53-61, 31 Am. St. Rep. 175, 30 Pac. 1020, **MAHONEY v. BOSTWICK**.

Intention That Deed Absolute in Form should operate as mortgage must be shown by satisfactory proof.

Approved in *Title Insurance etc. Co. v. Ingersoll*, 158 Cal. 484, 111 Pac. 364, upholding finding of trial court on conflicting evidence establishing parol trust; *Fagan v. Lentz*, 156 Cal. 686, 105 Pac. 953, refusing to disturb finding on conflicting evidence that deed given without consideration was not intended to be gift; *Couts v. Winston*, 153 Cal. 688, 689, 96 Pac. 358, and *Wadleigh v. Phelps*, 149 Cal. 637, 87 Pac. 98, both holding finding on conflicting evidence deed was mortgage would not be disturbed on appeal; *Blair v. Squire* (Cal.), 59 Pac. 212, and *Peres v. Crocker* (Cal.), 47 Pac. 930, both upholding finding that deed absolute on face was not intended as mortgage; *Meeker v. Shuster* (Cal.), 47 Pac. 582, holding deed absolute on face to be mortgage.

Decision of Trial Court on Conflicting Evidence that deed absolute on face is mortgage will not be disturbed on appeal.

Reaffirmed in *Stuart v. Hauser*, 9 Idaho, 71, 72 Pac. 725.

Before Grantor by Deed Absolute Intended as mortgage can compel reconveyance, he must pay all indebtedness due grantee pursuant to agreement for reconveyance.

Approved in *Merchants' State Bk. v. Tufts*, 14 N. D. 245, 116 Am. St. Rep. 682, 103 N. W. 762, holding grantor bound to pay advancements subsequent to deed, when deed was intended to secure them.

Maxim That He Who Seeks Equity must do equity applies only to matters growing out of same transaction.

Approved in *Peters v. Case*, 62 W. Va. 40, 57 S. E. 736, 13 L. R. A. (n. s.) 408, holding cross-bill praying affirmative relief must be confined to matters stated in original bill.

Liability of Mortgagee in Possession. See note, 85 Am. St. Rep. 498.

96 Cal. 61-67, 30 Pac. 962, **MAZE v. GORDON.**

Before Ratification of Act of Agent outside his authority can be inferred, knowledge by principal of terms of act must be shown.

Approved in *Ballard v. Nye* (Cal.), 69 Pac. 483, holding receipt without inquiry of part of insurance money, from one who had pretended to act as plaintiff's agent, without notice or knowledge he had so acted, was not ratification of his acts.

When Broker is Employed to Find Purchaser, but owner withdraws property from sale within life of contract, broker is entitled to recover for services performed in effort to find purchaser though none was in fact found.

Approved in *Breen v. Roy*, 8 Cal. App. 479, 97 Pac. 172, holding broker entitled to recover for services performed in good faith when principal withdrew contract within time limited on promise to pay for services rendered; *Yoder v. Randol*, 16 Okl. 310, 83 Pac. 538, 3 L. R. A. (n. s.) 576, holding broker entitled to commission for purchaser procured though purchaser refused to complete contract because of defect in vendor's title.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 618.

96 Cal. 67-73, 30 Pac. 965, **GREEN v. THORNTON.**

Account Stated may be Reopened in equity if vitiated by fraud or mistake.

Approved in *Vance v. Supreme Lodge Frat. Brotherhood*, 15 Cal. App. 182, 114 Pac. 85, and *Clarkson v. Hoyt* (Cal.), 36 Pac. 384, both reaffirming rule.

96 Cal. 73-83, 30 Pac. 1024, **SMITH v. DORN.**

Pleading may be Amended by Inserting Signature of attorney.

Approved in *Canadian Bank of Commerce v. Leale*, 14 Cal. App. 309, 111 Pac. 760, holding unsigned complaint could be amended by adding signature.

In Action by Stockholder to Set Aside Sale of corporate property on ground of fraud, allegation that demand on corporation to institute action would have been useless dispenses with necessity for such demand, when answer shows such demand would have been useless.

Approved in *Way v. Shaver*, 2 Cal. App. 653, 84 Pac. 284, holding in action by creditor as beneficiary to enforce trust, where complaint failed to aver trustee refused to execute trust, answer showing demand for execution would have been useless supplied deficiency in complaint.

Distinguished in *Elliott v. Puget Sound Wood Products Co.*, 52 Wash. 641, 101 Pac. 230, holding bill by one or more stockholders of corporation could not be maintained in behalf of general body when it did not show plaintiffs had exhausted every means of putting corporation into motion.

Actions by Stockholders in Behalf of Corporations. See note, 97 Am. St. Rep. 34, 43.

96 Cal. 84-92, 31 Am. St. Rep. 181, 30 Pac. 1016, 21 L. R. A. 406, **STOCKTON SAV. & LOAN SOCIETY v. GIDDINGS.**

Liability of Surety cannot be Greater than that of principal.

Reaffirmed in Menzel v. Primm, 6 Cal. App. 212, 91 Pac. 757.

In Action on Note Surety cannot Counterclaim damages for breach of warranty of machine for which note was given, when not party to warranty.

Approved in Le Breton v. Stanley Contracting Co., 15 Cal. App. 432, 114 Pac. 1029, holding unaccepted check on bank could not be counterclaimed in action by receiver of bank on defendant's note to bank.

Surety on Note may Avail Himself of defense of failure of consideration and of fact sale for which given had been rescinded.

Approved in City Nat. Bk. of Columbus v. Jordan, 139 Iowa, 509, 117 N. W. 762, holding fraud in inducing principal to execute note was defense in action against surety.

Right of Surety or Principal to Interpose independent cause of action in favor of latter as defense or counterclaim. See note, 18 L. R. A. (n. s.) 602.

96 Cal. 95-100, 30 Pac. 1027, **JONES v. DURRER.**

Waiver of Prior Breach of Conditions in lease does not preclude right of lessor to action on subsequent breaches.

Approved in German-American Sav. Bank v. Gollner, 155 Cal. 689, 102 Pac. 934, 24 L. R. A. (n. s.) 1066, holding waiver of stipulation in lease against assignment did not have effect to free leasehold estate from other conditions of lease.

Effect of License to Commit Breach of Satisfaction where property levied on proves exempt or to belong to a third person. See note, 11 L. R. A. (n. s.) 405.

Unlawful Detainer. See note, 120 Am. St. Rep. 64.

96 Cal. 100-102, 30 Pac. 1016, **WHITTAKER v. COUNTY OF TUOLUMNE.**

State and Its Political Subdivisions cannot be sued except as specially authorized by statute.

Approved in People v. San Joaquin Valley Agricultural Assn., 151 Cal. 806, 91 Pac. 744, holding property of district agricultural association not subject to execution.

96 Cal. 102-106, 31 Am. St. Rep. 189, 30 Pac. 1106, **BRADFORD v. PARKHURST.**

Where Purchaser is in Default in Payments on contract where time is of essence, he cannot recover back purchase money paid.

Reaffirmed in Poheim v. Meyers, 9 Cal. App. 37, 98 Pac. 67.

Fact That Contract for Sale of Land was signed by vendor alone does not entitle purchaser to recover back money paid thereunder, regardless of whether contract could not have been enforced against purchaser.

Approved in Cummins v. Beavers, 103 Va. 237, 106 Am. St. Rep. 881, 48 S. E. 893, holding option to purchase land based on valuable consideration could be specifically enforced.

96 Cal. 106-112, 31 Am. St. Rep. 192, 30 Pac. 1022, MOFFATT v. BULSON.

Homesteads on Public Lands. See note, 100 Am. St. Rep. 645.

96 Cal. 113-117, 30 Pac. 1104, IN RE WESTERFIELD.

Upon Appeal from Order Denying New Trial, errors apparent on face of judgment-roll cannot be considered.

Approved in *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 451, 84 Pac. 332, holding on appeal from order denying new trial, question that findings did not support judgment could not be raised; *Sprigg v. Barber* (Cal.), 54 Pac. 900, order denying new trial could not be reviewed where statement contained no specification of errors relied on.

96 Cal. 117-118, 30 Pac. 1019, GOLDBERG v. THOMPSON.

Swamp Lands Which have Become Fit for cultivation before application to purchase can be sold only to actual settlers.

Approved in *Boggs v. Ganeard*, 148 Cal. 717, 84 Pac. 198, holding void sale of swamp land to party not actual settler which had been reclaimed by settler thereon.

96 Cal. 119-125, 31 Pac. 8, BUCKLEY v. SUPERIOR COURT.

On Appeal Regularly Taken from Justice's Court, superior court has jurisdiction for any and all purposes.

Distinguished in *Maxson v. Superior Court* (Cal.), 54 Pac. 521, holding superior court on reversing case appealed from justice's court had no jurisdiction to remand case to justice.

Action of Court Within Its Jurisdiction, though entirely without authority of law, will not be reviewed on certiorari.

Approved in *People v. Ham Tong*, 155 Cal. 581, 132 Am. St. Rep. 110, 102 Pac. 264, 24 L. R. A. (n. s.) 481, holding error in decision of matter of which court had jurisdiction did not render judgment void; *Budd v. Superior Court*, 14 Cal. App. 258, 111 Pac. 629, holding prohibition did not lie to prevent superior court from proceeding with trial of justice's court appeal of which it had jurisdiction, when sureties on appeal bond had failed to justify on notice; *Thomas v. Hawkins*, 12 Cal. App. 329, 107 Pac. 579, holding certiorari did not lie to review dismissal of justice's court appeal when no undertaking was filed; *Bergevin v. Wood*, 11 Cal. App. 645, 105 Pac. 936, holding certiorari did not lie to review dismissal of appeal from justice's court when insufficient undertaking was filed; *Dahlgren v. Superior Court*, 8 Cal. App. 625, 627, 97 Pac. 682, 683, holding appointment of stranger as special administrator of estate of deceased person instead of daughter who had applied therefor could not be reviewed on certiorari.

Erroneous Dismissal of Appeal from justice's court to superior court cannot be reviewed on certiorari.

Approved in *McGowan v. Superior Court*, 13 Cal. App. 153, 154, 109 Pac. 35, 36, *Rabin v. Pierce*, 10 Cal. App. 736, 103 Pac. 772, and *Andrews v. Cook*, 28 Nev. 269, 270, 271, 81 Pac. 304, all following rule; *Olcese v. Justice's Court*, 156 Cal. 86, 103 Pac. 318, holding certiorari did not lie to review judgment of justice's court affirmed on appeal by superior court.

Overruled in *Kraker v. Superior Court*, 15 Cal. App. 653, 115 Pac. 664, and *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 476, 479,

481, 114 Pac. 979, 980, 981, both holding mandamus lay to compel court to proceed with trial of justice's court appeal improperly dismissed.

96 Cal. 125-140, 30 Pac. 1115, PEOPLE v. WONG ARK.

Statements of Injured Party Made after act, not in presence of defendant, nor made as dying declarations, are inadmissible against accused.

Approved in *Murphy v. Board of Police Pension etc. Commrs.*, 2 Cal. App. 469, 83 Pac. 577, statement of injured person as to what was matter with him, made after alleged assailant was out of sight, was hearsay; *People v. Brown*, 15 Cal. App. 400, 114 Pac. 1006, holding question calling for narrative of past event as to conduct of deceased not in presence of defendant was properly excluded; *State v. Foley*, 113 La. 59, 104 Am. St. Rep. 495, 36 So. 887, holding statement made by deceased very soon after shooting to be part of *res gestae*; *State v. Kapelino*, 20 S. D. 595, 108 N. W. 337, holding heated discussions taking place immediately before commission of crime, but not in presence of accused, were not admissible as part of *res gestae*.

Jurisdiction of Court Comes from Source of power above and beyond legislature, and court can only be deprived of it by power from whence it came.

Approved in *Grangers' Bank v. Superior Court (Cal.)*, 33 Pac. 1097, holding prohibition lay to prevent court from entertaining action for recovery of real estate outside county, though accounting was also asked, and various proceedings had already been taken without question as to jurisdiction.

96 Cal. 140-152, 31 Pac. 10, 17 L. R. A. 301, SAN FRANCISCO v. WESTERN UNION TEL. CO.

State Tax on Federal Franchise of Western Union Telegraph Company is void.

Approved in *Western Union Tel. Co. v. Visalia*, 149 Cal. 745, 87 Pac. 1023, *Western Union Tel. Co. v. Lakin*, 53 Wash. 329, 101 Pac. 1096, and *Sunset Telephone etc. Co. v. Pomona*, 164 Fed. 571, all reaffirming rule.

Distinguished in *Western Union Tel. Co. v. Los Angeles*, 160 Cal. 128, 116 Pac. 566, and *Western Union Tel. Co. v. Hopkins*, 160 Cal. 114, 116 Pac. 560, both upholding tax assessment on state franchise of telegraph company in streets of Los Angeles; *Williams v. City of Talladega*, 164 Ala. 643, 51 So. 332, holding foreign telegraph company operating lines along post roads subject to tax on intrastate business.

Taxation of Franchises. See note, 131 Am. St. Rep. 881.

Power of States to Control or Impose burdens upon interstate telegraph and telephone companies. See note, 24 L. R. A. 162.

Taxation of Corporate Franchises. See note, 57 L. R. A. 56, 83, 92.

Corporate Taxation and the Commerce Clause. See note, 60 L. R. A. 686.

96 Cal. 155-160, 31 Am. St. Rep. 198, 30 Pac. 1113, WARD v. MARSHALL.

Salary Attached to Office is Incident to legal title.

Approved in *Bannerman v. Boyle*, 160 Cal. 199, 116 Pac. 732, holding *de facto* officer could not compel payment of salary to him; *Tan-*

ner v. Edwards, 31 Utah, 86, 120 Am. St. Rep. 919, 86 Pac. 766, holding state officer entitled to salary for portion of term for which he was commissioned though he had not personally assumed charge of office and compensation had been paid to de facto incumbent.

Distinguished in **Merkley v. Williams**, 3 Cal. App. 273, 84 Pac. 1017, holding successful contestant of election was entitled only to receive salary for remainder of term; **Bergerou v. Parker**, 4 Cal. App. 175, 87 Pac. 250, confinement of officer in jail for more than three months did not deprive him of right to salary for period of confinement when no one was appointed to discharge duties during such period.

Disapproved in dissenting opinion in **Rees v. Minneapolis**, 105 Minn. 248, 117 N. W. 433, majority upholding finding that mayor did not intend to suspend policeman from duty without pay.

Recovery of Salary by Officer Wrongfully Removed. See note, 90 Am. St. Rep. 421.

96 Cal. 160-162, 31 Pac. 14, HARVEY v. DALE.

Rule of Caveat Emptor Applies to Purchaser of bonds of water company.

Approved in **O'Sullivan v. Griffith**, 153 Cal. 506, 95 Pac. 875, holding fact that franchise was void was no defense to action for price of its transfer.

96 Cal. 165-171, 31 Pac. 16, PEOPLE v. SWIFT.

Equitable Title Under Certificate of Purchase in hands of assignee is vitiated by fraud of assignor in its procurement.

Reaffirmed in **Miller v. Engle**, 3 Cal. App. 334, 85 Pac. 162.

96 Cal. 171-182, 31 Pac. 45, PEOPLE v. O'BRIEN.

Fraudulent Purpose is not Essential to crime of altering public records.

Approved in **People v. Tomalty**, 14 Cal. App. 229, 230, 232, 111 Pac. 515, 516, following rule; **People v. Wolfrom**, 15 Cal. 736, 115 Pac. 1090, holding intent to defraud buyer of mortgaged personal property not essential to constitute violation of section 538, Penal Code; **State v. Keller**, 8 Idaho, 706, 70 Pac. 1053, holding criminal intent need not be alleged in indictment where offense charged is statutory.

Ignorance of Law Does not Excuse infringement thereof.

Approved in **State v. Examining & Trial Board**, 43 Mont. 399, 117 Pac. 80, holding ignorance of law did not excuse illegal charge for mileage by chief of police; **Skeen v. Craig**, 31 Utah, 33, 86 Pac. 491, holding ignorance of law did not excuse city councilman from taking illegal compensation.

Indictment for Offense of Altering public record is sufficient if it sets forth offense charged in such manner as to enable person of common understanding to know what is intended.

Approved in **People v. Finley**, 153 Cal. 63, 94 Pac. 250, upholding indictment charging assault by life prisoner substantially in language of code.

Instruction That Jury Should Consider Position of defendant testifying in own behalf, and interest he may feel in verdict, in passing on weight of testimony, is proper.

Approved in **Lang v. State**, 42 Fla. 601, 28 So. 857, and **People v. Ryan**, 152 Cal. 368, 92 Pac. 855, both upholding similar instruction;

Burk v. State, 79 Neb. 244, 112 N. W. 574, reversing judgment of conviction on ground instruction in regard to testimony of defendant told jury they should consider contradictions of his testimony in determining its credibility.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 818.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 998; 62 L. R. A. 218.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 30.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 700.

What Constitutes Extradition. See note, 116 Am. St. Rep. 456.

96 Cal. 182-183, 31 Pac. 16, McCORMICK v. BELVIN.

Where Undertaking Does not Refer separately to either of two appeals taken on one notice of appeal it is void for both.

Approved in **Estate of Sutro**, 152 Cal. 252, 92 Pac. 488, holding where two identical notices of appeal from same judgment were given on different days, failure of undertaking to refer to either notice rendered it void.

96 Cal. 183-188, 31 Pac. 49, McBEAN v. SAN BERNARDINO.

Provision in Contract for Sewer That City shall not be liable prevents recovery from city if assessments do not meet expense.

Approved in **Union Trust Co. v. State**, 154 Cal. 726, 99 Pac. 187, 24 L. R. A. (n. s.) 1111, holding state not liable for failure of agents to collect assessments on bonds for opening city street authorized by legislature.

96 Cal. 202-206, 31 Pac. 2, BUSH v. BARNETT.

Common Carrier is Presumed Negligent upon proof of injury to passenger.

Approved in **Sambuck v. Southern Pac. Co. (Cal.)**, 71 Pac. 175, following rule; **Dixon v. Pluns (Cal.)**, 31 Pac. 932, holding where plaintiff while walking on sidewalk was injured by fall of chisel from building, prima facie case of negligence was established.

Presumption of Negligence from Happening of accident causing personal injuries. See notes, 113 Am. St. Rep. 1020, 1031; 13 L. R. A. (n. s.) 608.

Relation of Res Ipsa Loquitur to burden of proof. See note, 16 L. R. A. (n. s.) 529.

96 Cal. 206-210, 31 Pac. 37, DORN v. BAKER.

Exemption from Taxation or Assessment of lands owned by governmental bodies, or in which they have an interest. See note, 132 Am. St. Rep. 347.

96 Cal. 210-213, 31 Pac. 38, BURR v. SACRAMENTO COUNTY.

Application by Taxpayer for Writ of Review to annul order for payment of unauthorized claims against county will be denied when claim has actually been paid before commencement of action.

Approved in **Reagan v. Bahrs**, 11 Cal. App. 236, 104 Pac. 590, denying application for certiorari to review order appointing temporary

superintendent of street repairs made five months after expiration of term of appointee.

96 Cal. 214-217, 31 Pac. 41, RAMELLI v. IRISH.

Right of Prior Appropriator of Waters on public land will be recognized as against subsequent purchaser of land from government.

Approved in *Land v. Johnston*, 156 Cal. 256, 104 Pac. 450, following rule; *Crawford Co. v. Hathaway*, 67 Neb. 365, 108 Am. St. Rep. 647, 93 N. W. 794, 60 L. R. A. 889, holding right to water acquired by appropriation was superior to that of riparian proprietor whose right attached subsequently.

Party Who has Appropriated Waters may change place of diversion, or of use, or character of use if others are not injured by change.

Approved in *Barton v. Riverside Water Co.*, 155 Cal. 517, 101 Pac. 793, 23 L. R. A. (n. s.) 331, holding location of artesian wells supplying water could be changed, if without injury to others; *Anderson v. Bassman*, 140 Fed. 23, holding whether appropriation took place in California or in Nevada, for use in Nevada, did not affect appropriator's right; *Hard v. Boise City Irr. etc. Co.*, 9 Idaho, 598, 76 Pac. 333, 65 L. R. A. 407, holding owner of property right in water of ditch could transfer it for use on other lands.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

Change of Use or Channel of Water Appropriated. See note, 30 L. R. A. 385.

96 Cal. 218-222, 31 Pac. 42, SHEPLAR v. GREEN.

Where Vendee Enters Under Contract of purchase and makes improvements, commencement of action to quiet title by vendor is repudiation of contract, and entitles vendee to bring suit for specific performance without tender of purchase money.

Approved in *Stanton v. Singleton (Cal.)*, 54 Pac. 589, holding refusal to allow party to option contract to perform conditions, and repudiation prior to expiration of option, released holder from tender of purchase price as condition to suit for specific performance.

96 Cal. 223-227, 31 Pac. 1, DENIS v. VELATI.

To Constitute Delivery of Deed, Grantor must divest himself of all power and dominion over it.

Approved in *Follmer v. Rohrer*, 158 Cal. 758, 112 Pac. 546, upholding finding that deed was delivered; *Drinkwater v. Hollar*, 6 Cal. App. 121, 91 Pac. 666, holding tradition of deed without consent of grantor was not delivery; *Towne v. Towne*, 6 Cal. App. 701, 92 Pac. 1052, holding possession of valid deed by grantee established delivery in absence of evidence to show no delivery; *Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 466, 86 Pac. 818, delivery of deed not shown; *Koester v. Port Huron Co.*, 24 S. D. 559, 124 N. W. 745, holding contract not delivered with intent it should become effective.

Distinguished in *Dennison v. Barney*, 49 Colo. 454, 113 Pac. 523, holding where deed was placed in possession and under control of grantee, it took effect at once.

96 Cal. 228-233, 31 Pac. 39, HULSMAN v. TODD.

In Action for Damages for Diversion of water, where defendants joined in common answer denying plaintiff's title and alleging it to

be in themselves by reason of appropriation by one of defendants' grantors for benefit of all, all defendants are jointly liable for such diversion.

Distinguished in *Mau v. Stoner*, 15 Wyo. 133, 87 Pac. 439, holding in trespass for interfering with ditch where plaintiff charged defendants jointly, their joinder in joint answer did not preclude them from taking advantage of fact proof did not establish joint liability.

Where Findings Dispose of Issues sufficiently to support judgment, and make clear that other findings, if made, would have been adverse to appellant, judgment will not be reversed for failure to find specifically on each issue.

Approved in *O'Connor v. Clarke* (Cal.), 44 Pac. 483, following rule; *Bailiff v. Powers* (Cal.), 37 Pac. 509, refusing to reverse judgment for failure to find on material issue when record showed no evidence on such issue.

96 Cal. 239-242, 31 Pac. 52, PEOPLE v. URQUIDAS.

Instruction That "There is Nothing in Nature of circumstantial evidence that renders it less reliable than other kinds of evidence," correctly states law.

Approved in *People v. Olsen*, 1 Cal. App. 20, 81 Pac. 677, holding remark of judge as to effect of circumstantial evidence made during impaneling of jury affected no right of defendant; *State v. Foster*, 14 N. D. 569, 105 N. W. 940, holding instruction distinguishing between weight and effect of circumstantial and direct evidence properly refused.

Circumstantial Evidence. See note, 97 Am. St. Rep. 774.

Where Newly Discovered Evidence might have been produced with reasonable diligence, new trial will not be granted.

Approved in *Foley v. Northern Calif. Power Co.*, 14 Cal. App. 409, 112 Pac. 470, and *O'Connor v. Clarke* (Cal.), 44 Pac. 483, both following rule; *People v. Woodruff* (Cal.), 58 Pac. 856, and *Smiley v. Territory*, 15 Okl. 317, 81 Pac. 434, both upholding denial of new trial on ground of newly discovered evidence when not shown such evidence was of character to justify new hearing; *Grass v. Robertson* (Cal.), 37 Pac. 772, holding new trial on ground of newly discovered evidence properly refused when affidavits were conflicting.

96 Cal. 243-251, 31 Pac. 54, LORENZ v. WALDRON.

Anything Short of Reasonable Probability of injury is insufficient to warrant injunction against proposed use of property by owner.

Approved in *Galbreath v. Hopkins*, 159 Cal. 303, 113 Pac. 177, holding plaintiff not called upon to seek to enjoin drainage of upper lands until such drainage and discharge therefrom actually affected his rights; *Orcutt v. Pasadena Land etc. Co.*, 152 Cal. 601, 93 Pac. 498, holding resident in municipality could not enjoin transfer by corporation furnishing water to such municipality of its property and franchise to another corporation, his right to water not being affected by such transfer; *Dunn v. Youmans*, 224 Ill. 40, 79 N. E. 323, denying injunction to compel relaying of drain in original location when new location furnished actually better drainage facilities to complainant; *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 367, 65 N. E. 342, holding danger of injury from broken electric wires was

so remote that placing wires of later occupying company above those of earlier company on street would not be enjoined.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 785, 794, 825.

96 Cal. 251-258, 31 Pac. 109, KRENZBERGER v. WINGFIELD.

To Exclude Parol Evidence to Vary Terms of writing, writing must be one which, by legal construction, shows upon face it was intended to express whole contract between parties.

Approved in Luitweiler etc. Engine Co. v. Ukiah Water etc. Co., 16 Cal. App. 207, 116 Pac. 711, parol evidence rule did not apply where reference was required to series of conversations and correspondence between parties; Henry v. Herschey, 9 Idaho, 554, 75 Pac. 268, admitting parol evidence to show that at time of execution of written instrument one of conditions therein had been fully satisfied.

Distinguished in Dodd v. Pasch, 5 Cal. App. 689, 91 Pac. 167, holding parol evidence inadmissible to vary terms of lease by showing it was leased from month to month.

In Action on Contract Held That Plaintiff could testify work had been done in accordance with contract, as being statement of fact within his knowledge.

Approved in Nolan v. Nolan, 155 Cal. 481, 132 Am. St. Rep. 99, 101 Pac. 522, holding plaintiff's direct testimony that he owned note was statement of fact, and not opinion.

96 Cal. 258-260, 31 Pac. 36, HASKIN v. JAMES.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 467.

96 Cal. 261-262, 31 Pac. 53, BAUMBERGER v. ARFF.

Party has No Absolute Right to Continuance because of absence of his attorney while engaged in trial in another court.

Approved in Boehm v. Gibson (Cal.), 35 Pac. 1015, upholding judgment for defendant rendered on trial when plaintiff's attorney was engaged in trial in another court.

Court may Impose Payment of Costs and jurors' fees as condition to continuance asked on ground of absence of attorney who was engaged in another trial.

Approved in Williams v. Myer, 150 Cal. 720, 89 Pac. 975, holding when continuance was asked to allow plaintiff to amend, court could impose payment of jurors' fees, mileage, and fees and mileage of defendant's witnesses; Abrook v. Ellis, 6 Cal. App. 454, 92 Pac. 397, holding court had discretion to refuse continuance asked on ground of absence of attorney of party.

96 Cal. 265-268, 31 Pac. 111, BRUSIE v. GATES.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

96 Cal. 269-274, 31 Pac. 170, LONG v. CORONADO R. R. CO.

Finding of Negligence by Court upon undisputed facts upheld.

Approved in Wardlaw v. California Ry. Co. (Cal.), 42 Pac. 1076, following rule; Johnson v. Thomas (Cal.), 43 Pac. 579, holding question of contributory negligence properly left to jury.

Duty of Master to Provide Sufficient Help. See note, 17 L. R. A. (n. s.) 775.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 120.

Volenti Non Fit Injuria as Defense to actions by injured servants. See note, 47 L. R. A. 175.

Miscellaneous.—Cited in *Hardesty v. Largy Lumber Co.*, 34 Mont. 164, 86 Pac. 33, discussing applicability of certain code sections to indemnification of employee by employer for personal injury.

96 Cal. 275-283, 31 Am. St. Rep. 201, 31 Pac. 290, **DELANO v. JACOBY.**

Question as to What is Necessary in power of attorney for sale of land to authorize attorney to execute and deliver deed must be determined on circumstances of each case.

Approved in *Stemler v. Bass*, 153 Cal. 795, 96 Pac. 811, contract held not to confer power on agent to bind owner by contract of sale; *Bacon v. Davis*, 9 Cal. App. 92, 98 Pac. 75, holding agent's power authorized him to execute contract of sale.

Waiver of Purchaser's Right to Rescind land contract. See note, 30 L. R. A. (n. s.) 877.

96 Cal. 283-288, 31 Pac. 293, **CLARK v. AUSTIN.**

Actions for Contribution not Founded on express promise. See note, 98 Am. St. Rep. 40.

96 Cal. 289-298, 31 Pac. 103, **PEOPLE v. PENDEGAST.**

Act of 1891 Redividing State into new senatorial districts is valid, though by reason of change of certain counties from odd to even numbered districts, voters therein have double representation for ensuing two years.

Approved in *Wheeler v. Herbert*, 152 Cal. 238, 92 Pac. 359, upholding act changing boundary of Fresno and Kings counties, though it placed parts of two counties in same assembly district.

96 Cal. 298-309, 31 Am. St. Rep. 209, 31 Pac. 166, **WARNOCK v. HARLOW.**

Unrecorded Deed from Trustee is not Void as against prior notice of lis pendens in action to enforce trust against grantee of deed.

Approved in *Gilman v. Carpenter*, 22 S. D. 129, 115 N. W. 662, holding unrecorded deed not affected by judgment in subsequent action by another claimant to quiet title, in which no lis pendens was filed.

Notice of Lis Pendens is not "Instrument" within meaning of section 1217, Civil Code.

Approved in *De Wolfskill v. Smith*, 5 Cal. App. 184, 89 Pac. 1004, holding copy of notice of appropriation of water need not be acknowledged as condition to being recorded.

Everyone to Whom Property is Transferred in violation of trust holds as involuntary trustee, unless he purchased in good faith and for value.

Approved in *Cottonwood Bank v. Case*, 25 S. D. 89, 125 N. W. 303, holding void deed by trustee in violation of trust without consent of beneficiaries.

In Action by Tenant of Grantee of Trustee to compel such grantee, and grantee of title obtained by beneficiary in action to enforce trust subsequent to grant by trustee, to interplead respecting rent due, burden is on grantee of beneficiary to aver and prove grantee of trustee was not bona fide purchaser.

Distinguished in *Bell v. Pleasant*, 145 Cal. 415, 104 Am. St. Rep. 61, 78 Pac. 958, in action to cancel deeds, where plaintiff claimed under prior unrecorded deeds and defendants under subsequent recorded deeds from same grantor, burden was on defendants to aver and prove they were bona fide purchasers for value.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 73.

96 Cal. 310-314, 31 Pac. 106, JOHNSON v. VISHNER.

Complaint in Ejectment Alleging Defendant wrongfully ousted plaintiff and took possession, to plaintiff's damage, is sufficient to sustain judgment for rents and profits.

Approved in *Phillips v. Reynolds*, 79 Neb. 629, 113 N. W. 235, petition held sufficient to allow recovery of mesne profits.

Informal Verdict Held to have Been Properly construed to support judgment.

Approved in *People v. Morley*, 8 Cal. App. 376, 97 Pac. 86, following rule; *Johnson v. Phenix Ins. Co.*, 152 Cal. 200, 92 Pac. 183, holding verdict construed with pleadings supported judgment.

Both Court and Jury are Bound by admissions of pleadings.

Reaffirmed in *Frank v. Symons*, 35 Mont. 64, 88 Pac. 564.

96 Cal. 315-321, 31 Pac. 107, PEOPLE v. DOLAN.

Validity of Information is not Affected by defect in complaint filed against defendant before committing magistrate.

Approved in *People v. Gregory*, 8 Cal. App. 741, 97 Pac. 913, holding complaint before magistrate could not be reviewed on motion to set aside information.

Where One Set of Circumstances Leads to two opposing conclusions, any reasonable doubt should be resolved in favor of innocence of accused.

Cited in *People v. Corey*, 8 Cal. App. 727, 97 Pac. 911, *arguendo*.

Effect of Mistake as to Age of Girl under statute denouncing sexual offenses. See note, 25 L. R. A. (n. s.) 662.

96 Cal. 322-331, 31 Pac. 100, GREEN v. ABIETINE MEDICAL CO.

Fully Paid Stock of Corporation is assessable.

Approved in *Bottle Mining etc. Co. v. Kern*, 9 Cal. App. 530, 99 Pac. 995, and *Von Horst v. American Hop. etc. Co.*, 177 Fed. 979, both following rule; *Wall v. Basin Min. Co.*, 16 Idaho, 328, 101 Pac. 738, 22 L. R. A. (n. s.) 1013, holding corporation could contract that fully paid stock should be nonassessable.

Assessments on Paid-up Stock. See notes, 45 L. R. A. 648; 22 L. R. A. (n. s.) 1020.

Effect upon One's Right as Stockholder of wrongful issuance of his stock as fully paid. See note, 20 L. R. A. (n. s.) 1079.

96 Cal. 332-339, 31 Pac. 164, MARBLE LIME CO. v. LORDSBURG HOTEL CO.

Single Judgment may be Rendered in consolidated lien suits.

Approved in *Nordstrom v. Corona City Water Co.*, 155 Cal. 210, 132 Am. St. Rep. 81, 100 Pac. 244, following rule.

"Trivial Imperfection" as Used in Code relates to question whether or not there has been actual completion of building.

Approved in *Schindler v. Green*, 149 Cal. 754, 87 Pac. 627, upholding finding of trial court that imperfection in work was trivial.

To Constitute "Cessation of Labor for Thirty Days," such as will bar lien not filed within thirty days thereafter, cessation must be such as to charge careful person with notice.

Approved in *Robinson v. Mitchel*, 159 Cal. 588, 591, 114 Pac. 987, 988, upholding finding that "cessation of labor" had not continued thirty days.

96 Cal. 339-348, 31 Pac. 161, **MILLER v. COX.**

Time as of Essence of Contract for sale of land. See note, 104 Am. St. Rep. 273.

96 Cal. 354-360, 31 Am. St. Rep. 218, 31 Pac. 245, 24 L. R. A. 195, **EX PARTE SING LEE.**

Ordinance Requiring Written Consent of majority of property holders in block, and in four adjacent blocks, for establishment of laundry is unreasonable and void.

Approved in *Coon v. Board of Public Works*, 7 Cal. App. 762, 95 Pac. 913, holding void ordinance requiring written consent of owners of property within two hundred feet as condition for establishment of livery-stable; *In re San Chung*, 11 Cal. App. 514, 520, 105 Pac. 610, 613, upholding ordinance forbidding laundry to be carried on in any building used as public store; *People v. Van De Carr*, 199 U. S. 561, 26 Sup. Ct. 144, 50 L. Ed. 305, upholding statute vesting discretion in board of health to give permits to sell milk; *Curran Bill Posting etc. Co. v. Denver*, 47 Colo. 236, 107 Pac. 267, holding void ordinance delegating to fire and police board discretion to revoke or decline to renew billboard licenses; *In re Snyder*, 10 Idaho, 690, 79 Pac. 821, 824, 68 L. R. A. 708, holding void ordinance requiring farmer to take out license to sell farm products in city; *State v. Withnell*, 78 Neb. 38, 126 Am. St. Rep. 586, 110 N. W. 682, 8 L. R. A. (n. s.) 978, holding void ordinance requiring written consent of all owners within one thousand feet for erection of gas tank; *Block & Griff v. Schwartz*, 27 Utah, 406, 101 Am. St. Rep. 971, 76 Pac. 28, holding void act declaring sale in bulk of merchant's stock to be in fraud of creditors unless inventory was made out five days before sale and creditors notified; *State v. Brown*, 37 Wash. 104, 107 Am. St. Rep. 798, 79 Pac. 638, 68 L. R. A. 889, holding void ordinance requiring license from dental board to "own, run, or manage" dental office.

Power to Make Particular Use of Property conditional upon consent of neighbors. See note, 8 L. R. A. (n. s.) 979.

Constitutionality of Statutes Restricting Contracts and business. See note, 21 L. R. A. 796.

Power of Municipal Corporations to Define, prevent, and abate nuisances. See note, 36 L. R. A. 608.

Municipal Power Over Nuisances Relating to Trade or business. See note, 38 L. R. A. 652.

Delegation of Municipal Power as to License, franchise, and buildings. See note, 20 L. R. A. 725, 727.

Power of Municipality to Prevent or Regulate use of property for advertising purposes. See note, 132 Am. St. Rep. 93.

Constitutional Limitations on Power to Impose License or occupation taxes. See note, 129 Am. St. Rep. 284.

96 Cal. 360-362, 31 Pac. 224, EX PARTE FELCHLIN.

Power of Municipality to Regulate Dealing in intoxicating liquors. See note, 114 Am. St. Rep. 301.

Discrimination Against Women in Police Regulations. See note, 49 L. R. A. 111, 112.

Power to Exclude Women from Saloons. See note, 18 L. R. A. (n. s.) 657.

96 Cal. 362-365, 31 Pac. 224, EX PARTE NOBLE.

Writ of Habeas Corpus cannot be Used as means of retrying issues of fact.

Approved in *In re Leonardino*, 9 Cal. App. 692, 100 Pac. 708, holding on habeas corpus question of fact arising at trial could not be reviewed.

Miscellaneous.—Cited in *Ex parte Mogensen*, 5 Cal. App. 597, 598, 90 Pac. 1064, to point that town of sixth class has power under section 11, article XI, Constitution, to prohibit liquor traffic.

96 Cal. 365-371, 31 Pac. 322, WELCH v. WILLIAMS.

In Construction of Statute, All Its Provisions must be considered together, and reconciled where possible, and particular provisions must be construed so as to promote and not defeat general purpose of law.

Approved in *In re Sing*, 14 Cal. App. 514, 112 Pac. 582, construing "any other person" in juvenile court law not to be ejusdem generis with classes mentioned before.

96 Cal. 371-376, 31 Am. St. Rep. 225, 31 Pac. 250, 17 L. R. A. 697, EATON v. BROWN.

Australian Ballot Law, in so far as it provides for voting of straight tickets by stamping opposite party name at head of ticket, is void.

Approved in dissenting opinion in *Socialist Party v. Uhl*, 155 Cal. 796, 797, 103 Pac. 189, 190, majority upholding provision of primary law that person can only have name printed on ballot of party with which he affiliated at last election; dissenting opinion in *Solon v. State*, 54 Tex. Cr. 293, 114 S. W. 363, majority upholding law making it misdemeanor to loan money to voter knowing it is to be used for paying poll tax; *Eckerson v. Des Moines*, 137 Iowa, 486, 115 N. W. 190, arguendo.

Distinguished in *Oughton v. Black*, 212 Pa. 7, 61 Atl. 348, upholding act making provision for voting straight ticket by single mark on ballot.

Right of Elector to Vote for Candidate not named on official ballot. See note, 91 Am. St. Rep. 686.

Marking Official Ballot. See note, 47 L. R. A. 806.

How Far Right to Vote Absolute. See note, 25 L. R. A. 484.

96 Cal. 376-381, 31 Am. St. Rep. 229, 31 Pac. 247, MILLER v. MILLER.

Tax Deed is Conclusive of Regularity of all proceedings required to be done at hands of public officials leading up to execution of deed.

Approved in *Gibson v. Smith*, 24 S. D. 527, 124 N. W. 739, upholding tax deed which did not on face detail compliance with all conditions that render deed valid.

Person Relying on Tax Deed is bound to establish service of notice upon owner thirty days before expiration of time for redemption.

Approved in *Johnson v. Taylor*, 150 Cal. 203, 119 Am. St. Rep. 181, 88 Pac. 904, 10 L. R. A. (n. s.) 818, *Wetherbee v. Johnston*, 10 Cal. App. 265, 101 Pac. 803, and *King v. Samuel*, 7 Cal. App. 64, 93 Pac. 394, all holding rule applies to state.

96 Cal. 388-393, 31 Pac. 264, PAIGE v. ROEDING.

All Presumptions are in Favor of regularity of proceedings of courts of general jurisdiction.

Approved in *Estate of Bouysson*, 3 Cal. App. 41, 84 Pac. 460, action of trial court in vacating order appointing administrator presumed regular.

Where Judgment-roll Shows Two Judgments, later in time is presumed correct.

Approved in *Moore v. Mott* (Cal.), 34 Pac. 346, holding in action on bond to release attachment, where judgment in attachment suit appeared of record subsequent to judgment of nonsuit, such judgment was valid in absence of showing to contrary.

Court may, Under Proper Circumstances, set aside findings and judgment.

Approved in *Cubitt v. Cubitt*, 74 Kan. 359, 86 Pac. 477, holding court could correct mistake in name of parent inserted in papers of adoption; *Haese v. Heitzeg*, 159 Cal. 574, 114 Pac. 818, *arguendo*.

96 Cal. 394-396, 31 Pac. 265, NICHOLSON v. GETCHELL.

Mandatory Injunction Lies to Abate Nuisance on showing danger of injury is probable and imminent.

Approved in *Sanders v. Miller*, 52 Tex. Civ. App. 379, 113 S. W. 1000, holding cause of action for damages did not arise upon digging water hole near plaintiff's premises when danger or unsanitary conditions had not arisen.

96 Cal. 397-399, 31 Pac. 261, GOODSSELL v. ASHWORTH.

Actions for Which Sureties on Official Bonds are liable. See note, 91 Am. St. Rep. 573.

96 Cal. 400-403, 31 Pac. 259, STARK v. WELLMAN.

Action for Negligence in not Taking proper care of money delivered defendant at his request, of which he agreed to take proper care, but which he failed to redeliver on demand, is founded on breach of contract and not on tort.

Approved in *Morse v. Steele*, 149 Cal. 306, 86 Pac. 694, holding action for damages for failure to redeliver livestock and increase given to another for purpose of care and breeding for owner's benefit was on contract.

Tort for Negligent Breach of Contract between private parties. See note, 12 L. R. A. (n. s.) 926.

Where Amendment is Made After Verdict, error is immaterial when cause was tried with reference to allegations of amendment.

Approved in *La Rue v. St. Anthony & Dak. Elv. Co.*, 17 S. D. 98, 95 N. W. 294, holding admission in evidence of original superseded answer containing admissions was harmless error when there was sufficient evidence to support verdict without such admissions.

96 Cal. 404-408, 31 Pac. 266, **ANDERSON v. DE URIOSTE.**

Contract for Street Work may be Assigned by contractor without consent of city.

Approved in *Berkeley Development Co. v. Marx*, 10 Cal. App. 412, 102 Pac. 279, holding warrant may run in favor of assignee of contractor.

Assignability of Construction or Building Contracts. See note, 21 L. R. A. (n. s.) 361.

96 Cal. 408-412, 31 Pac. 234, 31 Pac. 267, **EDWARDS v. ROLLEY.**

Bed of River Through Which Water has ceased to flow is not swamp or overflowed land within meaning of act of Congress of September 28, 1850.

Approved in *State v. Gerbing*, 56 Fla. 614, 47 So. 357, 22 L. R. A. (n. s.) 337, holding act does not include lands under navigable waters.

Unauthorized State Patent may be Collaterally Attacked by party in mere possession of land.

Approved in *Williams v. San Pedro*, 153 Cal. 47, 52, 94 Pac. 235, 237, holding void certificate of purchase of tide lands could be collaterally attacked in action by holder to quiet title, though defendants did not connect themselves with title of state.

Right of State to Grant Tide Lands. See note, 22 L. R. A. (n. s.) 344.

96 Cal. 417-418, 31 Pac. 289, **DIGGINS v. THORNTON.**

Action will be Dismissed for Unreasonable Delay in service of summons.

Reaffirmed in *Luke v. Bennion*, 36 Utah, 65, 106 Pac. 714.

96 Cal. 421-425, 31 Pac. 363, **CASTRO v. GAFFEY.**

Lease Signed by Lessor and Accepted by Lessee has same force as if signed by lessee.

Approved in *Dodd v. Basch*, 5 Cal. App. 689, 91 Pac. 167, following rule; *Green Ridge Fuel Co. v. Little John*, 141 Iowa, 224, 119 N. W. 700, holding void coal lease signed only by life tenant and part of remaindermen.

96 Cal. 426-432, 31 Pac. 353, **HUBBACK v. ROSS.**

Declarations of Agent are not Admissible to prove his agency.

Approved in *Kast v. Miller & Lux*, 159 Cal. 728, 115 Pac. 933, and *Parker v. Brown*, 131 N. C. 264, 42 S. E. 606, both following rule.

96 Cal. 433-441, 31 Pac. 358, **WICKERSHAM v. COMERFORD.**

Wife Separated from Husband by Agreement which surrendered claims for support is not entitled to widow's allowance from his estate.

Approved in Estate of Miller, 158 Cal. 423, 111 Pac. 257, holding wife who abandoned husband not entitled to widow's allowance; Estate of McVay, 14 Idaho, 73, 93 Pac. 34, holding separation caused by cruel treatment of husband did not deprive wife of right to probate homestead; Ullman v. Abbott, 10 Wyo. 111, 67 Pac. 469, holding wife who had not lived with husband in state for thirty years not entitled to homestead.

Validity and Effect of Separation Agreements. See note, 83 Am. St. Rep. 881.

Validity of Agreement Between Husband and Wife renouncing marital rights. See note, 12 L. R. A. (n.s.) 851.

Procurement of Order Setting Aside Estate to widow by willful suppression of facts is extrinsic fraud warranting vacation of order.

Approved in Campbell-Kawannanako v. Campbell, 152 Cal. 210, 92 Pac. 187, holding sham sale to effectuate void trust procured by fraud on court presented case of extrinsic fraud warranting relief.

Creditor, Whose Claim Against Estate has not been allowed, may bring suit in equity to set aside decree setting apart homestead to widow on ground it was procured by fraud.

Approved in Estate of Walker, 160 Cal. 549, 117 Pac. 511, holding only court of equity could set aside decree of distribution and establish will thereafter discovered.

96 Cal. 441-443, 31 Pac. 457, HANSON v. CORDANO.

Application of Payments. See note, 96 Am. St. Rep. 77.

96 Cal. 443-447, 31 Pac. 458, RICHARDSON v. EUREKA.

Liability for Damming Back Stream. See note, 59 L. R. A. 854

96 Cal. 448-455, 31 Pac. 453, IN RE SPENCER.

Appeal Lies from Order Denying New Trial of contest of probate of will.

Approved in Estate of Sutro, 152 Cal. 257, 92 Pac. 490, holding appealable order denying new trial in proceeding for partial distribution; State v. Langan, 32 Nev. 180, 105 Pac. 570, holding motion for new trial was proper as preliminary to appeal in estate proceedings to set aside homestead for widow.

Where Result Could not have Been Different, judgment will not be reversed for errors at trial.

Approved in Estate of Dolbeer, 149 Cal. 230, 86 Pac. 697, Spotswood v. Spotswood, 4 Cal. App. 717, 89 Pac. 364, and Mendocino Co. v. Peters, 2 Cal. App. 28, 29, 82 Pac. 1124, holding assignments of error based on rulings pertaining to evidence on fact admitted by pleadings need not be considered; People v. Taggart, 1 Cal. App. 426, 82 Pac. 397, holding erroneous instruction as to circumstantial evidence to be without prejudice; Greene v. Murdock, 1 Cal. App. 139, 81 Pac. 994, where plaintiff was not entitled to verdict under pleadings and evidence, he was not prejudiced by erroneous instruction to jury.

Capricious and Arbitrary Likes and Dislikes of testator are not evidences of insanity.

Approved in Estate of Riordan, 13 Cal. App. 319, 109 Pac. 631, following rule; Estate of Dolbeer, 3 Cof. Prob. 244, 247, 248, holding unreasonable dislikes of testator not ground for avoiding will; Taylor

v. McClintock, 87 Ark. 275, 112 S. W. 412, holding stupid error did not render will invalid.

Aversion to Relatives as Affecting Mental Capacity to make will. See notes, 117 Am. St. Rep. 582; 1 Cof. Prob. 532.

Belief in Spiritualism is not Evidence of testator's insanity.

Approved in **Steinkuehler v. Wempner**, 169 Ind. 165, 81 N. E. 486, 15 L. R. A. (n. s.) 673, and **O'Dell v. Goff**, 149 Mich. 157, 112 N. W. 738, both following rule.

Belief in Spiritualism as Affecting testamentary capacity. See notes, 2 Cof. Prob. 31; 15 L. R. A. (n. s.) 674.

What are Insane Delusions. See note, 37 L. R. A. 270.

What is Testamentary Capacity. See note, 27 L. R. A. (n. s.) 62.

96 Cal. 455-462, 31 Pac. 558, **McCROSKY v. LADD**.

In Action on Note Between Original Parties, equities existing between them arising out of execution of note or connected therewith may be inquired into.

Approved in **Menzel v. Primm**, 6 Cal. App. 214, 91 Pac. 758, holding surety could defend action on note by showing failure of consideration by reason of plaintiff having repudiated contract, which was consideration, after maturity of note.

Where Vendor Allows Whole of Installments of contract to fall due, he cannot sue for any installment without tender of conveyance.

Approved in **Boone v. Templeman**, 158 Cal. 297, 139 Am. St. Rep. 126, 110 Pac. 950, following rule; **Woodbury v. King**, 152 N. C. 680, 68 S. E. 224, purchaser of standing timber on land, when sued on note for price, could prove partial failure of title and deficiency in timber sold so as to permit jury to determine abatement in price.

Distinguished in **Gagnon v. Molden**, 15 Idaho, 733, 99 Pac. 967, contract for furnishing water considered and held that failure to furnish and deliver water before date fixed for first annual installment was breach of contract and gave other party right of action for damages.

Right of Grantee in Possession to Question Right of grantor to collect purchase money. See note, 21 L. R. A. (n. s.) 366, 380.

96 Cal. 462-466, 29 Pac. 117, 31 Pac. 561, **BAUM v. REAY**.

What Title or Interest will Support Ejectment. See note, 18 L. R. A. 785.

96 Cal. 467-479, 31 Pac. 554, **VERDIER v. ROACH**.

Contingent Claim Provable at Any Time must be presented against estate.

Cited in **People's Home Savings Bank v. Stadtmuller**, 150 Cal. 107, 88 Pac. 281, arguendo.

Contingency of Claim as Affecting Limitation of time for presentation. See note, 58 L. R. A. 88.

Statement of Claims Against Estates of Decedents. See notes, 130 Am. St. Rep. 317; 5 Cof. Prob. 303.

96 Cal. 480-484, 31 Pac. 1115, **WHITTON v. SULLIVAN**.

Principal is Bound as to Third Persons by apparent authority he has given agent.

Approved in **Browning v. McNear**, 158 Cal. 529, 111 Pac. 542, holding seller, in dealing with agent of purchaser having general

authority to buy grain, was not affected by limitation upon authority of agent not communicated to him.

96 Cal. 484-486, 31 Am. St. Rep. 237, 31 Pac. 529, **FISH v. McCARTHY**.

Guardian of Minor cannot Subject Estate of ward to mechanic's lien by contract for building, without authorization of court.

Approved in *Los Angeles v. Winans*, 13 Cal. App. 254, 109 Pac. 649, following rule; *Lothrop v. Duffield*, 134 Mich. 488, 96 N. W. 578, holding ward's estate not liable for services of attorney rendered at guardian's request; *Davidson v. Wampler*, 29 Mont. 67, 74 Pac. 84, holding guardian could not bind ward by contract entered into on his behalf.

Right to Mechanic's Lien for Improvements on infant's land by authority of guardian. See note, 15 L. R. A. (n. s.) 1159.

96 Cal. 486-490, 31 Pac. 532, **MOORE v. SCHOFIELD**.

In Action Against Two Joint Obligors, one of whom has died after suit brought, neither plaintiff nor surviving obligor is competent as witness to prove obligation.

Approved in *Delmoe v. Long*, 35 Mont. 150, 88 Pac. 781, holding plaintiff in suit to enforce trust in mining claim against executors of his alleged co-owner was incompetent to testify to matters occurring before death of latter.

96 Cal. 494-501, 28 Pac. 571, 31 Pac. 561, **TREWATHA v. BUCHANAN GOLD MIN. ETC. CO.**

Engineer Employed to Operate Hoisting Tackle in mine used to hoist rock and raise and lower miners is fellow-servant with workman in mine.

Approved in *Schwind v. Floriston Pulp etc. Co.*, 5 Cal. App. 202, 89 Pac. 1069, holding employee of paper-mill and yard foreman were fellow-servants.

Who are Fellow-servants Generally. See note, 18 L. R. A. 797.

What Servants Deemed to be in Common Employment, apart from statutes, where no questions as to vice-principalship arise. See note, 50 L. R. A. 438.

Where Injury is Proximately Caused by negligence of fellow-servant, master is not liable even though appliances used were defective and contributed to injury.

Approved in *Gila Valley etc. R. R. Co. v. Lyon*, 8 Ariz. 127, 71 Pac. 960, reaffirming rule; *Haskell & Barker Car Co. v. Przewdziankowski*, 170 Ind. 15, 127 Am. St. Rep. 352, 83 N. E. 632, 14 L. R. A. (n. s.) 972, holding employer liable for injury to employee caused by fellow-employee carelessly placing truck so close to car track that passing car set it in motion; *Hardesty v. Largy Lumber Co.*, 34 Mont. 164, 86 Pac. 33, holding employer liable for injury to employee through fall of pile of lumber carelessly piled under direction of vice-principal.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 131, 175, 177.

Duty of Mine Owners to Prevent Injury to employees. See note, 87 Am. St. Rep. 576.

96 Cal. 501-504, 31 Pac. 619, REED v. LYON.

Person Relying on Tax Deed must prove giving of notice to redeem required by section 3785, Political Code.

Approved in *Johnson v. Taylor*, 150 Cal. 203, 119 Am. St. Rep. 181, 88 Pac. 904, 10 L. R. A. (n. s.) 818, *Wetherbee v. Johnston*, 10 Cal. App. 266, 101 Pac. 803, and *King v. Samuel*, 7 Cal. App. 63, 64, 93 Pac. 394, all following rule.

96 Cal. 505-509, 31 Am. St. Rep. 239, 31 Pac. 531, 746, CURRIER v. NELSON.

"North" as Used in Descriptive Call of Deed means due north, unless qualified.

Approved in *Moody v. Vondereau*, 131 Ga. 526, 62 S. E. 823, holding where deed described land as bounded on "north" by land of grantor, due east and west line cutting off proper acreage was northern boundary.

96 Cal. 510-518, 31 Am. St. Rep. 242, 31 Pac. 581, VULCAN POWDER CO. v. HERCULES POWDER CO.

Trader may Sell Patent Right and protect assignee by agreement to refrain from acts which would lessen its value.

Approved in *Hartman v. John D. Park & Sons Co.*, 145 Fed. 377, upholding contract between manufacturer owning secret process limiting retailers as to retail price.

Several Persons or Companies cannot Legally Enter into business combination to control manufacture or sale or price of staple of commerce merely because some of them have patents for certain grades of staple.

Approved in *State v. Creamery Package Mfg. Co.*, 110 Minn. 437, 136 Am. St. Rep. 514, 126 N. W. 130, following rule; *Bobbs-Merrill Co. v. Straus*, 139 Fed. 192, holding illegal combination of publishers to control retail selling price of copyrighted books; *State v. Standard Oil Co.*, 218 Mo. 461, 116 S. W. 1047, holding combination of oil companies to be illegal and in restraint of trade; *Heim Brewing Co. v. Belinder*, 97 Mo. App. 70, 71 S. W. 693, holding void agreement of brewers in city that they would not sell beer to retailers who were in debt for beer to any brewer; dissenting opinion in *John D. Park & Sons Co. v. National etc. Druggists' Assn.*, 175 N. Y. 43, 96 Am. St. Rep. 578, 67 N. E. 151, 62 L. R. A. 632, majority upholding agreement between makers of patent medicine and association of wholesalers to maintain makers' prices.

Courts will Grant No Relief to Parties to contract which is void as against public policy.

Distinguished in *California Raisin Growers' Assn. v. Abbott*, 160 Cal. 608, 117 Pac. 771, holding in equitable action for accounting against fruit growers' association, where unlawful design of association was not alleged by any defendant, evidence it was organized to create monopoly was inadmissible; *Grogan v. Chaffee*, 156 Cal. 613, 105 Pac. 747, 27 L. R. A. (n. s.) 395, upholding contract for sale of olive oil on conditions as to terms of resale as not creating monopoly.

Contracts, Consideration for Which has Partly Failed, or is partly illegal. See note, 117 Am. St. Rep. 499.

Constitutionality of Statutes Restricting Contracts and business. See note, 21 L. R. A. 794.

Miscellaneous.—Cited in *Vulcan Powder Co. v. California Vigorit Powder Co. (Cal.)*, 31 Pac. 583, companion case.

96 Cal. 518-521, 31 Pac. 914, 19 L. R. A. 53, **JOSEPH v. MACOWSKY.**

Party Seeking Relief from Fraud must himself be free from fraud.

Approved in *Millbrae Co. v. Taylor (Cal.)*, 37 Pac. 236, 237, refusing injunction to protect trade name when plaintiff's use of name was fraud on public; *Castroville Co-op. Creamery Co. v. Col*, 6 Cal. App. 536, 92 Pac. 649, holding where plaintiff had permitted fraudulent use of its label before filing trademark, it could maintain no action for its infringement; *Lemke v. Dietz*, 121 Wis. 108, 98 N. W. 938, holding proprietary medicine label which falsely stated medicine was prepared by physician would not be protected by injunction.

96 Cal. 522-532, 31 Pac. 584, **IN RE MOORE.**

Administrator cannot be Charged With Loss resulting from failure to collect rent where not due to lack of ordinary diligence in management of estate.

Reaffirmed in *Elizalde v. Murphy*, 4 Cal. App. 120, 87 Pac. 248, holding administrator not chargeable with negligence in failing to sue on promissory note, maker of which was at all times insolvent.

Where Executor Paid Sum to Widow under agreement she should accept it as her share of estate, he is entitled to decree that such sum is charge against her entire distributive share.

Reaffirmed in *Elizalde v. Murphy*, 4 Cal. App. 120, 87 Pac. 248.

Probate Court, in Exercise of Probate Jurisdiction, proceeds upon principles of equity.

Approved in *Estate of Glenn*, 153 Cal. 80, 94 Pac. 232, and *Estate of Johnson*, 4 Cal. Prob. 501, 506, both following rule; *In re Burton*, 5 Cal. Prob. 238, holding probate court had full jurisdiction to hear and determine every matter necessary or proper in proceeding before it.

Order Setting Apart Real Property as probate homestead vests title in parties named in decree.

Approved in *Estate of Hayes*, 1 Cal. Prob. 553, following rule; *Estate of Kennedy*, 157 Cal. 521, 108 Pac. 281, holding title to such homestead comes from order setting it apart and not from will; *Hanley v. Hanley*, 4 Cal. Prob. 480, 482, holding such order could not be collaterally attacked.

Distinguished in *Hoppe v. Hoppe (Cal.)*, 36 Pac. 392, holding order setting apart homestead from community property could not vest title to homestead in widow when made without notice to minor children.

Right to Rents on Lease of Intestate's Property. See note, 40 L. R. A. 323.

Allowance to Administrator for Interest on disbursements. See note, 5 Cal. Prob. 394.

Miscellaneous.—Cited in *Moore v. Moore (Cal.)*, 34 Pac. 90, on another appeal.

96 Cal. 532-595, 31 Pac. 915, 19 L. R. A. 40, **BLYTH v. AYRES.**

Section 230, Civil Code, Uses "Adopts" in sense of "legitimates," and is statute of legitimation.

Approved in *Allison v. Bryan*, 26 Okl. 528, 138 Am. St. Rep. 988, 109 Pac. 937, following rule; *Garner v. Judd (Cal.)*, 64 Pac. 1076, holding acknowledgment of bastard by father without receiving it

into family was not adoption and such child had no right to administer on father's estate; *Allison v. Bryan*, 21 Okl. 561, 97 Pac. 283, 18 L. R. A. (n. s.) 931, holding where father with consent of wife received his bastard into family and treated it as legitimate child, it thereby became legitimated.

Section 230, Civil Code, Relative to Legitimation, applies to case of father resident in state, where mother and child reside in foreign country.

Distinguished in *Miller v. Pennington*, 218 Ill. 225, 75 N. E. 921, 1 L. R. A. (n. s.) 773, and *Hall v. Gabbert*, 213 Ill. 211, 212, 213, 72 N. E. 807, both holding child born before marriage but afterward recognized by father to be legitimate; *Irving v. Ford*, 183 Mass. 450, 97 Am. St. Rep. 447, 67 N. E. 367, 65 L. R. A. 177, holding, under act legitimizing offspring of cohabiting slaves, mere acknowledgment of parentage, under circumstances of case, did not amount to legitimation; *Moen v. Moen*, 16 S. D. 218, 92 N. W. 15, holding where non-resident alien had acknowledged child in writing on his death after statute took effect, such child was heir to property in state.

"Acknowledgment," as Used in Section 230, Civil Code, has no technical meaning, and must be taken in ordinary sense.

Approved in *Estate of Gird*, 157 Cal. 542, 543, 137 Am. St. Rep. 131, 108 Pac. 503, holding "public acknowledgment" sufficiently shown; *Brisbin v. Huntington*, 128 Iowa, 176, 103 N. W. 148, holding bastard recognized in writing by father was not legitimated and could not take under will giving property to lawful issue; *Pederson v. Christofferson*, 97 Minn. 500, 106 N. W. 961, upholding acknowledgment of paternity made in writing in presence of witnesses, though not made for express purpose of such acknowledgment; *Thomas v. Estate of Thomas*, 64 Neb. 586, 588, 589, 90 N. W. 632, 633, holding unacknowledged writing admitting paternity of child sufficiently complied with statute providing for acknowledgment of paternity.

Collateral Kindred cannot Constitute Family within meaning of section 230, Civil Code.

Reaffirmed in *Estate of De Laveaga*, 4 Cal. Prob. 428.

Either Widower or Bachelor may have Family, viz., collective body of persons living together under one head or manager.

Approved in *Estate of Gird*, 157 Cal. 544, 137 Am. St. Rep. 131, 108 Pac. 504, holding unmarried man adopted children by receiving them into his family.

Purpose of Legislature in Enacting Section 1387, Civil Code, was to entitle illegitimate children to inherit as legitimate children.

Approved in *Morin v. Holliday*, 39 Ind. App. 213, 214, 77 N. E. 864, holding children of illegitimate child who had been acknowledged by father could inherit his estate.

Conflict of Laws as to Legitimacy. See note, 65 L. R. A. 183.

96 Cal. 596-597, 31 Pac. 580, **PEOPLE v. LANE.**

On Refusal of Superior Court of certificate of probable cause and of stay of proceedings pending settlement of bill of exceptions, accused may renew application in supreme court.

Approved in *In re Neil*, 12 Idaho, 754, 87 Pac. 882, right of admission to bail after conviction of felony does not necessarily follow issuance of certificate of probable cause.

Interruption of Statute of Limitations by insolvency assignment.
See note, 26 L. R. A. 746.

96 Cal. 598-601, 31 Pac. 553, 22 L. R. A. 370, IN RE GUILFOYLE.

Mark of Testator to Will is Sufficient though name is not repeated in immediate connection with it.

Approved in *Geraghty v. Kilroy*, 103 Minn. 288, 114 N. W. 839, holding signature to will by mark was sufficient though testator's name was written at end of will by another without express direction.

Ability to Write as Invalidating Signature made by mark or by aid of another. See note, 7 L. R. A. (n. s.) 1195.

Drawee's Duty to Know Signature of Drawer. See note, 27 L. R. A. 662.

96 Cal. 605-608, 31 Pac. 564, PEOPLE v. NEWMAN.

Section 11, Article XI, Constitution, does not confer authority on cities to change charter by ordinance, or abrogate department of city government by police regulation.

Approved in *John Rapp & Son v. Kiel*, 159 Cal. 709, 115 Pac. 654, holding legislative body of city could be limited by charter provision in exercise of police power conferred on city by Constitution; *Ex parte Grey*, 11 Cal. App. 128, 104 Pac. 478, holding void ordinance providing for appointment of board of plumbing examiners by police commission, when general law imposed duty on board of health.

96 Cal. 609-612, 31 Pac. 618, BOGART v. WOODRUFF.

Judgment by Default in Suit on Note given by woman before marriage is not void because she was sued in maiden name and husband was not joined.

Approved in *Emery v. Kipp*, 154 Cal. 85, 129 Am. St. Rep. 141, 97 Pac. 19, 19 L. R. A. (n. s.) 983, upholding judgment quieting title to land rendered against married woman in maiden name as sole defendant.

Publication of Process Against Married Woman in maiden name.
See note, 19 L. R. A. (n. s.) 985.

96 Cal. 612-617, 31 Pac. 575, CALANCHINI v. BRANSTETTER.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 68.

96 Cal. 617-623, 31 Pac. 740, KREISS v. HOTALING.

Where Agreement to Submit to Arbitration and award is not valid under statute, proceedings upon judgment cannot be enforced.

Approved in *In re Joshua Hendy Machine Works*, 9 Cal. App. 611, 99 Pac. 1110, following rule.

Power of Court to Vacate Order Void on face is not extinguished by lapse of time.

Approved in *Wiencke v. Bibby*, 15 Cal. App. 53, 113 Pac. 877, holding court properly set aside void order appointing receiver.

Staying of Execution otherwise than by statutory proceedings.
See note, 127 Am. St. Rep. 708.

96 Cal. 623-641, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, SAN GABRIEL VALLEY LAND ETC. CO. v. WITMER CO.

Mortgagor Who Pays Full Mortgage Debt to assignee of mortgagor, and is compelled to pay taxes assessed on mortgagee's interest to

remove lien, may recover amount so paid from person to whom such tax was assessed.

Approved in *Finnell v. Finnell*, 159 Cal. 539, 114 Pac. 822, holding one who purchased land subject to vendor's lien for purchase note, which he did not assume, and paid it for his own protection on vendor's failure, could recover amount so paid from vendor; *Bailey v. Bishop*, 152 N. C. 386, 67 S. E. 969, holding where one agreed to pave street through land of another on latter conveying land for street, and latter was compelled by city to pave sidewalk, latter could sue former for cost so incurred; dissenting opinion in *William Ede Co. v. Heywood*, 153 Cal. 619, 621, 96 Pac. 82, 83, 22 L. R. A. (n.s.) 562, majority holding purchaser of property subject to lien for taxes assessed on mortgagee's interest under mortgage from grantor, who paid taxes to remove lien, could not recover taxes so paid from mortgagee.

Overruled in *William Ede Co. v. Heywood*, 153 Cal. 617, 96 Pac. 82, 22 L. R. A. (n.s.) 562, holding purchaser of property subject to lien for taxes assessed on mortgagee's interest under mortgage from grantor, who paid tax to remove lien, could not recover taxes so paid from mortgagee.

Assessment-book is Prima Facie Proof of assessment, amount, and validity of unpaid taxes.

Reaffirmed in *Escondido v. Wohlford*, 153 Cal. 41, 94 Pac. 233.

Miscellaneous.—Cited in *Campbell v. Quackenbush* (Cal.), 31 Pac. 746, companion case.

96 Cal. 641-645, 31 Pac. 583, *ACHESON v. WESTERN UNION TEL. CO.*

Complaint on Contract not in Writing is defective if no consideration is alleged.

Approved in *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 576, 112 Pac. 458, holding complaint showed, at worst, defective allegation of consideration, and was good in absence of special demurrer.

Special Damage from Breach of Contract must be pleaded.

Approved in *Harron v. Wilson etc. Co.*, 4 Cal. App. 499, 88 Pac. 516, holding, in action to recover rent for machinery, counterclaim for damages for breach of warranty of certain machinery purchased did not plead special damage entitled to be considered as counterclaim.

96 Cal. 653-655, 31 Pac. 565, *SHERER v. SUPERIOR COURT.*

Where Court has Jurisdiction to Hear and determine question, error in such determination does not render judgment void.

Approved in *People v. Ham Tong*, 155 Cal. 581, 132 Am. St. Rep. 110, 102 Pac. 264, 24 L. R. A. (n.s.) 481, and *San Luis Obispo v. Simas*, 1 Cal. App. 181, 81 Pac. 975, both following rule; *Maxson v. Superior Court* (Cal.), 54 Pac. 520, holding whether complaint stated cause of action could not be reviewed on certiorari; *Thomas v. Hawkins*, 12 Cal. App. 329, 107 Pac. 579, and *Dahlgren v. Superior Court*, 8 Cal. App. 625, 627, 97 Pac. 682, 683, both refusing on writ of review to consider errors within jurisdiction; *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1017, prohibition did not lie to restrain erroneous proceeding of court within its juris-

diction; *Gibson v. Langdon*, 2 Alaska, 167, 169, holding on certiorari from justice's court, only question of jurisdiction could be considered; *Franklin Union v. People*, 220 Ill. 367, 110 Am. St. Rep. 248, 77 N. E. 180, 4 L. R. A. (n.s.) 1001, holding defect of parties did not invalidate injunction; *O'Brien v. People*, 216 Ill. 364, 108 Am. St. Rep. 219, 75 N. E. 112, holding in injunction suit, where defendants were served but failed to appear, court had jurisdiction, which was not affected by defects in bill.

96 Cal. 655-660, 31 Am. St. Rep. 247, 31 Pac. 623, DOUGLASS v. TODD.

Under Section 473, Code of Civil Procedure, relief may be granted for mistake in law.

Approved in *Mitchell v. California etc. S. S. Co.*, 156 Cal. 580, 105 Pac. 592, and *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 275, 277, 90 Pac. 43, 44, both following rule.

Upon Motion for Relief from Default, court will not try merits of case on affidavits, but will hear counter-affidavits as to excuse for permitting default.

Distinguished in *Bond v. Karma-Ajax Con. Min. Co.*, 15 Cal. App. 472, 115 Pac. 255, holding where no case of excusable neglect was made out, party was not entitled to relief and error in admitting counter-affidavits to his affidavit of merits was not prejudicial; *Beck v. Lavin*, 14 Idaho, 370, 97 Pac. 1030, holding in such case court would not consider affidavits counter to those stating defendant's defense.

On Setting Aside Default Judgment, court can impose terms which leave plaintiff secure in right to subject property of defendant to any judgment he may obtain.

Approved in *McCarty v. Wilson*, 2 Cal. App. 157, 83 Pac. 171, upholding order relieving party from neglect in serving bill of exceptions given on condition he should surrender office, right to which was subject of action, pending appeal.

Vacation of Judgments for Negligence or mistakes of attorney. See note, 96 Am. St. Rep. 111.

96 Cal. 664-668, 31 Pac. 565, BURRIS v. ADAMS.

Probate Sale of Realty will not be Declared Void on collateral attack on title acquired thereby if statutory provisions are substantially complied with, and in doubtful case court will not lean toward attacking party who is mere volunteer.

Approved in *Burris v. Kennedy* (Cal.), 38 Pac. 971, refusing to set aside probate sale of realty for mere irregularities when collaterally attacked by grantee of distributee under final decree, who raised no objection to validity of sale.

When Cause of Action to Quiet Title depends on proof of fraud, facts constituting fraud must be alleged and proved.

Approved in *Virginia Lumber Co. v. Glenwood Lumber Co.*, 5 Cal. App. 259, 90 Pac. 49, holding complaint in conversion not alleging fraud would not admit proof of fraud in procuring goods from plaintiff by third person, when defendant took from him for valuable consideration.

Distinguished in *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 416, 95 Pac. 1031, holding, in trover for conversion of goods, plaintiff, without pleading that third party secured goods from him by fraud and transferred them to defendant without consideration, could prove these facts in avoidance of defendant's title; *Cutler v. Fitzgibbons*, 148 Cal. 563, 83 Pac. 1075, upholding complaint in action to quiet title against alleged forged deed.

Action to Quiet Title cannot be Maintained by one claiming equitable title as against holder of legal title.

Approved in *Buchner v. Malloy*, 155 Cal. 255, 100 Pac. 688, and *Robinson v. Muir*, 151 Cal. 124, 90 Pac. 524, both following rule.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 97 CALIFORNIA.

97 Cal. 1-8, 31 Pac. 1112, **GORMAN v. SOUTHERN PACIFIC CO.**
Mental Suffering as Element of Damages for expulsion by carrier.
See note, 12 L. R. A. (n. s.) 185.

97 Cal. 8-10, 31 Pac. 625, **PACIFIC PAVING CO. v. BOLTON.**
Allegation in Complaint to Foreclose Lien of street assessment that city council "duly gave and made its determination to order work done" avers in legal effect that everything was done necessary to give validity to order.

Approved in Bituminous Lime Rock Pav. etc. Co. v. Fulton (Cal.), 33 Pac. 1118, holding complaint to enforce street assessment sufficiently alleged performance of acts required of city officials as against general demurrer; Gurnsey v. Northern Cal. Power Co., 7 Cal. App. 545, 94 Pac. 863, holding order granting franchise was sufficiently averred when alleged it was duly given or made.

Distinguished in Crouse v. Barrows, 156 Cal. 156, 103 Pac. 895, holding complaint failed to state cause of action, when resolution of intention to perform street work was insufficient in description.

97 Cal. 10-12, 31 Pac. 1117, **BARKER v. DOHERTY.**
Contract for Erection of Building is Void if plans and specifications are made part of contract, and are not filed with recorder.

Approved in Condon v. Donohue, 160 Cal. 755, 118 Pac. 115, holding unenforceable contract for building when private memorandum was made part of contract and was not filed with recorder.

97 Cal. 15-18, 31 Pac. 898, **GUMPEL v. CASTAGNETTO.**
Averments of Fraud in Complaint Seeking reconveyance of land conveyed by deed absolute held to support finding deed was given as mortgage only.

Approved in Moehlenpah v. Mayhew, 138 Wis. 574, 119 N. W. 831, holding where in suit to rescind sale of remainder on ground of mistake court found neither vendor nor purchaser knew of prior death of life tenant and denied relief, judgment adjudicated that, notwithstanding mutual mistake, sale was valid.

**97 Cal. 21-28, 31 Pac. 1110, CHRISTY v. SPRING VALLEY WATER-
WORKS.**

Possession of Part of Property Under Instrument describing whole extends possession to whole.

Reaffirmed in *Owsley v. Matson*, 156 Cal. 404, 104 Pac. 984.

Color of Title. See note, 88 Am. St. Rep. 704.

**97 Cal. 28-39, 31 Pac. 726, BANK OF BRITISH NORTH AMERICA
v. ALASKA IMP. CO.**

Foreign Banking Corporation Held to have complied with statute requiring filing certain statements as condition to maintaining actions.

Distinguished in *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 577, 112 Pac. 458, holding where forfeiture of right to sue by plaintiff was pleaded as defense, performance of acts required by state officers to declare forfeiture upon nonpayment of license tax must be particularly alleged.

Constitutionality of Statutes Restricting Contracts and business. See note, 21 L. R. A. 795.

Miscellaneous.—Cited in *Bank of British North America v. Alaska Imp. Co.* (Cal.), 31 Pac. 730, companion case.

97 Cal. 40-47, 31 Pac. 730, FREEL v. MARKET ST. CABLE RY. CO.

Physician Who Prescribed for Plaintiff after injury cannot testify, over plaintiff's objection, as to his physical condition, in action for damages for such injury.

Approved in *McRae v. Erickson*, 1 Cal. App. 332, 82 Pac. 212, holding physician in charge of defendant's hospital, who was paid by assessments on wages of men, was in effect employed by plaintiff, and could not testify as to statements made to him by plaintiff upon examination of injury; *Trull v. Modern Woodmen*, 12 Idaho, 323, 85 Pac. 1082, upholding statute allowing applicant for life insurance to stipulate against privilege of refusing to allow physician to testify; *Smart v. Kansas City*, 208 Mo. 194, 123 Am. St. Rep. 415, 105 S. W. 718, 14 L. R. A. (n. s.) 565, holding physician in charge of hospital but who did not personally treat plaintiff, could not testify as to information received from him on his arrival; *Haworth v. Kansas City Southern Ry. Co.*, 94 Mo. App. 226, 68 S. W. 115, holding physician could not over plaintiff's objection testify as to what he learned from plaintiff while professionally treating him; *Meyer v. Supreme Lodge*, 178 N. Y. 68, 70 N. E. 113, 64 L. R. A. 839, holding where physician was called to treat plaintiff against his will, he became patient by operation of law, and information acquired by physician was privileged.

Whether Privilege as to Information acquired by physician extends to physician not employed by patient. See note, 16 L. R. A. (n. s.) 887.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 49.

97 Cal. 56-58, 31 Pac. 627, HISTORY CO. v. LIGHT.

When Summons is Improperly Served outside county under section 848, Code of Civil Procedure, justice of peace may set it aside on defendant's motion.

Approved in *Burge v. Justice's Court*, 11 Cal. App. 215, 104 Pac. 582, holding prohibition did not lie to prevent hearing of cause when

summons was improperly served outside county but remedy was by motion to set aside service.

Where Court has Jurisdiction to Decide motion, its decision cannot be reviewed on certiorari.

Approved in *Dahlgren v. Superior Court*, 8 Cal. App. 628, 97 Pac. 683, following rule; *People v. Ham Tong*, 155 Cal. 581, 132 Am. St. Rep. 110, 102 Pac. 264, 24 L. R. A. (n. s.) 481, applying rule in criminal case.

97 Cal. 62-66, 31 Pac. 609, ROBINSON v. TEMPLAR LODGE.

Cotenants in Mines. See note, 91 Am. St. Rep. 857.

Conclusiveness of Decisions of Tribunals of associations or corporations. See note, 49 L. R. A. 374, 377.

97 Cal. 66-69, 31 Pac. 836, ROGERS v. DUFF.

Failure to Find on Issue is not Reversible Error where it does not appear that evidence was introduced in relation to such issue.

Approved in *People v. McCue*, 150 Cal. 200, 88 Pac. 901, *Bailiff v. Powers* (Cal.), 37 Pac. 509, and *Gerth v. Gerth*, 7 Cal. App. 738, 95 Pac. 905, all following rule; *Hatton v. Gregg*, 4 Cal. App. 546, 88 Pac. 596, holding failure to find on plea of limitations was immaterial when findings supported judgment regardless of plea.

What is Community Property. See note, 126 Am. St. Rep. 107.

97 Cal. 72-77, 31 Pac. 742, 22 L. R. A. 256, BREEZE v. BROOKS.

Findings Should be Construed so as to uphold rather than defeat judgment.

Approved in *Bruce v. Bruce*, 16 Cal. App. 357, 116 Pac. 996, where findings waived, court presumed to have found all facts necessary to support judgment; *Santos v. Silva*, 1 Cal. App. 616, 82 Pac. 981, *Pacific Lumber Co. v. Wilson*, 6 Cal. App. 562, 92 Pac. 655, *Eastwood v. Standard Mines etc. Co.*, 11 Idaho, 203, 81 Pac. 384, and *Vasey v. Campbell*, 4 Cal. App. 454, 88 Pac. 509, all holding findings supported judgment; *Leist v. Dierssen*, 4 Cal. App. 637, 8 Pac. 813, *Murphy v. Stelling*, 8 Cal. App. 705, 97 Pac. 674, and *Marshutz v. Seltzer*, 5 Cal. App. 145, 89 Pac. 878, uncertainty construed in favor of judgment; *Ripperdam v. Weldy*, 149 Cal. 674, 87 Pac. 279, *Griffin v. Pacific Electric Ry. Co.*, 1 Cal. App. 680, 82 Pac. 1085, and *Aetna Indem. Co. v. Altadena Min. etc. Co.*, 11 Cal. App. 173, 104 Pac. 474, all holding when from facts found other facts necessary to support judgment could be inferred, trial court is deemed to have made such inference.

Requisites of Present Oral Contract of Insurance. See note, 5 L. R. A. (n. s.) 412.

Estoppel of Land Owner Permitting Title to remain in another to assert it as against latter's creditors. See note, 30 L. R. A. (n. s.) 1.

97 Cal. 78-80, 31 Pac. 744, SALINAS BANK v. DE WITT.

Agreement for Use of Machinery for Threshing, expenses to be paid by user and one-half net proceeds given to owner, is not partnership.

Approved in *Title Insurance & Trust Co. v. Grider*, 152 Cal. 752, 94 Pac. 603, agreement considered and held to create mere agency for sale of land, though agents were to pay certain expenses and to receive portion of net profits.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 991, 992.

Where Testimony on Material Issue is admitted after objection, court is presumed to have given it some weight in determining issue.

Reaffirmed in *King v. Green*, 7 Cal. App. 478, 94 Pac. 779.

97 Cal. 81-83, 31 Pac. 895, PIO v. AIGELTINGER.

Right of Respondent to have Appeal Dismissed does not depend upon filing of certificate of clerk of trial court before transcript is filed or motion to dismiss heard.

Approved in *Stiavetti v. Unsworth*, 10 Cal. App. 682, 103 Pac. 149, holding copy of clerk's certificate need not be served with notice of motion to dismiss.

97 Cal. 83-91, 31 Pac. 840, EX PARTE BROWN.

Court cannot Order Production and opening of sealed packages of ballots cast at election unless contest has begun, and order to produce such ballots at criminal prosecution for fraud is void.

Approved in *State v. Taylor*, 220 Mo. 635, 637, 119 S. W. 378, 379, following rule.

Power of Courts to Require Ballot-boxes to be produced or opened in proceedings other than election contests. See note, 33 L. R. A. 386.

Ballots cannot be Produced in Evidence without satisfactory preliminary proof they remain in same condition as in which they were taken from ballot-box.

Approved in *Chatham v. Mansfield*, 1 Cal. App. 306, 82 Pac. 346, holding ballots received by clerk in broken envelopes and kept where public had access to them could not be received to control election returns.

Scope and Effect of Election Law provisions for preserving ballots. See note, 30 L. R. A. (n. s.) 608.

97 Cal. 91-92, 31 Pac. 899, JACKS v. BALDEZ.

Aside from Means Provided in Section 473, Code of Civil Procedure, judgment can be vacated on motion only when void on face.

Approved in *Tuffree v. Stearns Ranchos Co. (Cal.)*, 54 Pac. 827, refusing to set aside judgment not void on face when motion was not under section 473, Code of Civil Procedure; *Forrester v. Lawler*, 14 Cal. App. 173, 111 Pac. 285, holding judgment of dismissal duly entered but not conforming to order of dismissal could not be corrected by summary order of amendment made after six months.

97 Cal. 93-100, 33 Am. St. Rep. 163, 31 Pac. 846, KENNEDY v. CALIFORNIA SAV. BANK.

Writ of Attachment Issued Against any defendant for amount exceeding demand made against him in complaint must be discharged on his motion.

Approved in *Jensen v. Dorr*, 157 Cal. 441, 108 Pac. 322, discharging writ of attachment irregularly issued against vessel.

Proceedings to Dissolve Attachments. See note, 123 Am. St. Rep. 1037.

Liability of Stockholder for Corporate Debts is founded on contract.

Approved in *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 40, 113 Pac. 692, *Miller & Lux, Inc., v. Katz*, 10 Cal. App. 579,

102 Pac. 947, *Walker v. Woodside*, 164 Fed. 683, 90 C. C. A. 644, and *Adams v. Clark*, 36 Colo. 73, 85 Pac. 644, all following rule; *Foreign Mines Development Co. v. Boyes*, 180 Fed. 597, holding in suing stockholder on corporation liability, contract from which it arose must be alleged.

97 Cal. 108-111, 31 Pac. 844, HEFT v. PAYNE.

Extension of Time for Completion of street work must be given within time limited by contract.

Reaffirmed in *Palmer v. Burnham* (Cal.), 47 Pac. 600.

Personal Liability to Pay Assessment for local improvement. See note, 35 L. R. A. 61.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 905, 915, 917.

97 Cal. 112-114, 31 Pac. 909, McDONALD v. DODGE.

Board of Supervisors of San Francisco is legislative department of municipality.

Approved in *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 316, 26 Sup. Ct. 100, 50 L. Ed. 204, following rule.

Miscellaneous.—Cited in *Clarke v. Jennings* (Cal.), 32 Pac. 1049, companion case.

97 Cal. 114-122, 31 Pac. 901, FALLS v. SAN FRANCISCO & NORTH PAC. R. R. CO.

Railroad is Bound Only to Exercise of ordinary care as to condition of station at which passengers are received.

Approved in *St. Louis Iron Mt. etc. Ry. Co. v. Woods*, 96 Ark. 316, 131 S. W. 870, following rule; *Pere Marquette R. Co. v. Strange*, 171 Ind. 167, 84 N. E. 823, 20 L. R. A. (n. s.) 1041, holding railroad not liable for injury to man in attempting to cross tracks in front of moving train at station; *Fremont etc. R. R. Co. v. Hagblad*, 72 Neb. 781, 101 N. W. 1036, 4 L. R. A. (n. s.) 254, holding railroad owed only ordinary care to persons at stations who did not hold relation of passenger to road.

97 Cal. 122-124, 31 Pac. 908, WILLIAMS v. SAVINGS & LOAN SOCIETY.

Violation of Provision in Contract for street work fixing number of hours which shall constitute day's work does not affect validity of assessment for such work.

Reaffirmed in *Flinn v. Peters*, 3 Cal. App. 236, 84 Pac. 996.

Courts will Take Judicial Notice of streets of San Francisco and their location, in action to enforce assessment for street improvement.

Approved in *Pacific Paving Co. v. Verso*, 12 Cal. App. 365, 107 Pac. 591, following rule.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 444.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 921.

97 Cal. 125-131, 31 Pac. 906, HARDY v. HARDY.

Action for Permanent Maintenance of wife under section 137, Civil Code, can only be based on ground of desertion by husband.

Approved in *Dole v. Gear*, 14 Haw. 556, following rule; *Hiner v. Hiner*, 5 Cal. App. 548, 90 Pac. 957, holding such action addressed to equity side of court, and appeal therein should be taken direct to supreme court.

97 Cal. 135-146, 31 Pac. 845, BUCK v. CITY OF EUREKA.

Statute Relating to Change of Venue is remedial, and should be liberally construed.

Approved in *State v. Superior Court*, 40 Wash. 446, 111 Am. St. Rep. 915, 82 Pac. 875, 2 L. R. A. (n. s.) 568, following rule; *Sherman v. Southern Pac. Co.*, 31 Nev. 291, 102 Pac. 259, holding statute providing for relief from defaults should be liberally construed.

Principal Place of Business of Corporation is its residence.

Approved in *Krogh v. Pacific Gateway etc. Co.*, 11 Cal. App. 238, 104 Pac. 698, and *Waechter v. Atchison etc. Ry. Co.*, 10 Cal. App. 73, 101 Pac. 42, both following rule.

Municipal Corporation is Resident of County within which its territory lies, and can demand that actions against it be tried in such county.

Approved in *Parks Co. v. City of Decatur*, 138 Fed. 553, 70 C. C. A. 674, holding municipal corporation not liable by attachment in courts of another state.

Venue of Action Against Municipality. See note, 25 L. R. A. (n. s.) 712.

97 Cal. 140-147, 31 Pac. 910, SOBERANES v. SOBERANES.

Deed of Gift to One in Confidential Relation is presumed fraudulent, and burden is on donee to show gift was made freely and voluntarily.

Approved in *Arellanes v. Arellanes*, 151 Cal. 447, 90 Pac. 1061, and *Zihn v. Zihn*, 153 Cal. 409, 95 Pac. 869, both upholding finding deed of gift was voluntarily given; *Becker v. Schwerdth*, 6 Cal. App. 464, 92 Pac. 398, upholding deed from aged mother to son; *McDonnell v. McDonnell*, 10 Cal. App. 66, 101 Pac. 41, upholding deed of gift from aged and ill person; *Nobles v. Hutton*, 7 Cal. App. 21, 93 Pac. 292, setting aside deed from aged and ill mother to son to exclusion of other children:

Gift Deed cannot be Set Aside merely on ground it strips grantor of all his property.

Approved in *Broadus v. James*, 13 Cal. App. 475, 476, 110 Pac. 162, 163, following rule; *Bretthauer v. Foley*, 15 Cal. App. 27, 113 Pac. 359, holding, in absence of fraud, deed could not be set aside on ground it was improvidently made.

Independent Advice as Condition of a valid gift inter vivos between parties in confidential relation. See note, 16 L. R. A. (n. s.) 1094.

97 Cal. 147-154, 31 Pac. 928, PECKHAM v. STEWART.

Contract to Furnish "Good and Perfect Title" calls for title good in point of fact and also apparently perfect when exhibited.

Approved in *Allen v. Globe Grain etc. Co.*, 156 Cal. 290, 104 Pac. 307, holding "perfect title" called for title free from reasonable doubt and fairly deducible of record; *Bartlett v. McGee (Cal.)*, 45 Pac. 1031, holding unrecorded contract for sale including by mistake lands conveyed by later contract was such defect of title as entitled purchaser under later contract to rescind and recover purchase money.

Idem Sonans. See note, 100 Am. St. Rep. 353.

97 Cal. 155-161, 31 Pac. 896, CHAPMAN v. BANK OF CALIFORNIA.

Regardless of Plea of Limitations, court of equity will not entertain suit brought after unreasonable delay.

Approved in *Patterson v. Hewitt*, 11 N. M. 24, 66 Pac. 558, 55 L. R. A. 658, following rule; *Stevenson v. Boyd*, 153 Cal. 636, 638, 96 Pac. 287, 288, 19 L. R. A. (n. s.) 525, holding suit to enforce alleged trust in title of land barred by laches.

97 Cal. 161-171, 31 Pac. 834, HOLMES v. SOUTH PACIFIC COAST RY. CO.

Railroad is not Liable for Injury to person carelessly walking on track in daylight without looking for approach of train for which he was waiting.

Approved in *Spear v. United Railroads*, 16 Cal. App. 663, 117 Pac. 968, approving instruction in regard to use of ordinary care in looking out for approaching cars at busy street crossing; *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 779, 89 Pac. 1110, holding bicycle rider negligent in riding on car tracks; *Jansen v. Southern Pacific Co.*, 5 Cal. App. 17, 89 Pac. 618, holding person negligent in crossing track without making attempt to ascertain whether train was approaching; *Rowe v. Southern California Ry. Co.*, 4 Cal. App. 4, 7, 87 Pac. 221, holding deceased negligent in stepping on track in front of train when engineer gave warning signals; *Birrell v. Great Northern R. R. Co.*, 61 Wash. 342, 112 Pac. 364, holding employee injured while walking between tracks was contributorily negligent; *Labarge v. Pere Marquette R. Co.*, 134 Mich. 146, 95 N. W. 1075, holding railroad not liable for injury to person in buggy backed on track by unmanageable horse; *Wheeler v. Oregon R. R. etc. Co.*, 16 Idaho, 396, 102 Pac. 354, holding plaintiff not guilty of contributory negligence in stepping on track to escape from fractious team without looking and listening.

Where Negligence of Plaintiff is Contemporaneous with that of defendant, negligence of defendant is wholly immaterial.

Approved in *Tobin v. Omnibus Cable Co. (Cal.)*, 34 Pac. 126, holding street railroad company liable for injury caused by starting car when passenger was alighting; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 534, 99 Pac. 98, holding where negligence of plaintiff preceded that of defendant and accident might have been averted with ordinary care, defendant was liable.

Where Facts are Undisputed, Question of negligence is one of law for court.

Approved in *Wardlaw v. California Ry. Co. (Cal.)*, 42 Pac. 1076, following rule; *Johnson v. Thomas (Cal.)*, 43 Pac. 580, holding question of contributory negligence properly left to jury.

97 Cal. 171-180, 31 Pac. 933, PEOPLE v. AH LEE DOON.

When Judge from Another County Presides at trial, he is presumed to have been regularly called in.

Reaffirmed in *Smith v. White*, 107 Va. 619, 59 S. E. 481.

Papers not Indorsed nor Authenticated by trial judge form no part of record and cannot be used to amend bill of exceptions.

Approved in *People v. Schultz*, 14 Cal. App. 110, 111 Pac. 273, holding instructions neither indorsed nor certified nor contained in bill of exceptions constituted no part of record on appeal and could not be considered.

Objection to Competency of Panel of jurors cannot be first made after verdict.

Approved in *People v. Duncan*, 8 Cal. App. 199, 96 Pac. 420, holding substitution of father for son on jury could not be objected to for first time after verdict.

Disqualification of Judge by Prior Connection with case. See note, 25 L. R. A. 116.

Continuance in Criminal Cases for absence of witnesses. See note, 122 Am. St. Rep. 750.

Evidence of Good Character to Create Doubt of guilt. See note, 103 Am. St. Rep. 894.

97 Cal. 182-184, 32 Pac. 10, **HANLEY v. SIXTEEN HORSES.**

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 274.

Miscellaneous.—Cited in *Hilton v. Hanly* (Cal.), 32 Pac. 11, companion case.

97 Cal. 184-189, 31 Pac. 893, **SCHMID v. BUSCH.**

Under Section 1184, Code of Civil Procedure, contract price, as to lien claimants, except contractor, shall be payable in money.

Approved in *Hampton v. Christensen*, 148 Cal. 736, 84 Pac. 202, holding provision of code that contract price shall not be diminished by offsets in favor of reputed owner and against contractor refers only to offsets not arising under terms of contract.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 193, 204.

97 Cal. 189-194, 31 Pac. 1130, **STROZYNSKI v. STROZYNSKI.**

Action of Trial Court in Dividing Community Property in action for divorce on ground of cruelty or adultery may be revised on appeal.

Approved in *Cargnani v. Cargnani*, 16 Cal. App. 101, 116 Pac. 308, following rule; *Pereira v. Pereira*, 156 Cal. 7, 134 Am. St. Rep. 107, 103 Pac. 491, 23 L. R. A. (n. s.) 88, modifying on appeal decree distributing community property.

97 Cal. 194-196, 31 Pac. 1109, **PEOPLE v. DAVIS.**

Proof That Property Charged to have been stolen was in possession of prosecutor at time of taking is sufficient evidence of his ownership.

Reaffirmed in *State v. Howard*, 30 Mont. 528, 77 Pac. 54.

Indictment for Larceny Need not Allege property was taken against will of owner.

Approved in *Hurst v. Territory*, 16 Okl. 607, 86 Pac. 282, following rule; *State v. Rathbone*, 8 Idaho, 171, 172, 67 Pac. 189, upholding indictment charging larceny in felonious taking of two mares.

Whether Indictment Involving Felonious Taking may lay ownership in one in possession as agent or bailee. See note, 21 L. R. A. (n. s.) 315.

Proof of Corpus Delicti. See note, 68 L. R. A. 67.

97 Cal. 196-202, 31 Pac. 937, **ESTATE OF ARGUELLO.**

Where Administrator Deposits Funds of estate in bank in his own name, he is liable for loss of deposit.

Approved in *Estate of Wood*, 159 Cal. 470, 114 Pac. 993, holding guardian liable for loss of funds of ward deposited in bank as permanent investment.

Deposit of Trust Fund in Bank by executors or administrators. See note, 98 Am. St. Rep. 374.

Liability of Executor or Administrator for loss of bank deposit. See note, 7 L. R. A. (n. s.) 619.

Effect of Writings in Favor of "trustee" without indicating beneficiary or terms of trust. See note, 82 Am. St. Rep. 521.

97 Cal. 203-208, 31 Pac. 1126, 32 Pac. 315, RILEY v. NANCE.

Estates and Interests to Which Judgment liens attach. See note, 117 Am. St. Rep. 780.

97 Cal. 208-213, 31 Pac. 1131, HATTON v. HOLMES.

Bank Paying Check on Forged Indorsement of payee's name acquires no right on it as against drawer of check.

Approved in *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 79, 81, 126 Am. St. Rep. 467, 116 N. W. 619, 620, 17 L. R. A. (n. s.) 514, holding bank liable for payment of warrant in which name of fictitious payee had been substituted; *Union Biscuit Co. v. Springfield Grocer Co.*, 143 Mo. App. 308, 126 S. W. 998, holding bank liable for payment to wrong person of altered check.

In Action Against Notary to Recover as damages money alleged to have been loaned by plaintiff on forged mortgage, which contained false acknowledgment by notary, where it appears money was paid by bank in which plaintiff had deposit, upon forged indorsement of payee's name on check given for money to be loaned, no loss is shown by plaintiff.

Approved in *Coffin v. Bruton*, 78 Ark. 166, 95 S. W. 462, and *Smith v. Maginnis*, 75 Ark. 477, 89 S. W. 92, both holding where notary made false certificate of acknowledgment that certain persons appeared before him and made affidavit they were soldiers, purchaser of additional homestead lands of such persons cannot hold notary for damages though purchase was made in reliance on certificate.

Distinguished in *Barnard v. Schuler*, 100 Minn. 291, 110 N. W. 967, and *Kleinpeter v. Castro*, 11 Cal. App. 87, 103 Pac. 1092, both holding notary liable for damages resulting from false acknowledgment of forged deed, signed by imposter personating true owner; *County of Silver Bow v. Davies*, 40 Mont. 341, 107 Pac. 86, holding sureties of clerk of court liable for loss through issuance of fraudulent jury and witness certificates though not valid on face, and treasurer was negligent in paying them.

Liability of Notaries. See note, 82 Am. St. Rep. 383, 384.

97 Cal. 214-223, 32 Pac. 3, SECURITY SAVINGS & LOAN CO. v. HINTON.

Under Constitution All Chartered Municipalities have power of taxation.

Approved in *Home Telephone etc. Co. v. Los Angeles*, 155 Fed. 566, holding city had authority under its charter to regulate telephone rates.

Taxation of Corporate Franchises. See note, 57 L. R. A. 72.

Miscellaneous.—Cited in *Los Angeles Sav. Bk. v. Hinton* (Cal.), 32 Pac. 6, and *Main St. Sav. Bk. & Trust Co. v. Hinton* (Cal.), 32 Pac. 6, both companion cases.

97 Cal. 224-232, 32 Pac. 11, PEOPLE v. LEM YOU.

Question of Materiality of Alleged False Testimony is one of law for court.

Reaffirmed in *People v. Bradbury*, 155 Cal. 815, 103 Pac. 219.

Materiality of False Testimony may Only Appear when considered in connection with testimony previously given.

Approved in *People v. Collins*, 6 Cal. App. 500, 92 Pac. 517, holding indictment for perjury sufficiently alleged materiality of false testimony when it did not appear from other averments that it was immaterial.

In Trial for Perjury, Jury has Only Right to find facts and apply to them law as given by court.

Reaffirmed in *People v. Chadwick*, 4 Cal. App. 68, 87 Pac. 386.

Stenographers' Notes as Evidence and right to read them to jury. See note, 81 Am. St. Rep. 365.

97 Cal. 232-235, 31 Pac. 893, 32 Pac. 327, IN RE HAAS.

Probate Court has Jurisdiction in settling account of executor to determine question of title to property alleged to belong to estate but claimed by executor to be held by him as guardian for ward.

Approved in *Hartwig v. Flynn*, 79 Kan. 601, 100 Pac. 644, holding probate court had no jurisdiction to try title to notes payable to order of executor found among decedent's effects and claimed by executor, and another person not party to proceeding; *Caron v. Old Reliable etc. Min. Co.*, 12 N. M. 223, 78 Pac. 65, holding probate court could not determine contested claim of title as between estate and stranger.

Distinguished in *Stevens v. Superior Court*, 155 Cal. 152, 99 Pac. 517, holding court could in settlement of accounts of executor determine amount of property of estate which had come into his hands, and as incident thereto, title to fund claimed by executor as individual.

97 Cal. 238-241, 32 Pac. 8, PEOPLE v. STEWART.

In Prosecution for Attempt to Commit Rape, testimony of prosecutrix alone may be sufficient to establish prima facie case against defendant.

Approved in *People v. Ah Lung*, 2 Cal. App. 280, 83 Pac. 297, upholding conviction for rape when corroborating testimony was slight.

Abandonment of Intent Before Consummation of rape does not purge guilty party of legal consequences of conduct.

Reaffirmed in *People v. Bowman*, 6 Cal. App. 751, 93 Pac. 199.

In Prosecution for Rape, Fact that prosecutrix made immediate complaint is material and competent evidence, though her statements are hearsay.

Approved in *People v. Gonzalez*, 6 Cal. App. 259, 91 Pac. 1014, and *People v. Wilmot* (Cal.), 72 Pac. 839, both following rule.

97 Cal. 241-244, 32 Pac. 8, HICKS v. FOLKS.

Right to Compel Prisoners to Labor. See note, 27 L. R. A. 600.

97 Cal. 244-246, 32 Pac. 9, ELBERT v. LOS ANGELES GAS CO.

Complete Contract is Constituted by Letters and telegrams between parties if they show clearly what contract is and are so connected that they may fairly be said to constitute one paper relating to contract.

Approved in *Cobb v. Glenn Boom & Lumber Co.*, 57 W. Va. 54, 110 Am. St. Rep. 734, 49 S. E. 1007, holding series of letters and telegrams constituted complete contract.

Contracts by Telegraph. See note, 110 Am. St. Rep. 760.

Telegrams as Writings to Make a Contract within statute of frauds. See note, 50 L. R. A. 240, 242.

97 Cal. 247-249, 32 Pac. 7, PEOPLE v. McDERMOTT.

Where Remittitur has Been Regularly Issued by supreme court and filed, jurisdiction of supreme court ends and judgment is final.

Approved in *Philbrook v. Newman*, 148 Cal. 175, 82 Pac. 773, holding conclusive order of supreme court rendered nine years before affirming order denying new trial.

97 Cal. 249-250, 31 Pac. 1128, PEOPLE v. BENOIT.

Crime of Incest. See note, 111 Am. St. Rep. 30.

97 Cal. 251-252, 31 Pac. 1133, 18 L. R. A. 744, PATTY v. COLGAN.

Act Appropriating Money for Benefit of flood sufferers held to be gift and void, and mandamus will not issue to compel controller to draw warrant.

Approved in *First State Bank v. Shallenberger*, 172 Fed. 1003, holding void act prohibiting individuals as such from engaging in banking and requiring banks to contribute to depositor's guaranty fund; *Payne v. Staunton*, 55 W. Va. 207, 46 S. E. 929, holding mandamus did not lie to compel inspection of records by private individual for sole purpose of learning evidence for institution of criminal proceeding.

Validity of Statute Providing for Assistance of individual members of certain classes of unfortunate or afflicted persons. See note, 7 L. R. A. (n. s.) 1197.

Adjudication Respecting Abatement of Nuisance as bar to damage suit. See note, 58 L. R. A. 739.

97 Cal. 254-258, 33 Am. St. Rep. 168, 32 Pac. 169, MILLS v. LA VERNE LAND CO.

Mere Right of Laborer to Assert Lien under mechanic's lien law is personal and cannot be assigned.

Approved in *Fleming v. Greener*, 173 Ind. 266, 87 N. E. 721, and *Fleming v. Greener*, 41 Ind. App. 80, 83 N. E. 355, both following rule; *Goldtree v. San Diego*, 8 Cal. App. 512, 97 Pac. 218, *arguendo*.

97 Cal. 259-263, 32 Pac. 171, HAYNE v. HERMANN.

Conveyance by Husband to Wife of land with verbal understanding she was to hold it in trust for him while he lived, and at his death divide it between herself and daughter creates constructive trust enforceable by daughter.

Approved in *Cooney v. Glynn*, 157 Cal. 587, 588, 108 Pac. 508, holding such trust created by conveyance by aged mother to son on his promise to convey to daughter; *Bollinger v. Bollinger*, 154 Cal. 699, 99 Pac. 198, holding where father deeded land to defendant on trust to divide between children of former wife, and widow brought untenable action to enforce trust, executors of deceased child made defendant could by cross-complaint enforce trust in her favor; *Crabtree v. Potter*, 150 Cal. 713, 89 Pac. 972, holding deed from parents to

daughter on parol promise to pay mortgage and allow grantors life estate created constructive trust; *Sanguinetti v. Rossen*, 12 Cal. App. 629, 107 Pac. 562, holding where property was conveyed to trusted friend and by agreement of clients transferred to their attorney for their benefit, constructive trust was created; *Chamberlain v. Chamberlain*, 7 Cal. App. 639, 95 Pac. 661, holding deed to daughter in law obtained by false representation as to grantor's liability for debts of corporation created constructive trust; *Hanson v. Svarverud*, 18 N. D. 555, 120 N. W. 552, holding deed to sons on their promise to hold in trust for grantor's use during their lives, and then to convey to all children equally, created constructive trust.

Distinguished in *Loomis v. Loomis*, 148 Cal. 151, 153, 82 Pac. 680, 1 L. R. A. (n. s.) 312, holding such trust not created by husband's conveyance of homestead to wife upon promise she would will to her brother.

Creation of Trusts in Land by Parol. See notes, 115 Am. St. Rep. 786, 787, 791, 792; 5 Cof. Prob. 257, 262.

97 Cal. 266-270, 32 Pac. 173, **MCDONALD v. DREW.**

Payment of Taxes for Statutory Time is requisite to acquisition of title by adverse possession.

Approved in *Rio Grande Western Ry. Co. v. Salt Lake Invest. Co.*, 35 Utah, 538, 101 Pac. 590, following rule; *Crane v. Judge*, 30 Utah, 55, 83 Pac. 567, holding payment of taxes on strip of land included by reason of erroneous boundary line was essential to claim by adverse possession.

97 Cal. 270-275, 32 Pac. 231, **LABORY v. LOS ANGELES ORPHAN ASYLUM.**

In Action to Quiet Title to Land, objection that corporation defendant has not filed articles of incorporation as required in section 299, Civil Code, must be taken at trial or is waived.

Approved in *Riverdale Mining Co. v. Wicks*, 14 Cal. App. 531, 112 Pac. 898, upholding judgment in favor of corporation in action relating to land where no objection was taken at trial that section 299, Civil Code, had not been complied with.

97 Cal. 276-280, 33 Am. St. Rep. 172, 32 Pac. 236, **PEOPLE v. MONTECITO WATER CO.**

Corporation De Facto is Necessary Party to quo warranto proceedings to procure its dissolution, and averment by state that it is corporation de facto does not estop state to question its corporate existence.

Approved in *State ex rel. Weinsheim v. Leischer*, 117 Wis. 479, 94 N. W. 300, holding in proceeding to oust village officers and have attempted incorporation declared invalid, village was necessary party.

What Constitutes a Corporation De Facto. See note, 118 Am. St. Rep. 258.

97 Cal. 283-285, 32 Pac. 237, **JOURNAL PUB. CO. v. WHITNEY.**

Board of Supervisors are Required by subdivision 23 of section 25, County Government Act, to annually fix price of county advertising.

Approved in *Dodge v. Kings County*, 150 Cal. 96, 88 Pac. 226, following rule; *Maxwell v. Board of Supervisors (Cal.)*, 32 Pac. 444,

holding mandamus did not lie to compel board of supervisors to give public notice calling for proposals for county advertising.

97 Cal. 286-290, 32 Pac. 238, YOAKUM v. WHITE.

Where Mortgage by Its Terms could be foreclosed on any default of payment under terms of note, on failure to pay installment of interest, foreclosure could be had for such interest only when note was not yet due.

Distinguished in *San Gabriel Valley Bank v. Lake View Town Co.* (Cal. App.), 86 Pac. 728, 729, holding under terms of mortgage and note, foreclosure for principal and interest could be had on any default in interest.

Proceedings to Enforce Mortgage for part of mortgage debt. See note, 37 L. R. A. 739.

97 Cal. 290-292, 32 Pac. 248, COALTER v. HURST.

Application for Payments. See note, 96 Am. St. Rep. 55.

97 Cal. 296-305, 32 Pac. 243, RALPHS v. HENSLEY.

Court will not Take Judicial Notice of its records in former actions or proceedings.

Approved in *Lownsdale v. Gray's Harbor Boom Co.*, 54 Wash. 547, 103 Pac. 835, holding court would not take judicial notice of record in another cause though between same parties and in same suit.

Judicial Notice of Court's Own Records in other actions. See note, 11 L. R. A. (n. s.) 16.

Ratification of Acts of Agent is Implied, whenever acts and conduct of principal, having full knowledge of facts, are inconsistent with any other supposition than that of previous authority.

Approved in *Kendall v. Earl* (Cal.), 44 Pac. 793, holding failure to disavow acts of agent immediately on learning of them amounted to ratification.

97 Cal. 305-313, 32 Pac. 226, PERINE v. FORBUSH.

Contract for Street Improvement not Entered into within fifteen days after first posting of notice of award is void when delay is caused by fault of contractor.

Approved in *Ralph Rogers Co. v. Workman*, 10 Cal. App. 613, 103 Pac. 155, upholding contract when delay of three months was not caused by contractor.

In Action upon Street Assessment, plaintiff must allege that the various provisions of statute under which it is sought to charge defendant were complied with.

Approved in *Kinley v. Thelen*, 158 Cal. 184, 110 Pac. 517, holding tax title insufficiently alleged.

Error in Including in Assessment for Street Work work not in contract does not render assessment void, but error may be corrected on appeal to city council, and failure to appeal is waiver of error.

Approved in *Bates v. Hadamson*, 2 Cal. App. 577, 84 Pac. 52, holding failure to appeal waived objection to excessive assessment not making assessment invalid on face.

Fact That Street Contract Contains Provision there shall be no assessment on adjoining property for improving part of street occupied by railroad does not render contract void.

Approved in *Dowling v. Altschul* (Cal.), 33 Pac. 496, upholding assessment of whole cost of paving cul-de-sac on owners of property facing sides.

97 Cal. 316-318, 32 Pac. 228, LIBBEY v. ELSWORTH.

Complaint in Action to Enforce Street assessment which shows contract was not entered into within fifteen days after first posting of notice of award is fatally defective, no excuse for delay being averred.

Distinguished in *Byrne v. Luning Co.* (Cal.), 38 Pac. 454, holding complaint to enforce street assessment which alleged performance of requirements according to specifications, without setting forth specifications, was not subject to general demurrer.

Contract for Street Work must Fix Time for commencement and completion of work.

Approved in *Treanor v. Houghton*, 103 Cal. 55, 36 Pac. 1082, holding defective allegation as to time for commencement and completion of street work cured by verdict; *Fletcher v. Prather*, 102 Cal. 425, 36 Pac. 661, holding time for commencement and completion could be fixed by indorsement of superintendent on contract with knowledge of contractor.

97 Cal. 318-329, 32 Pac. 312, FARMERS & MERCHANTS' BANK OF LOS ANGELES v. BOARD OF EQUALIZATION.

Defect in Notice to Appear Before Board of equalization is waived by appearance.

Approved in *California Domestic Water Co. v. Los Angeles*, 10 Cal. App. 190, 101 Pac. 549, following rule.

Certiorari can Only be Used to Determine whether inferior tribunal, board or officer has regularly pursued its authority.

Approved in *Matter of Hughes*, 159 Cal. 364, 113 Pac. 686, holding certiorari did not lie to correct mere errors of law of inferior court; *Hall v. Justice's Court*, 5 Cal. App. 139, 89 Pac. 872, holding certiorari did not lie to annul judgment by default in justice's court entered after eight years.

Miscellaneous.—Cited in *Security Savings Bank etc. Co. v. Board of Supervisors* (Cal.), 34 Pac. 438, companion case.

97 Cal. 329-335, 32 Pac. 316, LOS ANGELES COUNTY v. ORANGE COUNTY.

When New County is Formed from Territory of another county, new county is entitled to public buildings and property of old county situated within limits of new county.

Approved in *Pass School Dist. v. Hollywood School Dist.*, 156 Cal. 417, 105 Pac. 123, 26 L. R. A. (n. s.) 485, applying rule to school districts; *San Diego County v. Riverside County* (Cal.), 55 Pac. 8, 9, holding back railroad taxes paid to new county formed from old county not recoverable by old county from new after adjustment of taxes as between counties.

Legislature has Power to Create by Special Law new county from territory of existing county.

Approved in *Wheeler v. Herbert*, 152 Cal. 228, 233, 92 Pac. 355, 357, upholding act changing boundary between Kings and Fresno counties.

97 Cal. 335-338, 32 Pac. 320, JOYCE v. SHAFER.

Purchaser Under Executory Contract of sale of land cannot recover back payments made when he is in default in his payments.

Approved in Poheim v. Meyers, 9 Cal. App. 37, 98 Pac. 67, following rule; Foxley v. Rich, 35 Utah, 171, 99 Pac. 669, holding vendee could not rescind executory contract of purchase because vendor sold to another before time for performance, when second vendee recognized first vendee's rights; Hall v. Northern & Southern Co., 55 Fla. 242, 46 So. 180, holding conveyance by vendor to another before time for performance of contract to convey land was subject to contract rights.

One may Legally Contract to Sell Land which he does not own, and acquire title before time of performance.

Approved in Hanson v. Fox, 155 Cal. 107, 132 Am. St. Rep. 72, 99 Pac. 490, 20 L. R. A. (n. s.) 338, and Backman v. Park, 157 Cal. 610, 137 Am. St. Rep. 153, 108 Pac. 687, both holding contract could not be rescinded by purchaser merely because vendor had no title at time of making contract.

97 Cal. 339-343, 32 Pac. 323, IN RE BEDELL.

Under Section 1379, Code of Civil Procedure, nominee of person entitled to letters under section 1365 has preferred right over person of any subsequent class in section 1365.

Approved in Estate of Daggett, 15 Idaho, 509, 98 Pac. 851, holding court must appoint nominee of person entitled to letters.

Person Entitled to Letters, Who has Nominated another, cannot revive his privilege nor retract his waiver as against petitioner.

Approved in In re Silvar's Estate (Cal.), 46 Pac. 297, following rule; Estate of King, 4 Cal. Prob. 21, holding where named executors nominated another, who after appointment as administrator died, named executors had not waived right to be then appointed executors.

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1163.

97 Cal. 343-348, 32 Pac. 320, STERLING v. SMITH.

Where Party Relies on Fraud as Cause of action, facts constituting fraud must be pleaded.

Approved in Virginia etc. Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 260, 90 Pac. 49, holding in action for conversion of lumber, fraud of third party from whom defendant acquired lumber in good faith for value could not be proven when not alleged.

Evidence of Fraud, not Pleased in Complaint, may be introduced when answer creates necessity of proving fraud.

Approved in Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 415, 95 Pac. 1031, holding in action for trover for conversion of lumber, where defendant denied plaintiff's ownership and conversion, plaintiff could prove lumber was acquired by third party by fraud and transferred to defendant without consideration, and with notice of fraud, though fraud was not pleaded in complaint; Sarnighausen v. Scannell, 11 Cal. App. 656, 106 Pac. 119, holding when contract was pleaded in answer as defense, plaintiff, without pleading it, may show in proof contract was procured by fraud; Baker v. Baker, 9 Cal. App. 740, 100 Pac. 894, holding where plaintiff's deed

was offered as defense in quiet title suit, plaintiff could, without pleading it, prove fraud in procurement of deed.

One Who Acts in Fiduciary Capacity cannot be permitted to deal with himself in individual capacity.

Approved in *Curry v. King*, 6 Cal. App. 576, 92 Pac. 665, applying rule where realty broker induced principal by fraud to convey property to himself; *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 232, 90 Pac. 41, holding agent who commingled principal's machinery with his own and sold it as such was liable to account as of date when it was intrusted to him.

Distinguished in *Moore v. Gould*, 151 Cal. 728, 91 Pac. 618, holding original payee of note, after transfer, could, as attorney in fact of maker, renew it on maker's behalf, although he was thereby released as indorser; *Wann v. Scullin*, 210 Mo. 482, 109 S. W. 703, holding stockholder in corporation not disabled from representing third party dealing with corporation.

Failure to Find on Issue is not Ground for reversal when it does not appear evidence was introduced sufficient to authorize finding.

Approved in *Hatton v. Gregg*, 4 Cal. App. 546, 88 Pac. 596, holding failure to find on limitations was immaterial when finding must have been adverse to appellant; *Rauer's Law etc. Co. v. Bradbury*, 3 Cal. App. 260, 84 Pac. 1009, holding in action in assumpsit, by assignee of broker for commission, defendant could prove without pleading it as defense that broker had received undisclosed commission from purchaser.

97 Cal. 348-352, 32 Pac. 322, SMITH v. SUPERIOR COURT.

Where Action Involves Merely Legal as distinguished from equitable rights, appointment of receiver is unauthorized.

Approved in *First Nat. Bank v. Superior Court*, 12 Cal. App. 343, 107 Pac. 326, holding receiver could not be appointed in legal action upon mere averments of large indebtedness and insolvency of defendant; *Slover v. Coal etc. Co.*, 113 Tenn. 438, 106 Am. St. Rep. 851, 82 S. W. 1135, 68 L. R. A. 852, holding power to appoint receiver could not be invoked in behalf of persons suing corporation in tort.

Miscellaneous.—Cited in *Smith v. Los Angeles etc. R. Co. (Cal.)*, 34 Pac. 243, on another appeal.

97 Cal. 353-359, 32 Pac. 446, FOX v. HALE & NORCROSS SILVER MIN. CO.

Sufficiency of Corporation as Surety under sections 1056 and 1057, Code of Civil Procedure, may be excepted to as in case of natural persons.

Approved in *La Dow v. National Bldg. etc. Co.*, 11 Cal. App. 309, 104 Pac. 839, following rule.

Powers and Privileges of Surety and trust companies. See note, 48 L. R. A. 590.

97 Cal. 360-370, 33 Am. St. Rep. 190, 32 Pac. 324, SCARF v. ALDRICH.

Proceeding by Guardian for Sale of ward's estate is in rem, and court acquires jurisdiction though order to show cause as published irregularly fixed hearing at earlier date than allowed by statute.

Approved in *Eaves v. Mullen*, 25 Okl. 702, 107 Pac. 441, upholding sale of ward's property by guardian though only nine days' notice,

instead of ten, were given; *Hunter v. Buchanan*, 87 Neb. 282, 127 N. W. 169, upholding such sale though guardian's bond was not formally approved by court.

Statutory Notice in Appointment of Administrator. See note, 127 Am. St. Rep. 531.

Notice of Application as Affecting Validity of guardians' sales. See note, 120 Am. St. Rep. 148, 149.

Notice of Application by Guardian for Leave to sell infant's realty as jurisdictional. See note, 8 L. R. A. (n. s.) 1215.

97 Cal. 370-373, 32 Pac. 319, FRAZIER v. LYNCH.

Instruction as to Presumption of Possession arising from acts of defendants, considered and held to be erroneous as directing jury as to inferences they might draw from facts proved.

Approved in *Linforth v. S. F. Gas & Electric Co.*, 156 Cal. 67, 103 Pac. 324, holding instruction that if defendant's gas-pipes were in sound condition one week before explosion, resulting in injury, they must be presumed to be in same condition at time of explosion, invaded province of jury.

97 Cal. 373-379, 32 Pac. 444, McCORMICK v. SUTTON.

Possession of Part as Possession of Whole. See note, 125 Am. St. Rep. 306.

97 Cal. 388-400, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452, NORTON v. ATCHISON ETC. R. R. CO.

Void Judgment Rendered upon False Return of service of summons on nonresident may be vacated on motion within reasonable time.

Approved in *George Frank Co. v. Leopold etc. Co.*, 13 Cal. App. 61, 62, 63, 108 Pac. 879, 880, upholding order setting aside default judgment rendered on void service of summons when motion to set aside was made more than six months after entry; *McLean v. Territory*, 8 Ariz. 202, 71 Pac. 929, holding default judgment rendered on service by publication could be set aside only on special appearance and objection to jurisdiction, on motion for new trial; *Nelson v. Meehan*, 2 Alaska, 492, holding trial court could set aside on motion, pending final disposition of case by district court, judgment obtained by fraud and perjury.

Distinguished in *California Casket Co. v. McGinn*, 10 Cal. App. 11, 100 Pac. 1079, holding right to have default set aside lost by delay of more than six months when court had jurisdiction, though judgment was entered one day before actual default; *National Metal Co. v. Greene etc. Co.*, 9 Ariz. 197, 80 Pac. 399, holding trial court could not set aside default judgment after end of term, when sheriff's return showed service on local agent of corporation.

Necessity of Affidavit of Meritorious Defense, and necessity of showing such defense, to vacate judgment rendered without jurisdiction of defendant's person. See note, 18 L. R. A. (n. s.) 406.

Who may be Served With Process in Suit against foreign corporation. See note, 23 L. R. A. 497.

97 Cal. 400-403, 32 Pac. 317, PEOPLE v. JAMES.

Failure of Jury to Agree in Criminal Case and consequent discharge avoids plea of once in jeopardy.

Approved in *People v. Ham Tong*, 155 Cal. 581, 132 Am. St. Rep. 110, 102 Pac. 264, 24 L. R. A. (n. s.) 481, holding when information sought to charge robbery but charged only grand larceny, conviction for robbery followed by reversal on appeal could not be pleaded in bar to trial for grand larceny.

97 Cal. 403-411, 32 Pac. 441, *ALLIN v. WILLIAMS*.

Indorser is Entitled upon Payment of Judgment against maker on note which he has indorsed to assignment of judgment.

Approved in *North Stockton Town Lot Co. v. Fischer*, 138 Cal. 103, 70 Pac. 1083, holding defendant in action for purchase money of land sold under contract had right to deed upon payment of judgment rendered against him; *Kinsel v. Ballow*, 151 Cal. 757, 91 Pac. 621, *arguendo*.

Indorser of Note may Prove, as against his immediate indorsee, that his indorsement was without consideration.

Approved in *Farmers' Sav. Bank v. Hansmann*, 114 Iowa, 51, 86 N. W. 32, holding indorser not liable on note made payable to him by mistake, and indorsed at request of true owner to show title in him.

Right to Show by Parol That Indorsement unrestricted in form was for collection only. See note, 17 L. R. A. (n. s.) 839.

Admissibility of Parol Evidence, as between immediate parties, that unrestricted indorsement was merely to transfer title. See note, 28 L. R. A. (n. s.) 530.

97 Cal. 411-421, 32 Pac. 449, *HAAS v. WHITTIER*.

Transfer by Insolvent Debtor to Creditor not made in usual course of business is presumed *prima facie* to be preference not allowed by section 55 of insolvent act.

Approved in *Salisbury v. Burr* (Cal.), 44 Pac. 462, holding transfer by insolvent to have been made to third party to prevent property from coming into hands of assignee, with view to defeat rights of creditors.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 467.

97 Cal. 422-427, 32 Pac. 515, *MARSHALL v. TAYLOR*.

Entry of Judgment is Ministerial Duty of Clerk.

Approved in *Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 383, following rule; *Stern v. Bennington*, 100 Md. 347, 108 Am. St. Rep. 433, 60 Atl. 18, holding where court gave oral direction to clerk to enter judgment, and clerk failed to make entry, parol evidence was admissible to show judgment was in fact ordered to be entered.

Court has Discretion to Refuse to Dismiss Action on ground plaintiff entitled to judgment has neglected for more than six months after verdict to demand to have judgment properly entered.

Approved in *Rickey Land etc. Co. v. Glader*, 153 Cal. 181, 94 Pac. 769, refusing to dismiss action for failure to enter judgment within six months when defendant had not been injured by delay; *Neihaus v. Morgan* (Cal.), 45 Pac. 256, holding such motion to dismiss not authorized when neither party was entitled to judgment at time because written findings have not been prepared and approved nor waived.

Miscellaneous.—Cited in *Spencer v. Troutt*, 133 Cal. 609, 65 Pac. 1084.

97 Cal. 429-438, 32 Pac. 558, KENNEDY v. MILLER.

Constitution Requires Adoption of One School System which shall be applicable to all common schools.

Approved in *Board of Education of Ardmore v. State*, 26 Okl. 371, 373, 109 Pac. 565, 566, free school system which legislature is directed to establish by Constitution is matter of state concern, and not municipal affair.

School District is Quasi-municipal Corporation.

Approved in *Pass School Dist. v. Hollywood School Dist.*, 156 Cal. 418, 105 Pac. 123, 26 L. R. A. (n. s.) 485, holding legislature had plenary power to divide, change or abolish school districts at pleasure; *People v. San Joaquin Valley Agricultural Assn.*, 151 Cal. 805, 91 Pac. 744, holding district agricultural association is public corporation; *Los Angeles School Dist. v. Longden*, 148 Cal. 382, 83 Pac. 247, holding city school district including also outlying lands to be quasi-municipal corporation distinct from city and not lost or merged in city.

City Charters are Limited by Operation of general laws.

Approved in *Mahoney v. Board of Education*, 12 Cal. App. 298, 107 Pac. 586, following rule; *Barthel v. Board of Education*, 153 Cal. 379, 95 Pac. 893, holding election and dismissal of teachers in public schools could not be regulated by charter in manner in conflict with general law; *McKenzie v. Board of Education*, 1 Cal. App. 408, 82 Pac. 393, holding power given by charter to board of education to investigate charges against teachers was in harmony with general law; *Davidson v. Baldwin*, 2 Cal. App. 736, 84 Pac. 239, holding board of education of city of San Diego under its charter had power to appoint city superintendent of schools and to fix salary.

97 Cal. 438-440, 32 Pac. 517, SAN DIEGO SCHOOL DISTRICT v. SAN DIEGO COUNTY.

Appeal from Writ of Mandate to Supervisors to compel levy of tax will be dismissed when tax was levied before taking appeal.

Approved in *Mendocino County v. Peters*, 2 Cal. App. 35, 82 Pac. 1124, holding affirmance of judgment of condemnation of land rendered moot question of validity of order for entry made after judgment in trial court; *Leet v. Board of Supervisors (Cal.)*, 47 Pac. 595, dismissing appeal from mandamus to supervisors to issue liquor license when hearing was after license had expired; *Loesche v. Goerdt*, 123 Iowa, 57, 98 N. W. 572, holding where tax for certain schoolhouses had been levied and paid, taxpayers, who knew of every step being taken for its levy, were estopped by laches to question its validity; *Knight v. Hirbour*, 64 Kan. 566, 67 Pac. 1105, where injunction has been complied with, appeal from decree will not be considered when subject matter of decree is no longer in existence; *Betts v. State*, 67 Neb. 204, 93 N. W. 168, holding appeal from mandamus which had been obeyed would be dismissed when appellant's official term had meanwhile expired; *State v. Pray*, 30 Nev. 220, 94 Pac. 220, holding where one convicted of crime has paid fine under protest attempting to reserve rights on appeal, but such reservation is void, appeal would be dismissed, since money could not be returned to him.

Distinguished in *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 194, 81 Pac. 1031, holding where appellant died pending appeal, motion by his substituted executors to remand cause upon ground judgment could not be enforced for want of presentation as claim against estate of deceased appellant was improper and would be denied.

97 Cal. 440-442, 32 Pac. 518, **CORONADO v. SAN DIEGO.**

Writ of Prohibition. See note, 111 Am. St. Rep. 931, 943.

97 Cal. 442-445, 32 Pac. 561, **SAN DIEGO v. DAUER.**

Under Section 1793, Political Code, board of education has power to fix salary of superintendent of schools of San Diego.

Reaffirmed in *Davidson v. Baldwin*, 2 Cal. App. 735, 84 Pac. 239.

97 Cal. 448-454, 32 Pac. 520, **PEOPLE v. SAMONSET.**

Offense of Seduction, Under Section 268, Penal Code, is complete if by means of promise of marriage female is induced to surrender her chastity to man who then refuses to marry her.

Cited in *In re Lewis*, 67 Kan. 565, 100 Am. St. Rep. 479, 73 Pac. 78, 63 L. R. A. 281, holding subsequent marriage of defendant to injured female not bar to prosecution for illicit connection under promise of marriage.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 49.

97 Cal. 454-455, 32 Pac. 519, **OWENS v. COLGAN.**

Intervention cannot be Allowed After Final Judgment.

Reaffirmed in *Smith v. Elliott*, 56 Fla. 853, 47 So. 388.

97 Cal. 456-458, 32 Pac. 562, **THOMAS v. PARKER.**

Miscellaneous.—Cited in *Wisconsin Trust Co. v. Chapman*, 121 Wis. 489, 105 Am. St. Rep. 1032, 99 N. W. 345, in discussing liability of administrator in personal and representative capacities.

97 Cal. 459-460, 32 Pac. 531, **PEOPLE v. FICE.**

Failure of Court to Instruct Jury on any proposition deemed essential by defendant is not error unless request was made for such instruction.

Approved in *People v. White*, 5 Cal. App. 335, 90 Pac. 474, following rule; *People v. Williamson*, 6 Cal. App. 339, 92 Pac. 314, reversing for refusal to give essential instruction requested.

Court may Deny Motion for New Trial made on ground of newly discovered evidence where affidavits in support thereof were fully contradicted by counter-affidavits of prosecution.

Approved in *State v. Fleming*, 17 Idaho, 497, 106 Pac. 314, holding, on motion for new trial, court could consider counter-affidavits on any matter pertinent to motion except issue of fact to which newly discovered evidence relates.

97 Cal. 460-464, 32 Pac. 530, **NYE v. MARYSVILLE & YUBA ST. R. R. CO.**

Notice of Intention to Move for New Trial which was not inserted in statement is improperly inserted in record on appeal from judgment and order denying new trial.

Approved in *Mendocino County v. Peters*, 2 Cal. App. 27, 82 Pac. 1123, holding notice of intention to move for new trial not included in bill of exceptions settled on motion was no part of record.

Rule Requiring Passenger to Deposit Fare on entering street-car is reasonable.

Approved in *Martin v. Rhode Island Co.*, 32 R. I. 170, 173, 78 Atl. 551, 552, holding reasonable rule requiring deposit of fare in box which registers it.

97 Cal. 464-468, 32 Pac. 528, **HEALY v. WOODRUFF.**

Right of Prior Appropriator of Water. See note, 30 L. R. A. 675.

97 Cal. 468-471, 32 Pac. 512, **BENICIA AGRICULTURAL WORKS v. GERMANIA INS. CO.**

Insurance Policy on Harvester Construed not to cover loss by fire when stored in shed after season was over.

Approved in *Fireman's Fund Ins. Co. v. Aachen-Munich Fire Ins. Co.*, 2 Cal. App. 697, 698, 84 Pac. 255, 256, holding reinsurer of wheat not liable when location was misdescribed as being in "warehouse" instead of "elevator."

Location of Movable Property as affecting fire insurance. See note, 26 L. R. A. 241.

97 Cal. 475-476, 32 Pac. 588, **SUTTON v. SYMONS.**

Order Striking Out Statement on Motion for new trial is order made after final judgment and appealable.

Approved in *Freeman v. Brown*, 4 Cal. App. 109, 87 Pac. 205, holding appealable order denying motion for leave to amend statement on motion for new trial by inserting specifications excusably omitted.

Matters in Transcript Which Form No Proper Part of record will be disregarded on appeal.

Approved in *Lane v. Tanner*, 156 Cal. 138, 103 Pac. 848, refusing to consider purported testimony erroneously inserted in transcript.

97 Cal. 476-482, 32 Pac. 532, **POSACHANE WATER CO. v. STAND-ART.**

Opinion of Witness as to Grade of Ditch is admissible though subject to be overcome by more exact evidence.

Approved in *Gardner v. Metropolitan St. Ry. Co.*, 223 Mo. 409, 410, 122 S. W. 1073, 1074, holding persons who had observed and measured railway tracks with yardsticks could testify that one rail was higher than another, though not experts, and spirit-level was not used.

97 Cal. 490-495, 32 Pac. 563, **ELDER v. KUTNER.**

Liability of Surety is Limited by express terms of contract.

Approved in *Hewlett v. Beede*, 2 Cal. App. 565, 83 Pac. 1087, following rule; *Plymouth etc. Min. Co. v. United States Fidelity etc. Co.*, 35 Mont. 31, 88 Pac. 568, holding surety on attachment bond not liable for wanton and malicious acts of principals which would support tort against them.

Measure of Damages in Action on attachment bond is amount which will compensate for detriment proximately caused to party aggrieved.

Approved in *McCarthy Co. v. Boothe*, 2 Cal. App. 172, 83 Pac. 176, holding measure of damages in case of stock wrongfully attached was difference in value when taken and when restored, with profits and dividends to accrue meanwhile; *New Sharon Creamery Co. v. Knowlton*, 132 Iowa, 674, 108 N. W. 770, holding debtor entitled to only nominal damage for wrongful attachment of land when not dispossessed, or his enjoyment in any way interfered with.

Exemplary Damages in Action for Malicious Prosecution or abuse of process in suing out attachment for collection of debt only. See note, 29 L. R. A. (n. s.) 276.

Impairment of Credit of Attachment Debtor whose real property has been attached is not proximate damages for which sureties on attachment bond are liable.

Approved in *Pacific-Union Club v. Commercial etc. Assur. Co.*, 12 Cal. App. 509, 107 Pac. 731, holding insurance company not relieved from liability under earthquake clause because fire spread to insured property by reason of breaking of water mains by earthquake; *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa, 159, 98 N. W. 921, holding, in action for damages for malicious prosecution of attachment, injuries to credit, or character, or business were too remote to form items of damages.

In Action Against Sureties on Attachment Bond, counsel fees cannot be recovered unless alleged they have been actually paid.

Approved in *Young v. State Bank of Marshall*, 54 Tex. Civ. App. 211, 117 S. W. 479, holding in action on note stipulating for attorney's fees, holder must allege and prove contract price of attorney's services.

97 Cal. 496-500, 32 Pac. 556, **GRANT v. BERONIO**.

In Action for Specific Performance of agreement to convey land, court can direct application of purchase money to satisfaction of encumbrances, and for that purpose can order money brought into court and disbursed under its direction.

Approved in *Whittier v. Gormley*, 3 Cal. App. 492, 86 Pac. 727, holding court in enforcing specific performance could allow deduction in residue of purchase money to be applied to reimburse plaintiff for curing defects in title, and costs of redeeming from tax sale.

Where Purchaser has Right to Repudiate Contract for vendee's failure to execute deed on tender of purchase price, he may waive such right and sue for specific performance.

Approved in *Clinton v. Shugart*, 126 Iowa, 189, 101 N. W. 789, where vendor failed to pay taxes according to contract of sale and vendee tendered purchase price less such taxes, but vendor refused to accept tender, vendee could sue for specific performance.

97 Cal. 500-507, 32 Pac. 570, **ROGERS v. DUHART**.

If Facts Stated in Complaint are such as to entitle plaintiff to relief under any form recognized at common law, it is sufficient.

Approved in *Hayden v. Collins*, 1 Cal. App. 261, 81 Pac. 1121, complaint considered and held to state cause of action in ejectment.

Presumption That When Tenancy is Shown, continued possession of tenant is in same capacity, is not conclusive.

Approved in *Journe v. Hewes*, 124 Cal. 249, 56 Pac. 1034, holding notice of intention to exercise option to purchase given in lease did not change relation of lessor and lessee.

Person Permitted to Occupy Land for particular purpose who abuses privilege becomes trespasser.

Distinguished in *Stufflebeem v. Hickman* (Cal.), 53 Pac. 439, holding owner of land who leased it with understanding lessee, if he could not keep stock of strangers off, should charge them for use, could not maintain trespass against one whose cattle intruded and who arranged with lessee for season's pasturage.

Necessity and Character of Title or possession to sustain action of trespass. See note, 30 L. R. A. (n. s.) 259.

97 Cal. 507-510, 32 Pac. 583, LA SOCIETE FRANCAISE v. WEIDMANN.

What Constitutes a Partnership. See note, 115 Am. St. Rep. 407.

97 Cal. 513-516, 32 Pac. 573, SCOTT v. GLENN.

Settlement of Bill of Exceptions is "proceeding" in action, and court has power to relieve against objection that bill was not served in time.

Approved in *Morgan v. Oregon Short Line R. R. Co.*, 27 Utah, 99, 74 Pac. 525, following rule; *Sherman v. Southern Pac. Co.*, 31 Nev. 289, 102 Pac. 258, granting relief from default on ground of excusable neglect of defendant's attorney.

Miscellaneous.—Cited in *Dodd v. Pasch*, 5 Cal. App. 689, 91 Pac. 167, to point that lease is binding on lessor though not signed by lessee, who had entered under it.

97 Cal. 516-517, 32 Pac. 574, FOLEY v. BULLARD.

Parties Whose Rights Would not be Adversely Affected by reversal of judgment are not adverse parties on whom notice of appeal need be served.

Approved in *Nelson Bennett Co. v. Twin Falls Land etc. Co.*, 13 Idaho, 771, 92 Pac. 980, holding defendants who did not appear and who were not given or denied anything by judgment were not adverse parties.

Distinguished in dissenting opinion in *Nelson Bennett etc. Co. v. Twin Falls Land etc. Co.*, 13 Idaho, 778, 92 Pac. 983, majority holding defendants not appearing to whom nothing was given or denied in judgment were not adverse parties.

Upon Appeal by Some Defendants from judgment of foreclosure of street assessment, notice of appeal need not be served on non-appealing defendants.

Approved in *Worth v. Emerson*, 3 Cal. App. 162, 85 Pac. 665, refusing to dismiss, on motion of successor to defaulting defendant, appeal by plaintiff from order vacating default judgment foreclosing street assessment for failure to serve notice of appeal on defaulting defendant, who had not complained of judgment.

97 Cal. 518-522, 32 Pac. 571, SIVERS v. SIVERS.

Where Written Contract for Payment of money is silent as to time of payment, parol agreement in regard to time may be proven.

Approved in *O'Brien v. Garibaldi*, 15 Cal. App. 524, 115 Pac. 252, holding oral evidence tending to show consideration of order could not modify terms of order itself.

Oral Evidence Affecting Terms of written instrument is admissible when parties have not incorporated all terms of agreement therein.

Distinguished in *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 595, 96 Pac. 322, holding parol evidence inadmissible to show sale of fruit by sample when contract was silent on subject; *Pierce v. Edwards*, 150 Cal. 654, 89 Pac. 602, holding parol evidence inadmissible to vary terms of contract for sale of land; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 752, 103 Pac. 940, holding evidence inadmissible to vary terms of written option by proof of oral agreement that defendant should have one year from past date fixed in which to accept in writing; *Dodd v. Pasch*, 5 Cal. App. 689, 91 Pac. 167, hold-

ing parol evidence inadmissible to vary terms of written lease by showing it was tenancy from month to month.

Decision on Demurrer Adverse to Plaintiff is not res adjudicata to be pleaded as defense to later action.

Approved in *Yates v. Jones Nat. Bank*, 74 Neb. 743, 105 N. W. 290, holding judgment on demurrer based on technical defect not res adjudicata.

97 Cal. 523-527, 32 Pac. 575, JONES v. JUSTICE'S COURT OF LOS ANGELES CITY.

Approved in *Griffiths v. Justice's Court*, 35 Utah, 449, 100 Pac. 1066, holding justice of peace could not try case until first set for trial and notice of time and place given.

Judgment in Justice's Court Rendered upon verbal statement of plaintiff that defendant was served with notice of trial will be set aside.

Approved in *Grant v. Justice's Court*, 1 Cal. App. 387, 82 Pac. 264, holding party had notice when codefendant, whom he asked to appear for him as his attorney, had written notice of time of trial.

97 Cal. 532-542, 32 Pac. 576, 33 Pac. 323, GOULD v. WISE.

Delivery of Deed is Force That Vitalizes It.

Approved in *Daneri v. Gazzola*, 2 Cal. App. 357, 83 Pac. 457, following rule; *Drinkwater v. Hollar*, 6 Cal. App. 120, 122, 91 Pac. 666, holding deed not delivered though in possession of grantee; *Bowers v. Cottrell*, 15 Idaho, 229, 96 Pac. 939, holding deed conveyed no title when grantee fraudulently obtained possession of it; *Wisconsin Lakes etc. Co. v. Pike & North etc. Co.*, 115 Wis. 381, 91 N. W. 990, arguendo.

97 Cal. 546-552, 32 Pac. 589, HARRIS v. BARNHART.

Where Evidence in Support of Specification of error is not found in record on appeal from order refusing new trial, specification will be disregarded.

Approved in *Neder v. Jennings*, 28 Utah, 278, 78 Pac. 483, where all evidence was not contained in record on appeal, assignment that verdict was contrary to evidence could not be reviewed; *Billups v. Utah Canal etc. Extension Co.*, 7 Ariz. 214, 63 Pac. 714, holding assignment of error involving consideration of facts could not be considered when evidence was not incorporated in record.

Where Instructions were Given Which are not in record, it will be presumed on appeal that such instructions, together with those on record, correctly stated law of case.

Reaffirmed in *Churchill v. More*, 4 Cal. App. 224, 88 Pac. 292.

Motion for New Trial Does not Suspend Operation of judgment in absence of order to that effect.

Approved in *People v. Bank of San Luis Obispo*, 159 Cal. 81, 112 Pac. 873, following rule.

Where Appeal is Pending, Final Judgment is not estoppel against another action for same cause.

Approved in *Estate of Ricks*, 160 Cal. 473, 117 Pac. 541, and *Contra Costa Water Co. v. Oakland*, 165 Fed. 529, both following rule.

Disapproved in *Rodney v. Gibbs*, 184 Mo. 13, 82 S. W. 190, holding judgment was res adjudicata as to same parties and subject matter though appeal was taken without supersedeas bond having been given.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

97 Cal. 553-567, 33 Am. St. Rep. 203, 32 Pac. 591, **DRISCOLL v. MARKET STREET CABLE RY. CO.**

Verdict Rendered on Substantial Conflict of evidence will not be disturbed on appeal.

Approved in *Withers v. Massengill*, 148 Cal. 771, 84 Pac. 154, and *Nishkian v. Chrisholm*, 2 Cal. App. 499, 84 Pac. 312, both following rule; *Codoni v. Donati*, 6 Cal. App. 84, 91 Pac. 424; *Richards v. Fraser*, 136 Cal. 463, 69 Pac. 84, and *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 578, 93 Pac. 379, all reversing judgment on finding against great weight of evidence.

Violation of City Ordinance is Negligence Per Se.

Approved in *Stein v. United Railroads*, 159 Cal. 371, 113 Pac. 664, and *Fenn v. Clark*, 11 Cal. App. 81, 103 Pac. 945, both following rule; *Cragg v. Los Angeles Trust Co.*, 154 Cal. 667, 98 Pac. 1065, holding failure of owner of building to employ licensed elevator operator as required by ordinance was negligence per se; *Manning v. App Cona Gold Min. Co.*, 149 Cal. 45, 84 Pac. 661, holding failure of servant of mine owner to properly lash poles in bucket according to statute did not make owner negligent per se when he furnished all necessary materials.

Violation of Police Ordinance as Ground for private action. See note, 5 L. R. A. (n. s.) 250, 252.

Pedestrian Crossing Street Railroad has right to rely on signals being given by approaching car.

Approved in *Ruppel v. United Railroads*, 10 Cal. App. 323, 101 Pac. 805, and *Dow v. Des Moines City Ry. Co.*, 148 Iowa, 447, 126 N. W. 925, both following rule; dissenting opinion in *Hutson v. Southern California Ry. Co.*, 150 Cal. 707, 89 Pac. 1096, majority holding person approaching railroad crossing had no right to assume train operatives would not be negligent in any way.

Pedestrian in Crossing Street-car Track is bound to use ordinary care.

Approved in *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 600, 112 Pac. 54, following rule; *Scott v. San Bernardino Valley Traction Co.*, 152 Cal. 611, 613, 93 Pac. 679, 680, holding plaintiff exercised reasonable care in attempting to drive wagon across street in front of car about to start; *Bass v. Norfolk Ry. etc. Co.*, 100 Va. 7, 40 S. E. 102, holding decedent's failure to look for approaching car was not negligence per se; *Liutz v. Denver City Tramway Co.*, 43 Colo. 63, 95 Pac. 601, holding defendant negligent in crossing street in front of moving car; *Stewart v. Omaha etc. Ry. Co.*, 83 Neb. 103, 118 N. W. 1108, holding question of negligence in crossing street-car track from behind standing car was for jury.

Right of Motorman to Assume That No One will attempt to cross so close in front of car as to render collision probable. See note, 5 L. R. A. (n. s.) 1060.

Liability of Street Railways for Injury to child darting in front of cars. See note, 81 Am. St. Rep. 878.

97 Cal. 572-575, 32 Pac. 599, **SHIPMAN v. FORBES.**

In Proceedings Where Property of Citizens is to be taken, every requirement of statute having least semblance of benefit to owner must be complied with.

Approved in *Warden v. Broome*, 9 Cal. App. 174, 98 Pac. 254, holding void tax sale made under delinquent list containing erroneous statement of amount due; *Guptill v. Kelsey*, 6 Cal. App. 43, 91 Pac. 412, holding void tax deed not given in strict pursuance of statute; *Lantz v. Fishburn*, 3 Cal. App. 665, 91 Pac. 817, holding party claiming under deed given under improvement bond act had burden of proving strict compliance with statute; *Sacramento Paving Co. v. Anderson*, 1 Cal. App. 674, 675, 82 Pac. 1070, holding notice of resolution of intention to improve street need not be posted on blocks of street upon which no work was to be done; *Ede v. Cuneo* (Cal.), 55 Pac. 389, holding second street assessment not authorized where action on first was defeated for want of engineer's certificate.

97 Cal. 575-585, 33 Am. St. Rep. 209, 32 Pac. 579, 21 L. R. A. 33, RILEY v. MARTINELLI.

Where Land is Purchased With Money of one person but in name of another, resulting trust is established.

Approved in *Zenda Mining etc. Co. v. Tiffin*, 11 Cal. App. 65, 104 Pac. 12, following rule; *Heinrich v. Heinrich*, 2 Cal. App. 483, 84 Pac. 328, holding husband who fraudulently obtained wife's money and purchased property therewith for his own benefit was involuntary trustee for her benefit.

Purchaser of Husband's Legal Title to Land purchased with funds of wife takes subject to resulting trust for wife in husband.

Approved in *Moultrie v. Wright*, 154 Cal. 523, 98 Pac. 259, holding mortgage taken from trustee with knowledge of trust was subordinate to trust; *Robinson v. Muir*, 151 Cal. 122, 90 Pac. 523, holding where claimants of miners' liens brought suit to foreclose with notice that one defendant was prior grantee of property under unrecorded deed, neither they nor purchasers at execution sale acquired any rights as against such defendant in whose favor judgment was rendered.

Title Acquired by One Purchasing at his own execution sale. See note, 79 Am. St. Rep. 948, 950.

Effect of Levy Under Void or Voidable Judgment. See note, 55 L. R. A. 282.

When Real Estate Broker is Considered as procuring cause of sale or exchange. See note, 44 L. R. A. 392.

97 Cal. 586-590, 32 Pac. 593, GORDON v. BOOKER.

Monuments of Survey Control Courses and distances.

Approved in *Andrews v. Wheeler* (Cal.), 103 Pac. 146, holding where location of monuments could not be established, resort could be had to courses and distances to fix corners and boundaries.

Necessity of Color of Title, not Expressly Made a condition by statute, in adverse possession. See note, 15 L. R. A. (n. s.) 1206.

Miscellaneous.—Cited in *Reyburn v. Booker* (Cal.), 32 Pac. 594, companion case.

97 Cal. 590-594, 32 Pac. 578, COYNE v. RENNIE.

Municipal Officer After Reduction of Salary is not bound to continue in office, but must be content with reduced salary if he does so.

Approved in *Woods v. Potter*, 8 Cal. App. 45, 95 Pac. 1127, holding members of city council of San Diego not entitled to compensation.

97 Cal. 594-600, 32 Pac. 644, COUNTY OF SAN DIEGO v. SEIFERT.

Object of Publication of Notice of ordinance is to impart notice to those who are or may be affected by its provisions.

Approved in *County of Mono v. Depauli*, 9 Cal. App. 710, 100 Pac. 719, holding provisions as to publication of ordinance sufficiently complied with.

Record of Ordinance With Proof of publication is prima facie proof it was passed, signed, and attested in form in which it appears in record.

Approved in *Grafton v. St. Paul etc. R. R. Co.*, 16 N. D. 323, 113 N. W. 602, 22 L. R. A. (n. s.) 1, holding ordinance could be proved as to contents as well as to passage, by introduction into evidence of original record.

97 Cal. 600-604, 32 Pac. 594, COUNTY OF ORANGE v. HARRIS.

No Repeal by Implication can Result from subsequent unconstitutional statute.

Approved in *Matter of Application of Clary*, 149 Cal. 737, 87 Pac. 582, holding act of 1897 relating to commitment of insane persons, held void in part, could not have effect to repeal all prior inconsistent statutes, though assuming to do so; *Ex parte Sohncke*, 148 Cal. 263, 113 Am. St. Rep. 236, 82 Pac. 957, 2 L. R. A. (n. s.) 813, holding act of March 21, 1905, taking effect at once, did not work implied repeal of inconsistent act of March 20, 1905, taking effect sixty days later, the act later in date being unconstitutional.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 295.

Tax Collector is not Entitled to Portion of penalties collected on delinquent taxes for preparing delinquent list.

Approved in *Humiston v. Shaffer*, 145 Cal. 198, 78 Pac. 652, holding district attorney entitled to no allowance for services of stenographer employed by him in official work.

97 Cal. 604-606, 32 Pac. 600, WHITE v. WHITE.

Court has Power in Divorce Proceeding to authorize husband to mortgage his property to pay alimony.

Reaffirmed in *White v. White* (Cal.), 33 Pac. 401.

97 Cal. 606-609, 32 Pac. 643, 20 L. R. A. 197, MARION v. OAKLAND BOARD OF EDUCATION.

Election of Teacher for Year Does not Give her life position, though she continues to teach for two years more without new election.

Approved in *Barthel v. Board of Education*, 153 Cal. 379, 95 Pac. 894, holding election for one year of teacher not holding city certificate did not give her life position.

Miscellaneous.—Cited in *Marion v. Board of Education* (Cal.), 32 Pac. 644, companion case.

97 Cal. 610-637, 32 Pac. 600, EX-MISSION LAND ETC. CO. v. FLASH.

Promoters of Corporation Occupy Fiduciary Relation to cosubscribers.

Approved in *Lomita Land etc. Co. v. Robinson*, 154 Cal. 43, 45, 97 Pac. 13, 18 L. R. A. (n. s.) 1106, holding promoters liable to corporation for secret profits, made from sale of their own property to corporation.

Duties and Liabilities of Promoters to corporation and its members. See note, 25 L. R. A. 94, 102.

Mere Lapse of Time Less Than Period of limitations does not bar action for equitable relief unless delay justifies presumption defendant is prejudiced thereby.

Approved in *Shiels v. Nathan*, 12 Cal. App. 619, 108 Pac. 40, holding wife's right to recover community property fraudulently transferred by husband not affected by delay of less than three years; *Patterson v. Hewitt*, 11 N. M. 24, 66 Pac. 558, 55 L. R. A. 658, holding plaintiffs guilty of laches in equity in neglecting to institute proceedings to enforce claims for eight years.

Actions by Stockholders in Behalf of Corporations. See note, 97 Am. St. Rep. 45.

97 Cal. 637-644, 32 Pac. 711, McSHERRY v. PENNSYLVANIA CONSOL. GOLD MIN. CO.

Motion to Retain or Remand Venue on ground of convenience of witnesses cannot be made until joinder of issues of fact.

Reaffirmed in *Pascoe v. Baker*, 158 Cal. 233, 110 Pac. 816.

Affidavit of Merits on Motion for Change of venue, made by one defendant for all, and stating all defendants have fully and fairly stated case to their attorneys, and have each been advised they have good cause of action, is sufficient.

Approved in *Pittman v. Carstenbrook*, 11 Cal. App. 230, 104 Pac. 702, holding sufficient affidavit of merits stating defendant had fully and fairly stated facts to his attorney, though not stated to be counsel in case; *Eddy v. Houghton*, 6 Cal. App. 88, 91 Pac. 398, holding sufficient affidavit of merits stating affiant had "fully and fairly stated the case" to his counsel.

Corporation has Right to Change of Venue of trial to county of its residence.

Distinguished in *Cochrane v. McDonald*, 4 Cal. Prob. 538, refusing change of venue to county where real estate in question was situated because basis of action was fraud rather than recovery of realty.

Residence of Corporation is County where its principal place of business is situated.

Approved in *Bloom v. Michigan Salmon Min. Co.*, 11 Cal. App. 124, 104 Pac. 325, and *Waechter v. Atchison etc. Ry. Co.*, 10 Cal. App. 73, 101 Pac. 42, both following rule.

97 Cal. 644-647, 32 Pac. 801, MORRIS v. WILSON.

Mechanic's Lien Exists Only by virtue of compliance with statute which creates it.

Approved in *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 715, 118 Pac. 113, holding contract providing for withholding of less than twenty-five per cent of whole contract price for thirty-five days after completion was void and no lien arose thereunder; *Provident etc. Loan Assn. v. Shaffer*, 2 Cal. App. 218, 83 Pac. 275, holding right to materialman's lien lost by failure to claim lien in statutory time.

In Suit on Mechanic's Lien, where statute has not been complied with, plaintiff may still recover personal judgment against owner, with whom he had contract.

Approved in *Ascha v. Fitch* (Cal.), 46 Pac. 299, following rule; *Gnekow v. Confer* (Cal.), 48 Pac. 332, holding subcontractor could have personal judgment against contractor on failure of lien but not against owner with whom he had no contractual relation.

97 Cal. 647-658, 32 Pac. 702, PARSONS v. SMILIE.

Relief in Equity from Forfeitures. See notes, 86 Am. St. Rep. 50, 54, 57; 69 L. R. A. 854, 865.

Miscellaneous.—Cited in *Estate of Tobin*, 3 Cal. Prob. 540.

97 Cal. 676-682, 32 Pac. 802, LINDSAY IRR. CO. v. MEHRTENS.

Legislative Declaration as to What is Public Use will be recognized by courts, but whether, in any individual case, use is public will be determined by courts.

Approved in *Tuolumne Water etc. Co. v. Frederick*, 13 Cal. App. 503, 110 Pac. 136, holding condemnation for electric power line to be for public use; *Hercules Water Co. v. Fernandez*, 5 Cal. App. 730, 731, 91 Pac. 402, 403, holding insufficient mere averment in complaint in condemnation suit that use was public, but facts must be stated showing use is one contemplated by statute; *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 675, 87 Pac. 30, holding court could determine whether particular use was public; *Shasta Power Co. v. Walker*, 149 Fed. 570, holding land could be condemned for ditch for power and light company.

To Render Use Public, it is not necessary entire public shall be capable of enjoying it, but it must be capable of enjoyment by all within neighborhood.

Approved in *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 677, 87 Pac. 31, holding land condemned for short branch railway to be for public use.

Fact That Stockholders of Corporation seeking to condemn land are owners of lands to be benefited by condemnation does not change use from public to private.

Approved in *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 681, 87 Pac. 32, holding fact that stockholders of granite company also became stockholders in railroad company formed to build road to market granite did not change use from public to private when road was open to use by public on equal terms.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 8, 9, 10, 24, 38, 50, 52, 86, 163.

NOTES

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CASES IN 98 CALIFORNIA.

98 Cal. 1-9, 32 Pac. 705, WILMINGTON TRANSPORTATION CO. v. O'NEIL.

Where One Undertakes Without Qualification to do anything not necessarily impossible, and fails to do it, he must make compensation in damages, though performance is rendered impracticable by circumstances over which he has no control.

Approved in *Carlson v. Sheehan*, 157 Cal. 697, 109 Pac. 30, holding obligation of contractor to complete building not released by reason of landslide causing damage to building; *Potts Drug Co. v. Benedict*, 156 Cal. 333, 104 Pac. 437, 25 L. R. A. (n. s.) 609, holding when estate for years in lot and building was assigned but building was destroyed before delivery, assignee was not relieved of obligation to pay purchase price.

98 Cal. 10-13, 32 Pac. 701, BROWN v. JENKS.

Street Assessment is Void Where Contract imposes on contractor duty of keeping pavement in repair after completion and acceptance of work.

Approved in *Montgomery v. Bennett*, 149 Ala. 124, 43 So. 94, following rule; *McQuiddy v. Worswick Street Pav. Co.*, 160 Cal. 17, 116 Pac. 71, upholding assessment for street work; *Mulberry v. O'Dea*, 4 Cal. App. 389, 88 Pac. 369; *Woollacott v. Meekin*, 151 Cal. 704, 705, 91 Pac. 613, 614, and *Van Loenen v. Gillespie*, 152 Cal. 223, 96 Pac. 88, all holding void assessment for street work when contract provided "all loss or damage arising from nature of work to be done under this agreement shall be sustained by contractor"; *Barber Asphalt Paving Co. v. Louisville*, 123 Ky. 695, 97 S. W. 33, 9 L. R. A. (n. s.) 154, holding one contracting with city to lay asphalt pavement and keep it and materials composing it in repair for ten years was bound to repair damage due to gas leaks when he knew gas-mains were in street when he made contract.

Distinguished in *Schindler v. Young*, 13 Cal. App. 19, 108 Pac. 734, holding provision in contract binding contractor to protect public from injury did not render assessment void; *Flinn v. Peters*, 3 Cal. App. 237, 84 Pac. 996, holding inclusion in contract of provision fixing maximum hours and minimum wages for labor did not render assessment void.

Power of City to Bind Contractor to maintain pavement. See note, 44 L. R. A. 532, 533, 535, 536, 541.

Miscellaneous.—Cited in *Excelsior Pav. Co. v. Leach* (Cal.), 34 Pac. 116, *Excelsior Pav. Co. v. Pierce* (Cal.), 33 Pac. 728, *Brown v. Parker* (Cal.), 33 Pac. 728, *Brown v. Winship* (Cal.), 33 Pac. 728; and *Burnett v. Llewelyn* (Cal.), 32 Pac. 702, all companion cases.

98 Cal. 13-19, 32 Pac. 646, DAVIS v. SOUTHERN PACIFIC CO.

Miscellaneous.—Cited in *Leishman v. Union Iron Works*, 148 Cal. 282, 113 Am. St. Rep. 243, 83 Pac. 34, 3 L. R. A. (n. s.) 500, to point that foreman of molders and foreman of carpenters in iron works were fellow-servants of molders working in molding department; *Tedford v. Los Angeles Electric Co.*, 134 Cal. 80, 66 Pac. 77, 54 L. R. A. 85, to point that employer cannot escape responsibility for neglect of duties by delegating them to superior servant.

98 Cal. 19-27, 35 Am. St. Rep. 133, 32 Pac. 708, DAVES v. SOUTHERN PACIFIC CO.

Law Recognizes No Distinctions growing out of grades of employment of respective employees, as regards master's liability for injury to servant through negligence of another servant.

Approved in *Vestner v. Northern California Power Co.*, 158 Cal. 288, 110 Pac. 920, holding lineman who climbed chopped tree at direction of foreman and was injured by its fall could not recover from employer on theory foreman was vice-principal; *Bridges v. Los Angeles Pacific Ry. Co.*, 156 Cal. 495, 105 Pac. 587, 25 L. R. A. (n. s.) 914, holding proprietor of electric station not liable for injury to employee by coming in contact with live wires left exposed by fellow-servant; *McDonald v. Hoffman*, 10 Cal. App. 518, 102 Pac. 674, holding master not liable for injury to carpenter due to negligence of foreman; *Schwind v. Floriston Pulp & Paper Co.*, 5 Cal. App. 202, 89 Pac. 1069, holding employer not liable for injury to mill employee injured while passing between cars in yard, by reason of fellow-employee unexpectedly moving cars; *Chicago etc. Ry. Co. v. Barker*, 169 Ind. 678, 83 N. E. 372, 17 L. R. A. (n. s.) 542, holding railroad not liable for death of engineer caused by running into open switch; *McLaine v. Head & Dowst Co.*, 71 N. H. 296, 93 Am. St. Rep. 522, 52 Atl. 546, 58 L. R. A. 462, holding foreman's failure to warn servant that load of earth was about to be dumped into trench where he was working did not render master liable; *Tills v. Great Northern Ry. Co.*, 50 Wash. 538, 97 Pac. 738, 20 L. R. A. (n. s.) 434, holding foreman of hand-car crew was vice-principal under circumstances of case.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 527, 607.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 38, 43, 130.

Master cannot Escape Liability for Negligence in performance of duties by delegating them to another.

Approved in *Matthews v. Bull* (Cal.), 47 Pac. 775, holding employer liable for negligence of foreman of pile-driver in giving signal to drop hammer; *Richey v. Southern Ry. Co.*, 69 S. C. 399, 48 S. E. 289, holding injury to engineer resulting from derailment of train was due to master's failure to provide safe track, responsibility for which could not be delegated.

Distinguished in *Brown v. People's Gas Light Co.*, 81 Vt. 480, 71 Atl. 204, 22 L. R. A. (n. s.) 738, holding where gas company provided suitable materials for supporting sides of trench, it was not liable for foreman's failure to use such materials.

Section Foreman as Fellow-servant of Members of crew with respect to operation of hand-car. See note, 20 L. R. A. (n. s.) 434.

Knowledge as Element of Employer's Liability. See note, 41 L. R. A. 117.

Delegability of Duty to Keep Switch Closed. See note, 17 L. R. A. (n. s.) 543.

98 Cal. 30-34, 32 Pac. 807, **OLAIBORNE v. CASTLE.**

Consideration is not Necessary to Support waiver of vendor's lien.

Approved in *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 746, 137 Am. St. Rep. 165, 110 Pac. 128, and *Finnell v. Finnell*, 156 Cal. 594, 134 Am. St. Rep. 143, 105 Pac. 742, both holding lien could be waived without consideration or writing.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 188, 206.

98 Cal. 35-40, 35 Am. St. Rep. 141, 32 Pac. 803, **BIGGI v. BIGGI.**

Conveyance to Husband and Wife Jointly makes property conveyed presumptively community, and failure to dispose of it by divorce decree leaves them as tenants in common.

Approved in *Coats v. Coats*, 160 Cal. 679, 118 Pac. 445, holding judgment annulling marriage but not disposing of property rights was not bar to action to determine such rights; *Tabler v. Peverill*, 4 Cal. App. 676, 88 Pac. 996, holding where issue was joined in divorce action as to character of property, but property was not disposed of by decree, husband and wife were tenants in common; *Ambrose v. Moore*, 46 Wash. 466, 90 Pac. 589, 11 L. R. A. (n. s.) 103, holding where property rights were not adjudicated by divorce decree, community property was held by tenancy in common.

Distinguished in *Bedal v. Sake*, 10 Idaho, 280, 77 Pac. 642, 66 L. R. A. 60, holding wife who abandoned husband, secured divorce on publication of summons in another state, remarried, and formed new community, abandoned all claim to former community.

98 Cal. 40-41, 32 Pac. 884, **RISLEY v. GRAY.**

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 761.

98 Cal. 45-51, 32 Pac. 809, 33 Pac. 206, **BENSON v. CENTRAL PACIFIC R. R. CO.**

Railroad Held not Liable for Injury to child on track while it was returning to station past which it had been carried.

Distinguished in *Kentucky etc. R. R. Co. v. Buckler*, 125 Ky. 36, 128 Am. St. Rep. 234, 100 S. W. 331, 8 L. R. A. (n. s.) 555, holding street railroad company liable for injury to passenger while returning to desired street, past which he had been carried, under directions of conductor; *Anderson v. Seattle-Tacoma etc. R. Co.*, 36 Wash. 398, 104 Am. St. Rep. 962, 78 Pac. 1016, holding railroad liable for injury to person forced to leave car at night and injured by contact with electric rail.

Care Required of Railroad Companies to prevent injuring children upon track. See note, 25 L. R. A. 791.

What Injuries Deemed Proximate Result of discharging passenger at wrong or improper place. See note, 7 L. R. A. (n. s.) 1178.

98 Cal. 51-54, 32 Pac. 866, SWAMP LAND DIST. NO. 150 v. SILVER.

Validity of Organization of Reclamation District cannot be inquired into in action to recover assessment levied upon land by de facto district.

Approved in *Reclamation Dist. v. McPhee*, 13 Cal. App. 388, 109 Pac. 1109, and *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 409, 105 Pac. 281, both following rule; *Miller v. Perris Irr. Dist.*, 85 Fed. 699, holding validity of assessment did not depend upon de jure character of district.

Municipal Corporation Does not Lose its existence by nonuser of its franchise.

Reaffirmed in *Elliott v. Pardee*, 149 Cal. 519, 86 Pac. 1089.

Procedure for Establishment of Drains and Sewers. See note, 60 L. R. A. 172, 234, 249.

Miscellaneous.—Cited in *Swamp Land Dist. v. Bump (Cal.)*, 32 Pac. 867, companion case.

98 Cal. 55-63, 35 Am. St. Rep. 144, 32 Pac. 867, MARSHALL v. TAYLOR.

Proof of Rape Does not Defeat Action for seduction.

Approved in *Velthouse v. Alderink*, 153 Mich. 219, 117 N. W. 77, 18 L. R. A. (n. s.) 587, following rule.

Distinguished in *Velthouse v. Alderink*, 153 Mich. 224, 225, 117 N. W. 78, 79, 18 L. R. A. (n. s.) 587, majority following rule.

Forcible Intercourse as Basis for seduction action. See note, 18 L. R. A. (n. s.) 589.

There must be Leading Aside from Chastity to constitute offense of seduction.

Reaffirmed in *Simmons v. State*, 54 Tex. Cr. 627, 114 S. W. 845.

Verdict for Twenty-five Thousand Dollars Damages for seduction of young girl held not excessive.

Approved in *James v. Oakland Traction Co.*, 10 Cal. App. 800, 103 Pac. 1089, holding verdict of fifteen thousand dollars for personal injuries in street railway accident was not excessive; *Lanigan v. Neely*, 4 Cal. App. 772, 89 Pac. 446, holding verdict of eight thousand dollars not excessive for breach of promise of marriage.

98 Cal. 63-67, 32 Pac. 811, BARROWS v. FOX.

Extent of Appropriation of Water is limited by quantity which may be applied by appropriator to beneficial use.

Approved in *Stenger v. Tharp*, 17 S. D. 21, 94 N. W. 403, following rule; *Anderson v. Bassman*, 140 Fed. 27, holding riparian owners in California and appropriators in Nevada were each limited to appropriation of reasonable quantity of water for beneficial use.

Lower Riparian Owner has Right to demand that unused surplus of water diverted by upper owner be returned to stream.

Approved in *Miller v. Wheeler*, 54 Wash. 435, 103 Pac. 643, 23 L. R. A. (n. s.) 1065, holding lower owner must prove abandonment of such surplus before he could establish right thereto.

In Action to Restrain Diversion of Water where defendant sets up right to water, judgment in his favor should determine quantity he is entitled to divert.

Approved in *Rogers v. Overacker*, 4 Cal. App. 340, 87 Pac. 1110, holding judgment enjoining diversion to such extent as to interfere with certain purposes was fatally uncertain.

Care Necessary to Avoid Waste in diverting water from stream. See note, 15 L. R. A. (n. s.) 239.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 674.

98 Cal. 73-86, 35 Am. St. Rep. 152, 32 Pac. 870, 19 L. R. A. 727, **EX PARTE WHITWELL.**

In Exercise of Police Power, it is judicial question whether any particular regulation is valid exercise of power.

Approved in *In re McCapes*, 157 Cal. 30, 106 Pac. 230, holding void regulation prohibiting one from building fires on his own premises without permit from fire warden; *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 471, 93 Pac. 72, 27 L. R. A. (n. s.) 260, upholding ordinance prohibiting further interment of dead bodies in San Francisco; *Ex parte Dietrich*, 149 Cal. 106, 84 Pac. 770, 5 L. R. A. (n. s.) 873, holding void act requiring exact weight to be marked on packages of butter offered for sale; *In re Miller*, 13 Cal. App. 566, 110 Pac. 139, upholding ordinance imposing license tax on cattle business in county; *In re San Chung*, 11 Cal. App. 514, 520, 521, 105 Pac. 610, 613, 614, upholding ordinance forbidding laundry in any building used for public stores; *In re McCoy*, 10 Cal. App. 126, 101 Pac. 424, holding void ordinance imposing tax on sheep business in county; *Williams v. State*, 85 Ark. 470, 122 Am. St. Rep. 47, 108 S. W. 840, 26 L. R. A. (n. s.) 482, holding court could determine reasonableness of police regulation; *Indianapolis v. Miller*, 168 Ind. 289, 80 N. E. 628, 8 L. R. A. (n. s.) 822, holding void ordinance requiring all theaters to have entrances on public streets and not on alleys; *Republic Iron etc. Co. v. State*, 160 Ind. 386, 66 N. E. 1007, 62 L. R. A. 136, holding void act providing for weekly payment of wages; *Block & Griff v. Schwartz*, 27 Utah, 406, 101 Am. St. Rep. 971, 76 Pac. 28, 65 L. R. A. 308, holding void act providing sale of stock of merchandise in bulk was fraudulent and void as to creditors unless inventory was made and creditors notified five days before sale; *Shepard v. Seattle*, 59 Wash. 373, 109 Pac. 1070, upholding ordinance regulating private hospitals for insane; dissenting opinion in *Sweet v. Ballentyne*, 8 Idaho, 442, 69 Pac. 999, majority upholding act prohibiting grazing of sheep within two miles of inhabited dwellings as valid exercise of police power.

Police Power of State is Power to make laws to secure comfort, convenience, peace and health of community.

Approved in *County of Plumas v. Wheeler*, 149 Cal. 762, 87 Pac. 911, holding ordinance regulating sheep business in county came within purview of police power; *Ex parte Flam*, 6 Cal. App. 237, 91 Pac. 812, holding act to prevent waste of water in artesian belt came within purview of police power.

Power of Municipality to Prevent or regulate use of property for advertising purposes. See note, 132 Am. St. Rep. 93.

Constitutionality of Statutes Restricting Contracts and business. See note, 21 L. R. A. 796.

Municipal Power Over Buildings and other structures as nuisances. See note, 38 L. R. A. 170.

Municipal Power Over Nuisances Affecting safety, health, and personal comfort. See note, 38 L. R. A. 323.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 646.

Miscellaneous.—Cited in *Succession of Hutchinson*, 112 La. 706, 36 So. 656, to point that legislative authority is not required to set up and maintain private hospital.

98 Cal. 86-103, 27 Pac. 651, 32 Pac. 805, McDANIEL v. PATTISON.

Jurisdiction of Probate Court to establish will is exclusive.

Reaffirmed in *Estate of Walker*, 160 Cal. 549, 117 Pac. 511.

Criticised in *Estate of Walker*, 160 Cal. 550, 551, 117 Pac. 511, 512, holding will could be established after final decree of distribution in action between devisee and fraudulent spoliator.

Will cannot be Received in Evidence to maintain title founded upon it until admitted to probate.

Approved in *Estate of Patterson*, 155 Cal. 636, 132 Am. St. Rep. 116, 102 Pac. 944, following rule.

Distinguished in *Cooney v. Glynn*, 157 Cal. 588, 108 Pac. 508, holding contents of destroyed will admissible to prove substitution of deed therefor as bearing on question of constructive trust.

Evidence to Establish Lost or Destroyed Wills. See note, 38 L. R. A. 441, 451.

98 Cal. 103-105, 32 Pac. 865, IN RE SANBORN.

Public Administrator is not "Person interested in estate" within meaning of sections 1307-1312, Code of Civil Procedure.

Approved in *Estate of Bergin*, 3 Cal. Prob. 293, holding public administrator not entitled to letters with will annexed as against resident devisee in foreign will; *State v. District Court*, 34 Mont. 229, 85 Pac. 1023, holding public administrator could not object to probate of will.

Distinguished in *Ward v. Brown*, 53 W. Va. 236, 44 S. E. 492, holding executor of will may propound it for probate.

Who can Contest a Will. See note, 130 Am. St. Rep. 204.

98 Cal. 105-110, 32 Pac. 876, KLAUBER v. SAN DIEGO STREET-CAR CO.

Rule That Court on Second Appeal must treat former decision as law of case applies only when same matters are brought before it on second appeal.

Approved in *Hunter v. Porter*, 10 Idaho, 88, 77 Pac. 439, following rule; *Millsap v. Balfour*, 158 Cal. 714, 112 Pac. 451, holding rule of law of case did not apply; *Luco v. De Toro (Cal.)*, 34 Pac. 517, holding remark as to certain finding made on first appeal was obiter, and not law of case on second appeal.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 326, 336, 343.

If upon Appeal by One Party on judgment-roll judgment is reversed and ordered entered for appellant, other party may, by appeal on proper record, present for consideration exceptions taken by him on trial of action.

Approved in *Lambert v. Bates*, 148 Cal. 148, 82 Pac. 768, holding party against whom judgment is ordered by appellate court to be entered on reversal of judgment in his favor could appeal from judgment so entered; *Tuffree v. Stearns Ranchos Co. (Cal.)*, 54 Pac. 828,

holding appeal lay from order denying motion to correct judgment where appeal from judgment would not present all facts on which motion was based.

Miscellaneous.—Cited in *Klauber v. San Diego Street Car Co.* (Cal.), 34 Pac. 516, on another appeal.

98 Cal. 117-119, 32 Pac. 800, KRUMDICK v. OBUMP.

It is Duty of Disqualified Judge to transfer cause to another court without delay.

Approved in *People v. Ebey*, 6 Cal. App. 772, 93 Pac. 381, holding judge disqualified by relationship to attorney had power to select qualified judge to try case; *Remy v. Olds* (Cal.), 42 Pac. 240, holding statute requiring disqualified judge to transfer cause was not satisfied by calling in qualified judge; *Gamble v. District Court*, 27 Nev. 244, 74 Pac. 531, mandamus lies to compel judge who was counsel in action before taking office to grant change of venue, though no motion was made therefor in open court.

Mandamus to Prevent Change of Venue from court having exclusive jurisdiction. See note, 2 L. R. A. (n. s.) 569.

98 Cal. 120-122, 32 Pac. 878, SHAIN v. PEOPLE'S LUMBER CO.

Rules of Court Confer Rights which may be enforced by litigants.

Approved in *Long v. American Surety Co.*, 11 Cal. App. 97, 103 Pac. 1095, holding respondent entitled to dismissal upon appellant's failure to file briefs within time required by rule of court.

98 Cal. 123-126, 32 Pac. 888, COCKRILL v. OLYMA.

If Order of Trial Court is Warranted by any possible state of facts not negatived by record on appeal, it will be presumed in support of order such state of facts existed.

Approved in *Kreling v. McMullen*, 158 Cal. 434, 111 Pac. 252, holding on appeal from default judgment all reasonable presumptions in support thereof would be indulged.

98 Cal. 127-132, 32 Pac. 880, PEOPLE v. GARDNER.

Information Charging Attempt to Commit Rape considered and upheld.

Approved in *People v. Ah Lung*, 2 Cal. App. 279, 83 Pac. 297, upholding information charging rape; *Daggs v. Territory*, 11 Ariz. 454, 94 Pac. 1108, holding insufficient indictment for assault with intent to commit rape.

Crime of Rape Being Punishable by any term of years not less than five, and attempt to commit rape being punishable for any term not exceeding one-half longest term for rape, sentence of five years is proper.

Approved in *State v. Stone*, 40 Mont. 92, 105 Pac. 90, upholding sentence of fifteen years for attempt to commit crime when crime itself is punishable by any term not less than five years, and attempt by term not exceeding one-half longest sentence for crime itself.

Information Charging Rape upon Girl of age of eleven years sufficiently charges she was under fourteen.

Approved in *Tullis v. Shaw*, 169 Ind. 667, 83 N. E. 378, holding complaint charging illicit intercourse with girl under fifteen charged in effect she was under seventeen, the statutory age.

Testimony of Stenographer as to Evidence given by witnesses on preliminary examination is inadmissible against defendant in criminal case.

Approved in *People v. Luis*, 158 Cal. 192, 110 Pac. 583, holding inadmissible transcribed shorthand report of confession taken through interpreters.

Criticised in *Lanigan v. Neely*, 4 Cal. App. 777, 89 Pac. 448, holding defendant could be impeached by proof of statements made by him in previous deposition inconsistent with testimony on trial.

Stenographers' Notes as Evidence and right to read them to jury. See note, 81 Am. St. Rep. 360, 362, 367.

Admissibility in Criminal Trial of testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 883.

In Prosecution for Attempt to Commit Rape, accused may be convicted upon uncorroborated testimony of prosecutrix alone.

Approved in *People v. Fernandez*, 4 Cal. App. 325, 87 Pac. 1115, and *People v. Ah Lung*, 2 Cal. App. 280, 83 Pac. 297, both following rule.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 53.

98 Cal. 134-137, 32 Pac. 863, FLAGG v. PUTERBAUGH.

Mandamus will not Issue to Compel Trial Judge to settle bill of exceptions if presented after time for appeal has expired.

Approved in *Vinson v. Los Angeles Pac. R. Co. (Cal.)*, 72 Pac. 841, holding pendency of proceedings to settle statement on motion for new trial after time to appeal had expired, no appeal having been taken, did not operate to extend time for filing transcript on appeal from judgment.

98 Cal. 138-142, 32 Pac. 864, PEOPLE v. WALTERS.

Where Case is Such That Proof of One Crime tends to prove any fact material on trial for another, such proof is admissible.

Approved in *People v. Manasse*, 153 Cal. 13, 94 Pac. 94, *People v. Cook*, 148 Cal. 341, 83 Pac. 46, and *People v. McCarthy*, 14 Cal. App. 150, 111 Pac. 274, all following rule; *People v. McClure*, 148 Cal. 421, 83 Pac. 438, holding shooting of another person by defendant could be shown when it was part of same transaction; *People v. Tomalty*, 14 Cal. App. 234, 111 Pac. 517, in prosecution for falsification of public record, evidence of other acts of similar nature was admissible to show general plan of concealment of shortage; *People v. Rowland*, 12 Cal. App. 19, 106 Pac. 433, admitting evidence of general shortage of bank while defendant was cashier as competent proof in support of particular charge of embezzlement; *People v. Cahill*, 11 Cal. App. 690, 106 Pac. 117, holding where accused committed two offenses by same act at same time and place, proof of one was admissible in prosecution for other; *People v. Ward*, 5 Cal. App. 38, 89 Pac. 875, in prosecution for obtaining money under false pretenses, evidence of representations made to others on same day was properly admitted as showing scheme to commit crime; *State v. Martin*, 47 Or. 286, 83 Pac. 850, holding, in homicide, testimony that defendant had intercourse with daughter of deceased and she was with child was admissible to show motive.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 980; 62 L. R. A. 198, 206, 210.

Right to Complain Because Prosecution is conducted or assisted by unofficial member of bar. See note, 24 L. R. A. (n. s.) 567.

98 Cal. 143-149, 32 Pac. 941, **KENNEDY v. GLOSTER.**

Execution of Deed Intended as mortgage is not abandonment of homestead.

Approved in MacLeod v. Moran, 153 Cal. 99, 94 Pac. 905, holding deed of trust not abandonment of homestead except for purposes of deed.

When Defects in Certificates of Acknowledgment are fatal. See note, 108 Am. St. Rep. 562.

98 Cal. 149-155, 32 Pac. 974, **SPINNEY v. GRIFFITH.**

Mechanic's Lien is Creation of Statute, and right to such lien and mode of enforcement depends solely on statutes.

Approved in Goldtree v. San Diego, 8 Cal. App. 509, 97 Pac. 217, holding, though laborers could not have lien on sewer built for city, yet they had lien on fund owing by city to contractor for its construction.

Building Contract for More than one thousand dollars, but not recorded, cannot be basis of mechanic's lien in favor of contractor.

Approved in California etc. Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 715, 118 Pac. 113, holding right to lien lost where contract failed to withhold twenty-five per cent of contract price for thirty-five days, as required by statute.

98 Cal. 155-157, 32 Pac. 890, **THOMPSON v. BRANDT.**

Order Denying Change of Venue will be reversed when it is clearly established convenience of witnesses will be promoted by such change.

Approved in Park v. Gruwell, 15 Cal. App. 512, 115 Pac. 254, reversing order granting change of venue to county of defendant's residence when clearly shown convenience of witnesses would be served by remanding to original venue.

98 Cal. 157-166, 35 Am. St. Rep. 163, 32 Pac. 976, 21 L. R. A. 593, **GRAY v. McWILLIAMS.**

Owner of Higher Land has Natural Easement to flow of surface water over lower land.

Approved in Heier v. Krull, 160 Cal. 444, 117 Pac. 531, holding drainage ditch on right of way over plaintiff's land could not be used for drainage of additional lands beyond watershed causing overflow on plaintiff's land; Galbraith v. Hopkins, 159 Cal. 302, 113 Pac. 176, holding owner of higher land could not drain pond by ditch discharging on lower owner to his injury; Hume v. Des Moines, 146 Iowa, 634, 125 N. W. 849, holding question of city's negligence in backing up surface water while improving street was for jury; Carroll v. Township of Rye, 13 N. D. 463, 101 N. W. 895, holding township not liable for injury to land owner by increased flow of surface water on his land due to improvement of highway; Davis v. Fry, 14 Okl. 349, 78 Pac. 183, 69 L. R. A. 460, holding natural lake without surface outlet could not be drained upon lands of lower owner.

Owner of Lower Land Along River is entitled to dam back on upper owner flood waters escaping from stream.

Approved in *Humphreys v. Moulton*, 1 Cal. App. 258, 81 Pac. 1085, upholding judgment abating as nuisance bringing together of several streams as result of which plaintiff's land was overflowed; *Fordham v. Northern Pac. Ry. Co.*, 30 Mont. 429, 104 Am. St. Rep. 729, 76 Pac. 1042, 66 L. R. A. 556, holding overflow waters of stream which still form part thereof may not be obstructed by railway fill.

Right of Land Owner to Accelerate or diminish flow of water to or from lands of another. See note, 85 Am. St. Rep. 722.

What is Surface Water. See note, 25 L. R. A. 527, 529, 530.

Rights as to Flow of Surface Water. See note, 21 L. R. A. 608, 611.

Municipal Rights and Duties with respect to surface water. See note, 65 L. R. A. 253, 254.

Creation and Conveyance of Easements Appurtenant. See note, 136 Am. St. Rep. 682, 684.

Adoption of Common Law in United States. See note, 22 L. R. A. 506.

Miscellaneous.—Cited in *Quinlan v. Calvert*, 31 Mont. 119, 77 Pac. 430.

98 Cal. 166-168, 32 Pac. 979, WHITE v. FRESNO NATIONAL BANK.

Decision on Application for Writ of Prohibition to stay proceedings in suit against corporation sued in county where it did not have its principal place of business that court has jurisdiction is conclusive and will not be considered on appeal from judgment.

Approved in *Kellogg v. Maloney*, 152 Fed. 408, 81 C. C. A. 531, holding decision on special appearance of defendant to move to quash summons that court had jurisdiction was final, and default judgment thereafter entered was conclusive.

Owner cannot Resist Payment of Contract on ground of delay in completion of building when delay was caused by his own acts.

Approved in *Wallis v. Wenham*, 204 Mass. 87, 90 N. E. 397, holding owner could not hold contractor for stipulated damages for delay when caused by owner's acts.

98 Cal. 168-171, 32 Pac. 983, SCOTT v. GLENN.

Contract for Sale of Real Estate is not Void because signed by vendor only.

Approved in *Harper v. Goldschmidt*, 156 Cal. 247, 251, 134 Am. St. Rep. 124, 104 Pac. 452, 454, holding vendee who had not signed contract for sale of real estate could not be compelled to perform, though he had paid part of purchase price and taken receipt therefor.

Signature of One Vendor by Covendor held to be satisfied by former.

Approved in *Gregg v. Carey*, 4 Cal. App. 355, 88 Pac. 283, holding signature of principal's name by agent without written authority was ratified by principal.

Who must Sign Memorandum of Executory Sale contract within statute of frauds. See note, 28 L. R. A. (n. s.) 689.

98 Cal. 171-178, 32 Pac. 980, BURKE v. BOURS.

Agent may Purchase Property from principal after full disclosure of all he knows concerning property he is authorized to sell.

Approved in *Pomeroy v. Wimer*, 167 Ind. 452, 79 N. E. 447, following rule; *Campbell v. Beard*, 57 W. Va. 510, 50 S. E. 451, upholding sale of land to agent when stipulated for in contract of agency.

Purchase by Agent of Principal's Property. See note, 80 Am. St. Rep. 565, 566.

Time as of Essence of Contract for sale of land. See note, 104 Am. St. Rep. 267.

98 Cal. 179-184, 32 Pac. 943, FRESNO v. FRESNO CANAL & IRR. CO.

Injunction Lies to Compel Canal on highway to be conducted so as not to be nuisance where such conduct is possible, and not for its destruction.

Approved in *Weaver v. Kuchler*, 17 Okl. 199, 87 Pac. 603, holding where slaughter-house could be conducted so as not to be nuisance, it should not be enjoined as nuisance per se.

Injunctions by Municipalities Against Nuisances in waters and watercourses. See note, 40 L. R. A. 466.

Prescriptive Right to Maintain Public Nuisance. See note, 53 L. R. A. 899.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 660.

Liability of Water Companies. See note, 81 Am. St. Rep. 492.

98 Cal. 184-189, 32 Pac. 945, 20 L. R. A. 87, MAWHINNEY v. SOUTHERN INS. CO.

Under Policy Insuring Threshing Outfit in field, insurer is not liable for loss near blacksmith-shop to which it had been taken for repairs.

Approved in *Fireman's Fund Ins. Co. v. Aachen-Munich Fire Ins. Co.*, 2 Cal. App. 697, 84 Pac. 255, holding reinsurer not liable when grain insured was misdescribed as being in warehouse when in fact in elevator; *Palatine Ins. Co. v. Kehoe*, 197 Mass. 356, 125 Am. St. Rep. 375, 83 N. E. 867, 15 L. R. A. (n. s.) 1007, holding fire policy did not cover property temporarily stored in another building pending removal to new location.

Location of Movable Property as affecting fire insurance. See note, 26 L. R. A. 242.

98 Cal. 189-193, 32 Pac. 936, STOCKTON SAVINGS BANK v. STAPLES.

In Suit to Quiet Title to Land claimed by adverse possession as against tenant in common, declarations of cotenant while in actual possession that he was sole owner are admissible in favor of his grantee as tending to show character of possession.

Approved in *Vannice v. Dungan*, 41 Ind. App. 31, 83 N. E. 251, holding declarations of defendant's intestate while in possession of land conveyed to him by deed, which plaintiffs seek to have declared mortgage, were admissible as res gestae to prove character of possession; *Trustees Bishop Estate v. Lulia*, 16 Haw. 632, holding admissible declarations of defendant in ejectment while in possession of land as to her claim thereto; *Hubbard v. Cheney*, 76 Kan. 227, 123 Am. St. Rep. 129, 91 Pac. 794, holding in contest between heirs of husband and wife as to whether deed to them was mortgage, declarations of husband in possession at time of purchase were admissible; *Murphy v.*

Dafoe, 18 S. D. 47, 99 N. W. 87, holding admissible in suit to quiet title declarations of person in possession that he was acting as agent.

Where Deed is Made to Corporation, it is presumed corporation has power to hold land.

Approved in *Diamond Coal Co. v. Cook* (Cal.), 61 Pac. 579, following rule.

98 Cal. 195-199, 32 Pac. 971, RICHARDS v. WOLFLING.

Abandonment and Forfeiture of Mining Claims. See note, 87 Am. St. Rep. 410.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 778, 799.

98 Cal. 199-202, 32 Pac. 982, COMMISSIONERS TO MANAGE YOSEMITE VALLEY AND BIG TREE GROVE v. BARNARD.

It is No Defense in Unlawful Detainer that plaintiff has leased premises to third party, with whose right defendant does not connect himself.

Reaffirmed in *Vatuone v. Cannobio*, 4 Cal. App. 425, 88 Pac. 375.

Unlawful Detainer. See note, 120 Am. St. Rep. 61.

Finding Outside Issues cannot Form Element in determining judgment.

Approved in *Cannon v. McKenzie*, 3 Cal. App. 290, 85 Pac. 132, holding where complaint was for value of goods sold, board, and labor, it could not support judgment for hire of team which was not within issues.

98 Cal. 203-204, 32 Pac. 970, ESTATE OF WHETTON.

Executor has Right to Defend Will on contest after probate.

Reaffirmed in *Estate of Dillon*, 149 Cal. 685, 87 Pac. 380.

Distinguished in *Estate of Hite*, 155 Cal. 457, 101 Pac. 451, holding executor not interested in contest of codicil between legatees.

Criticised in *Estate of Dalton*, 2 Cal. Prob. 102, holding executor not necessary party to proceeding for revocation of probate of will instituted after his discharge.

98 Cal. 206-210, 32 Pac. 1047, PEOPLE v. SELMA IRR. DISTRICT.

Irrigation District is Public Corporation.

Approved in *People v. San Joaquin Valley Agricultural Assn.*, 151 Cal. 805, 91 Pac. 744, holding district agricultural association public corporation; *Reclamation Dist. v. McPhee*, 13 Cal. App. 388, 109 Pac. 1108, holding reclamation district public corporation; *Perry v. Otay Irr. District* (Cal.), 60 Pac. 42, holding officers of irrigation district were public officers; *Hertle v. Ball*, 9 Idaho, 199, 72 Pac. 955, holding district court had jurisdiction to try contest of election of officers of irrigation district, such being public officers.

98 Cal. 210-217, 33 Pac. 53, SMITH v. LOS ANGELES PACIFIC RY. CO.

Special Damages must be Pleaded.

Cited in *Yaeger v. Southern California Ry. Co.* (Cal.), 51 Pac. 191, *arguendo*.

Where Court Made Finding as to Special Damage not pleaded in addition to general finding of damage, it is presumed on appeal that court had facts to support finding.

Distinguished in *Johnston v. Southern Pacific Co.*, 150 Cal. 537, 89 Pac. 349, holding in action for damages for injury to minor, aged sixteen, it could not be presumed on appeal against record that consent of minor had been given to appointment of guardian ad litem.

Effect of Consolidation of Corporations. See note, 89 Am. St. Rep. 637, 646.

Liability of Consolidated Railroad Company for debts of predecessor. See note, 23 L. R. A. 232.

What Unsecured Claims are Covered by assumption of indebtedness of corporation upon consolidation, merger or absorption. See note, 26 L. R. A. (n. s.) 1102.

Miscellaneous.—Cited in *Patton v. Los Angeles etc. Ry. (Cal.)*, 33 Pac. 55, companion case; *Bowman v. Hazen*, 69 Kan. 699, 77 Pac. 596, to point that order appointing receiver to take charge of property not involved in litigation is void and subject to collateral attack.

98 Cal. 218-219, 33 Pac. 58, **PEOPLE v. SMITH.**

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 177.

98 Cal. 219-227, 33 Pac. 66, **WELSH v. BRAMLET.**

Statute Providing for Compensation of officers of counties within any class is general law.

Approved in *Crockett v. Mathews*, 157 Cal. 160, 106 Pac. 577, holding amendment to such statute which affected entire class was general law; *Johnson v. Gunn*, 148 Cal. 750, 84 Pac. 667, holding act amending County Government Act respecting counties of twenty-seventh class was general law.

Distinguished in *Johnson v. Gunn (Cal. App.)*, 84 Pac. 372, holding act of 1901 providing for compensation of justices in counties of twenty-seventh class was local law and void.

Amendment of 1891 to Section 170, County Government Act, conferring special authority on district attorney of counties of eighth class, is local and special law.

Distinguished in *Newman v. Lester*, 11 Cal. App. 580, 105 Pac. 787, holding act making allowance for expenses of deputies of county officer was not void as increasing salary during term.

98 Cal. 230-234, 33 Pac. 60, **PEOPLE v. FAGAN.**

Indictment for Grand Larceny is not sustained by proof defendant knowingly received stolen goods.

Approved in *Ex parte Goldman (Cal. App.)*, 88 Pac. 821, holding averment accused concealed stolen property with knowledge of theft did not charge him as accessory.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 522.

Miscellaneous.—Cited in *People v. Fagan (Cal.)*, 33 Pac. 846, companion case.

98 Cal. 235-241, 33 Pac. 202, **PEOPLE v. SANSOME.**

Misconduct of District Attorney can only be availed of on motion for new trial.

Approved in dissenting opinion in *People v. Amer*, 151 Cal. 312, 90 Pac. 702, majority holding misconduct of district attorney was not ground for new trial.

Criticised in *People v. Amer*, 151 Cal. 308, 309, 90 Pac. 700, holding under section 1181, Penal Code, misconduct of district attorney, unaccompanied by error of judge, was not ground for new trial.

Drinking of Intoxicants by Jurors after submission of cause while in charge of officer held not to be such misconduct as to warrant reversal.

Approved in *People v. Cord*, 157 Cal. 571, 108 Pac. 515, holding separation of jurors to allow one to visit sick wife in charge of officer was not tenable objection.

Misconduct of Jurors, other than their separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1035.

Where Witness Testifies as Accomplice, court cannot instruct jury he was in fact accomplice.

Approved in *Driggers v. United States*, 21 Okl. 81, 1 Okl. Cr. 187, 129 Am. St. Rep. 823, 95 Pac. 620, and *Driggers v. United States*, 7 Ind. Ter. 768, 104 S. W. 1172, both following rule.

Verdict of Conviction for Burglary will not be reversed where proved burglary was committed and stolen property found in defendant's possession on ground of absence of proof connecting defendant with crime.

Approved in *People v. Spadoni*, 11 Cal. App. 220, 104 Pac. 589, holding admissions of defendant, which tend strongly to connect him with larceny, were sufficient corroboration of accomplice testimony.

Possession of Recently Stolen Property as evidence of burglary. See note, 12 L. R. A. (n. s.) 214.

98 Cal. 241-245, 33 Pac. 195, GREISS v. STATE INVESTMENT ETC. CO.

False Statement in Proof of Loss to avoid policy must be willfully made with intention to defraud company.

Approved in *Miller v. Fireman's Fund Ins. Co.*, 6 Cal. App. 398, 92 Pac. 333, following rule.

Fraud in Proof of Loss as Defense to action on insurance policy must be pleaded.

Approved in *Solem v. Connecticut Fire Ins. Co.*, 41 Mont. 355, 109 Pac. 434, following rule; *Smith v. Mutual etc. Ins. Co.*, 21 S. D. 442, 113 S. W. 97, holding breach of condition of fire policy must be specially pleaded to be available as defense.

Where Case is Tried on Theory that certain issues are raised, it is too late to raise question on appeal whether issues were in fact raised by pleadings.

Approved in *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 307, 90 Pac. 205, holding where trial was had on theory complaint was sufficient, technical objections raised for first time on appeal would be disregarded.

Arbitration as Condition Precedent to Action on insurance policy. See note, 15 L. R. A. (n. s.) 1063.

98 Cal. 247-252, 33 Pac. 51, HUNTER v. BRYANT.

Where Amended Complaint is Unobjectionable, objection on appeal that original complaint states no cause of action is untenable.

Approved in *Hunter v. Hubert* (Cal.), 39 Pac. 534, following rule.

Presumption of Attorney's Authority to appear for party whom he assumes to represent. See note, 126 Am. St. Rep. 40.

Effect of Judgment Obtained upon unauthorized appearance by attorney. See note, 21 L. R. A. 848, 853.

98 Cal. 253-258, 33 Pac. 88, WAINSCOTT v. OCCIDENTAL BLDG. & LOAN ASSN.

If Any Pecuniary Loss is Shown to have resulted from false representation, court will not inquire into extent before redressing wrong.

Approved in Spreckels v. Gorrill, 152 Cal. 389, 92 Pac. 1014, holding where property was bought for certain qualities it was falsely represented to possess, it was no defense that property was of equal value without qualities, material injury having been alleged; Eichelberger v. Mills Land etc. Co., 9 Cal. App. 638, 180 Pac. 122, holding rescission for fraud not sustainable without damage; Shopbell v. Boyd, 9 Cal. App. 140, 98 Pac. 70, holding where fraud was practiced in effecting exchange of lands, amount of damage was of secondary importance; King v. Lamborn, 186 Fed. 29, rescinding sale on ground of fraudulent representations though purchaser showed no pecuniary loss; Sonneysn v. Akin, 14 N. D. 256, 104 N. W. 1029, refusing rescission when false statement was followed by no injury.

In Absence of Investigation of Land sold, purchaser is warranted in relying on representations of seller.

Reaffirmed in Eichelberger v. Mills Land etc. Co., 9 Cal. App. 636, 100 Pac. 121.

Right to Rely upon Representations Made to effect contract as basis for charge of fraud. See note, 37 L. R. A. 614.

Rules Applicable to Action for Deceit Set Forth.

Approved in Hodgkins v. Dunham, 10 Cal. App. 705, 103 Pac. 358, rescinding contract for sale of stallion on ground of false representations that he was sure foal getter.

98 Cal. 259-264, 33 Pac. 56, SAN FRANCISCO v. COLLINS.

Costs in Condemnation Proceeding should be taxed against party seeking to condemn.

Approved in Petersburg School Dist. v. Peterson, 14 N. D. 352, 103 N. W. 759, following rule; Stolze v. Milwaukee etc. Ry. Co., 113 Wis. 58, 90 Am. St. Rep. 833, 88 N. W. 924, holding costs incurred by property owner in efforts to collect award in condemnation suit must be paid as part of compensation.

Properly Filed and Verified Cost Bill is prima facie evidence items have been necessarily incurred.

Reaffirmed in King v. Allen, 29 Mont. 8, 73 Pac. 1108.

98 Cal. 264-268, 33 Pac. 95, JORDAN v. FAY.

Legal Title to Real Estate Devised by will passes to devisee, subject to payment of claims against estate and expenses of administration.

Approved in Blair v. Hazzard, 158 Cal. 724, 112 Pac. 299, holding where will devised land to trustees with power to sell and apply proceeds to certain trusts, legal title vested in them and they had power to convey without order of court.

Property Acquired by Husband and Wife jointly after marriage is presumed to be community property.

Approved in Estate of Schade, 4 Cof. Prob. 442, following rule; Reavis v. Gardner (Cal.), 60 Pac. 964, arguendo.

Amendment of 1889 to Section 164, Civil Code, providing property conveyed to wife shall be presumed separate property, did not change

former rule that property acquired by either spouse during marriage is presumed community, so as to affect titles already vested.

Approved in *Booker v. Castillo*, 154 Cal. 676, 98 Pac. 1068, and *Nilson v. Sarmet*, 153 Cal. 527, 126 Am. St. Rep. 91, 96 Pac. 316, both following rule; *Santa Cruz Rock Co. v. Lyons* (Cal.), 43 Pac. 602, holding where husband signed contract for street work stating property was community, finding he was reputed owner was sustained, though deed was to wife after marriage; *James v. Oakland Traction Co.*, 10 Cal. App. 794, 103 Pac. 1086, holding repeal of statute limiting speed of cars could not affect vested right to recover for injuries caused by violation of statute.

What is Community Property. See notes, 126 Am. St. Rep. 122; 4 Cal. Prob. 64, 65.

98 Cal. 268-271, 33 Pac. 93, GALVIN v. GUALALA MILL CO.

Where Injury is Caused by Fire spreading from defendant's land, burden is on plaintiff to show defendant was negligent in starting fire.

Approved in *McVay v. Central California Ins. Co.*, 6 Cal. App. 187, 91 Pac. 746, following rule.

"Willfully," as Used in Section 384, Penal Code, means with evil intent.

Approved in *Kletzing v. Armstrong*, 119 Iowa, 508, 93 N. W. 501, holding "willful," as used in Code, section 4852, means with bad intent.

Miscellaneous.—Cited in *Jensen v. South Dakota Cent. R. Co.*, 25 S. D. 513, 127 N. W. 653, to point that in assessing double damages, jury may assess single damage to be doubled by court, or it may directly assess double damage; *Galvin v. Gualala Mill Co.* (Cal.), 33 Pac. 95, on another appeal.

98 Cal. 271-277, 33 Pac. 86, BURNS v. SCOOFFY.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 270.

Miscellaneous.—Cited in *Griffin v. Scooffy* (Cal.), 33 Pac. 88, companion case.

98 Cal. 278-280, 33 Pac. 98, PEOPLE v. BONNEY.

Court may Instruct Jury That Accomplice testimony is to be viewed with distrust at time such testimony is offered for people against defendant.

Approved in *People v. Strybe* (Cal.), 36 Pac. 5, following rule; *O'Grady v. People*, 42 Colo. 315, 95 Pac. 347, holding it was not error to refuse to charge that testimony of private detectives should be viewed with distrust.

98 Cal. 281-284, 33 Pac. 92, GANCEART v. HENRY.

Amendment of Complaint After Sustaining of demurrer thereto is waiver of any error in sustaining demurrer.

Approved in *Brittan v. Oakland Bank of Savings*, 112 Cal. 2, 44 Pac. 339, and *Papillion Times Printing Co. v. Sarpy County*, 85 Neb. 401, 123 N. W. 454, both following rule; *Papillion Times Printing Co. v. Sarpy Co.*, 86 Neb. 221, 125 N. W. 525, applying rule to answer.

To Establish by Parol That Deed absolute on face was given as mortgage, clear case must be made out.

Approved in *Blair v. Squire* (Cal.), 59 Pac. 212, *Holmes v. Warren*, 145 Cal. 463, 78 Pac. 956, and *Sullivan v. Woods*, 5 Ariz. 200, 50 Pac. 115, all holding deed was not mortgage.

98 Cal. 285-287, 33 Pac. 63, 447, TUNIS v. LAKEPORT AGRICULTURAL PARK ASSN.

New Trial Ordered as to Part of issues only.

Reaffirmed in *Robinson v. Muir*, 151 Cal. 125, 90 Pac. 524.

Mechanic's Lien Extends to Ground covered by buildings and so much of adjacent land as may be necessary to its convenient use.

Approved in *Filston Farm Co. v. Henderson*, 106 Md. 374, 67 Atl. 235, holding lien on school building did not extend to school grounds covering large area.

Extent of Land to Which Mechanic's Lien will Attach. See note, 26 L. R. A. (n. s.) 839.

98 Cal. 287-290, 33 Pac. 197, FIRST NAT. BANK OF SAN LUIS OBISPO v. SIMMONS.

To Hold Incoming Partner for outstanding firm obligation, it must be shown he assumed such obligation.

Approved in *Bank of Commerce v. Ada County etc. Co.*, 11 Idaho. 762, 85 Pac. 921, holding incoming partner was not liable for firm debt.

98 Cal. 291-292, 33 Pac. 62, ROURKE v. McNALLY.

One Who was in Prior Actual Possession of public land may maintain ejectment against person who made peaceable entry on such possession intending to occupy land as homestead, but not connected with government title.

Approved in *Los Angeles Farming etc. Co. v. Hoff* (Cal.), 34 Pac. 518, holding one occupying public land for twenty-five years under color of title could maintain ejectment against one assuming to enter as on public lands; *Nash v. McNamara*, 30 Nev. 134, 133 Am. St. Rep. 694, 93 Pac. 408, 16 L. R. A. (n. s.) 168, holding junior mineral location made on ground covered by valid existing senior location will not prevail over relocation on same ground made after failure to do work on senior location; dissenting opinion in *Balsz v. Liebenow*, 4 Ariz. 234, 236, 36 Pac. 211, 212, majority holding duplicate receiver's receipt issued to one making homestead filing did not entitle him to maintain ejectment against party in possession, though he had been given right to enter after contest in land office.

98 Cal. 293-299, 33 Pac. 63, BAIRD v. CRANK.

When Account is Stated, statute of limitations begins to run upon new cause of action from date of settlement.

Approved in *Figge v. Bergenthal*, 130 Wis. 631, 110 N. W. 800, holding, where account was stated, limitations began to run as to transactions included in account up to that time.

What Constitutes an Account Stated. See note, 27 L. R. A. 816, 821.

98 Cal. 299-304, 33 Pac. 263, PEOPLE v. BEMMERLY.

Mere Fact That Some Jurors separated from others before submission of cause and drank intoxicants does not warrant new trial.

Approved in *People v. Cord*, 157 Cal. 571, 108 Pac. 515, holding visit of juror to sick wife in company with officer during recess did not

warrant new trial; *People v. Emmons*, 7 Cal. App. 696, 698, 95 Pac. 1037, 1038, holding fact that some jurors used intoxicants moderately during trial did not vitiate verdict; *State v. Levy*, 9 Idaho, 499, 75 Pac. 232, holding technical separation of jury was not ground for new trial.

Disapproved in *State v. Sly*, 11 Idaho, 119, 80 Pac. 1128, holding separation of jury after being sworn prima facie entitled defendant to new trial.

Effect of Separation of Jury. See note, 103 Am. St. Rep. 161.

Permitting Separation of Jury in capital case. See note, 24 L. R. A. (n. s.) 781.

Misconduct of Jurors, Other Than Their Separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1035.

Burden of Proving Insanity as defense to crime is upon defendant and must be established by preponderance of evidence.

Reaffirmed in *People v. Willard*, 150 Cal. 552, 89 Pac. 128.

Presumption and Burden of Proof as to sanity. See note, 36 L. R. A. 727.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 739.

98 Cal. 304-309, 33 Pac. 123, DULIN v. PACIFIC WOOD & COAL CO.

Supersedeas is Synonymous With Stay of proceedings.

Approved in *Montgomery v. King*, 125 Ga. 390, 54 S. E. 136, holding settlement and filing of bill of exceptions to order overruling demurrer to proceeding to foreclose mortgage did not ipso facto operate to prevent court from proceeding with trial; *State v. Smith*, 49 Or. 598, 90 Pac. 1111, holding undertaking on appeal was sufficient to stay proceedings in suit for recovery of possession of land.

Writ of Supersedeas Pending Appeal is limited to restraining action on judgment appealed from.

Approved in *McAneny v. Superior Court*, 150 Cal. 9, 87 Pac. 1022, holding stay of proceedings on appeal from alimony order operated as supersedeas and deprived superior court of power to enforce order; *State v. Superior Court*, 39 Wash. 120, 109 Am. St. Rep. 862, 80 Pac. 1110, 1 L. R. A. (n. s.) 554, holding defendants pending appeal were not entitled to supersede preventive injunction.

Distinguished in *People v. Bank of San Luis Obispo*, 159 Cal. 77, 112 Pac. 871, holding appeal from order denying new trial does not suspend judgment; *Clute v. Superior Court*, 155 Cal. 18, 123 Am. St. Rep. 54, 99 Pac. 364, where enforcement of mandatory injunction was stayed by appeal, supersedeas could issue to arrest action of lower court in contempt proceedings for its violation.

98 Cal. 309-311, 33 Pac. 119, HAGER v. SOUTHERN PACIFIC CO.

Where Conduct Both of Party Injured and party alleged to have caused injury shows negligence, latter is not liable.

Approved in *Wheeler v. Oregon R. R. etc. Co.*, 16 Idaho, 394, 102 Pac. 353, holding proof of statutory negligence of defendant did not preclude showing of contributory negligence of plaintiff.

Fact That Additional Precautions are taken after injury by party sought to be held liable for negligence is no evidence of negligence.

Approved in *Koch v. Southern California Ry. Co.*, 148 Cal. 682, 113 Am. St. Rep. 332, 84 Pac. 178, 4 L. R. A. (n. s.) 521, and *Georgia*

Southern etc. Ry. Co. v. Cartledge, 116 Ga. 166, 42 S. E. 406, 59 L. R. A. 118, both following rule.

98 Cal. 315-317, 33 Pac. 118, PACKER v. DORAY.

Notice of Motion for New Trial cannot be amended after expiration of statutory time for filing by adding omitted specifications.

Approved in Blue Creek Land & Live Stock Co. v. Anderson, 35 Utah, 63, 99 Pac. 445, following rule.

98 Cal. 320-323, 33 Pac. 114, MUDD v. MUDD.

In Divorce Case Court may Make ex parte order for alimony and counsel fees.

Reaffirmed in Glass v. Glass, 4 Cal. App. 609, 88 Pac. 735.

Where Wife has Sufficient Separate Estate to defray costs and counsel fees in divorce, it is error for court to order payment of counsel fees.

Reaffirmed in Glass v. Glass, 4 Cal. App. 609, 88 Pac. 735.

98 Cal. 323-327, 35 Am. St. Rep. 172, 33 Pac. 204, 20 L. R. A. 580, BEER v. CLIFTON.

Indorser of Promissory Note after maturity is entitled to have demand made upon maker and notice of nonpayment.

Approved in Wills v. Booth, 6 Cal. App. 201, 202, 91 Pac. 760, 761, following rule.

Rights of Transferee After Maturity of negotiable paper. See note, 46 L. R. A. 804.

98 Cal. 329-332, 33 Pac. 113, McFARLAND v. McCOWEN.

Action of Supervisors in Allowing Claim against county for services is conclusive in absence of fraud.

Approved in County of Yolo v. Joyce, 156 Cal. 433, 105 Pac. 127, holding action of supervisors in allowing district attorney expense for transcripts of testimony was conclusive as to necessity therefor; Kelley v. Sersanous (Cal.), 46 Pac. 300, holding treasurer could not refuse to pay warrant duly issued by supervisors for claims against county based on contract valid on face.

98 Cal. 332-341, 33 Pac. 119, JACOB v. LORENZ.

New and Independent Cause of Action cannot be substituted by supplemental complaint.

Approved in Cassidy v. Saline County Bank, 7 Ind. Ter. 565, 104 S. W. 837, holding in suit on open account, complaint could not be amended by setting up judgment obtained in another state on same cause of action; Schwab v. Schwab, 93 Md. 384, 49 Atl. 332, 52 L. R. A. 414, holding where bill was for divorce from bed and board, supplemental bill, after issue was made, asking absolute divorce for causes arising after filing of original bill could not be allowed; Allen v. Davenport, 115 Iowa, 25, 87 N. W. 744, holding amendment which introduced new and distinct cause of action was improperly allowed.

Object of Supplemental Complaint is to obtain additional or different relief without resort to new trial.

Approved in Melvin v. Stone Co., 7 Cal. App. 326, 94 Pac. 390, holding supplemental complaint properly allowed.

Cause of Action for Damages for Trespass and cause of action for injunction to restrain further trespasses may be joined.

Approved in *Cassin v. Cole*, 153 Cal. 680, 96 Pac. 278, following rule; *Grover v. Manila etc. Co.*, 19 S. D. 569, 104 N. W. 264, complaint praying damages and injunction considered and held to state but one cause of action.

Place of Diversion of Water from Streams may be changed without affecting right.

Approved in *Barton v. Riverside Water Co.*, 155 Cal. 517, 101 Pac. 793, 23 L. R. A. (n. s.) 331, following rule.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

Miscellaneous.—Cited in *Foerst v. Kelso*, 131 Cal. 378, 63 Pac. 681, to point that when improper overruling of demurrer for uncertainty affects substantial rights of parties, it is ground for reversal.

98 Cal. 342-346, 33 Pac. 207, TOWLE v. PACIFIC IMPROVEMENT CO.

Evidence of Habitual Skill and carefulness of defendant charged with negligence is inadmissible on question of his negligence at particular time in question.

Approved in *Spear v. United Railroads*, 16 Cal. App. 644, 117 Pac. 960, holding inadmissible on question of negligence at time of accident evidence that motorman of street-car was new and learning trade; *Spiking v. Consolidated Ry. & Power Co.*, 33 Utah, 328, 93 Pac. 842, holding inadmissible evidence that decedent was careful and cautious man.

98 Cal. 346-352, 33 Pac. 209, 20 L. R. A. 730, SULLIVAN v. ZEINER.

Liability for Removal of Lateral or subjacent support of land in its natural condition. See note, 68 L. R. A. 680, 688.

98 Cal. 352-355, 33 Pac. 216, PEOPLE v. WESSEL.

Conviction for Rape may be had on testimony of prosecutrix alone.

Approved in *People v. Ah Lung*, 2 Cal. App. 282, 83 Pac. 298, upholding conviction for rape when testimony of prosecutrix was contradictory and corroboration slight.

Motion for New Trial cannot be Amended after it has been denied.

Approved in *People v. Long*, 7 Cal. App. 30, 93 Pac. 389, holding motion for new trial could not be amended after judgment by attempting to add to what had been actually done before judgment.

98 Cal. 355-360, 35 Am. St. Rep. 176, 33 Pac. 193, BULLARD v. McARDLE.

Execution Sale Made After Extinction of judgment is void.

Approved in *Tonopah Bank Corporation v. McKane Min. Co.*, 31 Nev. 298, 103 Pac. 231, holding sale under execution for sum sufficient to satisfy judgment, rendered null other writs previously issued.

Validity of Sales Under Satisfied Judgment. See note, 137 Am. St. Rep. 1098.

Appeal from Justice's to Superior Court on questions of law and fact deprives former of all jurisdiction and vacates its judgment, and case is thereafter in superior court as if originally brought there.

Approved in *Rabin v. Pierce*, 10 Cal. App. 736, 103 Pac. 771, *Lackmann v. Klauenberg*, 3 Cal. App. 185, 84 Pac. 777, and *Armantage v. Superior Court*, 1 Cal. App. 132, 134, 135, 81 Pac. 1033, 1034, 1035, all following rule; *Nail v. Superior Court*, 11 Cal. App. 30, 103 Pac. 903,

holding on such appeal superior court had no power to review action of justice's court in refusing to dissolve attachment; *Maxson v. Superior Court (Cal.)*, 54 Pac. 520, holding effect of appeal from justice's court is to vacate its judgment.

98 Cal. 360-365, 33 Pac. 211, BRODER v. CONKLIN.

Conclusions of Law Based on findings of fact may be changed at any time prior to entry of judgment.

Reaffirmed in *Brownell v. Superior Court*, 157 Cal. 708, 109 Pac. 93.

Judgment Signed by Trial Judge before expiration of term is not effective when not filed until after expiration.

Approved in *People v. Ruef*, 14 Cal. App. 630, 114 Pac. 53, holding signature to order by justice of supreme court made before leaving state was ineffective for any purpose when order was not signed by majority of justices until he was without state.

Until Actually Filed, Judgment is no part of record of case and is of no effect as judgment.

Approved in *Cline Piano Co. v. Sherwood*, 57 Wash. 243, 106 Pac. 744, holding attorney's lien did not attach until written judgment was formally entered.

Entry or Record Necessary to Complete Judgment or order. See note, 28 L. R. A. 625.

Miscellaneous.—Cited in *Broder v. Superior Court (Cal.)*, 33 Pac. 630, referring historically to principal case.

98 Cal. 366-374, 33 Pac. 213, 21 L. R. A. 354, CARR v. EEL RIVER ETC. R. R. CO.

Common Carrier of Passengers is bound to use greatest care and diligence in their transportation.

Approved in *Maxwell v. Fresno City Ry. Co.*, 4 Cal. App. 747, 89 Pac. 367, holding street railroad company liable for injury to passenger in alighting when car was stopped at unsafe place.

Question of Contributory Negligence of plaintiff in jumping from moving train at depot held to be for jury.

Approved in *Chicago etc. R. R. Co. v. Lampman*, 18 Wyo. 129, 104 Pac. 539, and *Walters v. Missouri Pac. Ry. Co.*, 82 Kan. 743, 109 Pac. 175, both following rule; *Brady v. Fresno City Ry. Co.*, 9 Cal. App. 431, 99 Pac. 407, holding question of contributory negligence of plaintiff injured by fall from moving car was for jury; *Pittsburgh etc. R. R. Co. v. Miller*, 33 Ind. App. 130, 70 N. E. 1007, holding complaint for injury sustained by alighting from moving train showed contributory negligence; dissenting opinion in *Chesapeake etc. R. R. Co. v. Paris*, 111 Va. 57, 68 S. E. 404, majority holding man who entered train merely to assist passenger and jumped off while moving was negligent.

Negligence of Passenger in Getting on or off moving train. See note, 22 L. R. A. (n. s.) 745.

Time Allowed Passenger to Alight. See note, 4 L. R. A. (n. s.) 141.

When Person Starting for Train becomes a passenger. See note, 24 L. R. A. 521.

Duty of Carrier Permitting Cars to become overcrowded. See note, 24 L. R. A. 711.

Starting Car Before Passenger is Seated. See note, 42 L. R. A. 293.

Res Ipsa Loquitur as Applied to Jolts or jerks causing injury to passengers. See note, 7 L. R. A. (n. s.) 1078.

98 Cal. 374-377, 33 Pac. 265, BRUNNER v. MARKS.

In Suit on Mechanic's Lien, description of land on which building was erected is not technical and need only identify it.

Approved in *West Iron Wks. v. Mont. Pulp etc. Co.*, 30 Mont. 556, 77 Pac. 416, holding specific description of land not required when building was clearly identified.

98 Cal. 377-383, 33 Pac. 266, HANSON v. SLAVEN.

Absolute Refusal to Perform Promise of contract waives offer or tender by other party as condition to action for breach.

Approved in *Liver v. Mills*, 155 Cal. 463, 101 Pac. 300, holding repudiation of contract by assignee of vendees relieved vendors of obligation to perform; *Bell v. Bank of California*, 153 Cal. 242, 94 Pac. 893, holding mere assertion by pledgee of lien greater in amount than that to which he is entitled did not dispense with necessity for tender by pledgor; *Howard v. Galbraith*, 13 Cal. App. 377, 109 Pac. 891, holding refusal to accept performance before time arrived for performance was equivalent to refusal to perform and was legal excuse for tender and demand.

98 Cal. 384-389, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698, DIXON v. PLUNS.

One Injured by Fall of Tool from scaffolding over sidewalk is not guilty of contributory negligence in walking on sidewalk.

Approved in *Bowley v. Mangrum & Otter*, 3 Cal. App. 232, 84 Pac. 997, holding one injured by opening of trap-doors in street not guilty of contributory negligence in walking over doors.

More Than Ordinary Care is Required of one using tools and materials directly over traveled thoroughfare.

Cited in *Burns v. Dunham etc. Co.*, 148 Cal. 209, 82 Pac. 960, *arguendo*.

Dropping of Tools upon Person on sidewalk by workman overhead raises such presumption of negligence as to prevent nonsuit.

Approved in *Bauhofer v. Crawford*, 16 Cal. App. 681, 117 Pac. 933, holding where automobile ran into wagon standing at side of empty, lighted street, there was such presumption of negligence as to prevent nonsuit; *Bowley v. Mangrum & Otter*, 3 Cal. App. 234, 84 Pac. 998, holding where plaintiff was injured by defendant opening trap-door in sidewalk from beneath, defendant was presumptively negligent.

Average Verdict for Damages reached by agreement in advance to accept average is chance verdict and should be set aside.

Approved in *Weinburg v. Soms (Cal.)*, 33 Pac. 342, 343, following rule.

Distinguished in *People v. Richards*, 1 Cal. App. 570, 82 Pac. 692, upholding compromise verdict of manslaughter.

Quotient Verdicts in Criminal Cases. See note, 108 Am. St. Rep. 975.

Presumption of Negligence from Happening of accident causing personal injuries. See note, 113 Am. St. Rep. 1011.

Presumption of Negligence of Master from unexplained starting of machinery injuring servant. See note, 1 L. R. A. (n. s.) 299.

Applicability of Res Ipsa Loquitur in absence of contractual relations. See note, 6 L. R. A. (n. s.) 800.

98 Cal. 390-400, 33 Pac. 433, RANDOL v. TATUM.

Covenant not to Assign Lease held waived by acceptance of rent from assignee.

Approved in *Spangler v. Spangler*, 11 Cal. App. 324, 104 Pac. 996, following rule; *German-American Sav. Bank v. Gollmer*, 155 Cal. 688, 102 Pac. 934, 24 L. R. A. (n. s.) 1066, holding waiver of condition in lease against assignment waived no other condition.

98 Cal. 400-405, 33 Pac. 397, McFAUL v. PFANKUCH.

Right to Purchase State Land may be contested at any time before patent has issued.

Approved in *Blakeley v. Kingsbury*, 6 Cal. App. 710, 93 Pac. 131, following rule; *Miller v. Engle*, 3 Cal. App. 329, 85 Pac. 160, holding subsequent applicant could contest certificate of purchase of timber land which was lieu land not listed to state or subject to patent, where certificate stated patent would not issue until land was confirmed to state.

Jurisdiction of Superior Court to determine contest of right to purchase state lands is limited to order of reference by surveyor general.

Reaffirmed in *Kleinsorge v. Burgbacher*, 6 Cal. App. 353, 92 Pac. 202.

Certificate of Purchase of State Land is prima facie but not conclusive evidence of title.

Approved in *Bieber v. Lambert*, 152 Cal. 564, 93 Pac. 97, upholding title based on certificate of purchase as against later application to purchase.

Certificate of Purchase of State Land obtained by fraud may be contested by later applicant.

Cited in *Ewbank v. Mikel*, 6 Cal. App. 141, 91 Pac. 673, *arguendo*.

Patent cannot be Collaterally Attacked by parties who show no color of title in themselves.

Approved in dissenting opinion in *Williams v. San Pedro*, 153 Cal. 52, 94 Pac. 237, majority holding defendants in quiet title suit could under denial of plaintiff's title show their certificate of purchase was void, though defendants claimed no interest in land.

98 Cal. 409-415, 33 Pac. 325, WILHOIT v. LYONS.

Payment of Purchase Price in good faith and without notice is essential to constitute bona fide purchaser for value.

Approved in *Fulkerson v. Stiles*, 156 Cal. 706, 105 Pac. 967, 26 L. R. A. (n. s.) 181, general creditor of married woman who had recovered judgment against her on debt, prior to her taking deed to community property, was not encumbrancer in good faith and for valuable consideration; *Purser v. Cady* (Cal.), 49 Pac. 181, holding appellant who had constructive notice of mechanics' liens was not bona fide purchaser.

To Entitle Subsequent Grantee of Land to protection against prior deed as bona fide purchaser, he must aver and prove grantor's possession, purchase, and payment of purchase money in good faith and without notice, actual or constructive, prior to and down to time of payment.

Reaffirmed in *Lindley v. Blumberg*, 7 Cal. App. 146, 93 Pac. 897.

Party Seeking Protection as Bona Fide purchaser must plead and prove his rights.

Approved in *Wittler-Corbin Machinery Co. v. Martin*, 47 Wash. 129, 91 Pac. 632, following rule; *Osceola Land Co. v. Chicago Mill etc. Co.*,

84 Ark. 10, 103 S. W. 612, holding where plaintiff in quiet title suit contended his grantor was bona fide purchaser, burden of proving grantor's want of notice of rights of third party was on defendant, who relied on such fact to defeat plaintiff's title.

98 Cal. 418-422, 33 Pac. 271, CROCKER v. CARPENTER.

Where Action to Determine Adverse Claim to real property presents only equitable issues, jury trial is not matter of right.

Approved in Davis v. Judson, 159 Cal. 128, 113 Pac. 150, and Smith Oyster Co. v. Darbee & Immel etc. Co., 149 Fed. 558, 559, both following rule.

Where Only General Objection is made to evidence when admitted, special objections cannot be considered on appeal.

Approved in Bundy v. Sierra Lumber Co., 149 Cal. 776, 87 Pac. 624, Starkweather v. Dawson, 14 Cal. App. 671, 112 Pac. 738, and Longan v. Weltmer, 180 Mo. 341, 103 Am. St. Rep. 573, 79 S. W. 661, 64 L. R. A. 969, all following rule.

98 Cal. 422-427, 33 Pac. 729, McKISSICK v. ASHBY.

Complaint Seeking Possession of Leased Premises at end of term considered and held to state cause of action.

Approved in Hayden v. Collins, 1 Cal. App. 261, 81 Pac. 1121, holding complaint seeking to recover possession of premises upon expiration of tenancy at will stated cause of action in ejectment.

Notice to Quit is not Necessary to landlord's right to re-enter upon termination of lease for fixed term.

Reaffirmed in Craig v. Gray, 1 Cal. App. 599, 82 Pac. 700.

Unlawful Detainer. See note, 120 Am. St. Rep. 41.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 97.

98 Cal. 427-433, 33 Pac. 431, CAPRON v. HITCHCOCK.

Contract With City Officer for Street Improvement is void, and furnishes no basis for assessment.

Approved in Independent School Dist. v. Collins, 15 Idaho, 542, 128 Am. St. Rep. 76, 98 Pac. 859, holding school district could recover money paid on contract void because made with school trustee, while retaining benefits received.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 276.

98 Cal. 433-441, 33 Pac. 332, STOCKTON v. WEBER.

To Arrive at Intention of Parties to deed, their situation and that of subject matter at time of contracting must be considered.

Approved in Pavkovich v. Southern Pacific R. R. Co., 150 Cal. 46, 87 Pac. 1098, construing deed to quarry which limited purpose and use of materials quarried.

98 Cal. 442-446, 33 Pac. 329, McCALLION v. HIBERNIA SAV. ETC. SOCIETY.

Where Judgment from Which Appeal is taken is not such as calls for stay bond, such bond if filed is void, and judgment cannot be had against sureties thereon.

Approved in Weldon v. Rogers, 154 Cal. 636, 98 Pac. 1071, holding void ex parte judgment against sureties on stay bond given on appeal from order not directing payment of money; Olsen v. Birch, 1 Cal.

App. 103, 81 Pac. 658, holding void judgment against sureties on stay bond given on appeal from judgment foreclosing liens against vessel.

98 Cal. 446-453, 35 Am. St. Rep. 186, 33 Pac. 338, BURY v. YOUNG.

Delivery of Deed by Grantor, who parts with all control of it, to third party to be delivered to grantees on his death is valid and passes title thereunder.

Approved in *Moore v. Trott*, 156 Cal. 355, 134 Am. St. Rep. 131, 104 Pac. 579, *Estate of Cornelius*, 151 Cal. 552, 91 Pac. 330, *Simpson v. Miller*, 7 Cal. App. 253, 94 Pac. 254, *Hutton v. Cramer*, 10 Ariz. 116, 85 Pac. 484, *Foreman v. Archer*, 130 Iowa, 55, 56, 106 N. W. 374, 375, *White v. Watts*, 118 Iowa, 551, 92 N. W. 661, *Zeitlow v. Zeitlow*, 84 Kan. 718, 115 Pac. 575, *Cook v. Newby*, 213 Mo. 491, 112 S. W. 277, *Rowley v. Bowyer*, 75 N. J. Eq. 84, 71 Atl. 400, *Schreckhise v. Wiseman*, 102 Va. 13, 45 S. E. 746, and *Maxwell v. Harper*, 51 Wash. 358, 98 Pac. 759, all following rule; *Rogers Dev. Co. v. California Real Estate Inv. Co.*, 159 Cal. 740, 115 Pac. 936, holding deed delivered in escrow passed title upon performance of condition by grantee; *Crozer v. White*, 9 Cal. App. 621, 100 Pac. 134, holding grantor parted with all control of deed by delivering it to third party, though deed was not delivered to grantee until after grantor's death; *Kenney v. Parks* (Cal.), 54 Pac. 253, holding mutual deeds executed by husband and wife and delivered to third person with directions to record that of spouse dying first were not revocable; *Grilley v. Atkins*, 78 Conn. 385, 387, 112 Am. St. Rep. 152, 62 Atl. 338, 339, 4 L. R. A. (n. s.) 816, holding grantee took immediate estate; *Bruner v. Hart*, 59 Fla. 177, 51 So. 595, upholding finding of unconditional delivery to third party.

Distinguished in *Copeland v. Copeland*, 60 S. C. 142, 38 S. E. 271, holding deed not delivered and effective when found in old chest with written slip directing it to be recorded on grantor's death.

Delivery of Deed to Third Person or record, or delivery for record, by grantor. See note, 54 L. R. A. 872, 874, 893, 903.

It is Essential to Delivery of Deed that grantor must part with all control of it.

Approved in *Follmer v. Rohrer*, 158 Cal. 758, 112 Pac. 546, upholding finding of delivery of deed; *Hayden v. Collins*, 1 Cal. App. 263, 81 Pac. 1122, holding deed delivered in escrow did not pass title when grantor resumed right to revoke and did in fact revoke it; *Emmons v. Harding*, 162 Ind. 164, 70 N. E. 145, holding question of grantor's intent to part with control of deed upon delivery to third person was for jury; *Koester v. Port Huron Co.*, 24 S. D. 557, 124 N. W. 744, upholding finding that contract and notes were placed in possession of agent of other party with power to recall on condition; *Flynn v. Flynn*, 17 Idaho, 161, 104 Pac. 1035, holding deed delivered.

Declarations and Acts of Grantor after delivery of deed cannot be received to disparage it.

Reaffirmed in *Bollinger v. Bollinger*, 154 Cal. 705, 99 Pac. 200.

98 Cal. 454-461, 33 Pac. 335, PORTER v. BUCHER.

What Constitutes Immediate Delivery and actual and continued change of possession of personal property under section 3440, Civil Code, is fact to be determined on evidence in each particular case.

Approved in *Sequeira v. Collins*, 153 Cal. 431, 95 Pac. 878, holding actual change of possession of brick kilns not established; *Castle v.*

Sibley, 1 Cal. App. 651, 82 Pac. 1068, upholding finding of actual delivery by wife to husband of prune crop grown on homestead; Roberts v. Burr (Cal.), 54 Pac. 851, holding there was actual transfer when firm composed of father and son sold wife and mother jewelry, which was delivered to her at home occupied by all of them; Webster v. Sherman, 33 Mont. 456, 458, 84 Pac. 880, holding when husband sold cattle to wife and also his brand, transfer of which was recorded, and cattle were thereafter kept on land owned by both, there was actual delivery.

Effect of Declaring Homestead by Husband is to convert his separate title into joint title in himself and wife to extent of homestead.

Approved in Rosenberg Bros. & Co. v. Ross, 6 Cal. App. 759, 760, 93 Pac. 285, 286, following rule.

Attacks by Creditors on Conveyances made by husbands to wives. See note, 90 Am. St. Rep. 546.

98 Cal. 465-472, 35 Am. St. Rep. 192, 33 Pac. 480, 20 L. R. A. 702, **RICO v. BRANDENSTEIN.**

Conveyance by Husband and Wife to husband of her separate estate is void under laws of 1857.

Approved in Mullins v. Shrewsbury, 60 W. Va. 696, 55 S. E. 737, holding void conveyance of land by wife to husband, they living together; Alexander v. Shalala, 228 Pa. 299, 139 Am. St. Rep. 1004, 77 Atl. 555, holding void deed of wife to husband of her real estate, though joined in by him.

98 Cal. 487-489, 33 Pac. 322, **PACIFIC YACHT CLUB v. SAUSALITO BAY WATER CO.**

Action to Determine Adverse Claim to easement in waters of spring in defendant's land and right of way thereto is real action and must be brought in county where situated.

Approved in Miller v. Kern County Land Co. (Cal.), 70 Pac. 184, holding action for damages for obstruction to easement in ditch was real action; Grangers' Bank v. Superior Court (Cal.), 33 Pac. 1096, holding action to recover real estate must be commenced in county where situated though accounting was asked for rents and profits.

98 Cal. 490-502, 33 Pac. 550, **TOBY v. OREGON PACIFIC R. R. CO.**

Assignee of Mortgage for Collection is so far owner he may sue in his own name.

Approved in Ingham v. Weed (Cal.), 48 Pac. 320, following rule.

In Action on Contract, Fraud may be set up as defensive relief to defeat action brought to enforce apparent obligation.

Approved in Ogle v. Hubbel, 1 Cal. App. 363, 82 Pac. 219, holding defendant could set up fraud and undue influence as defense though he had no ground for affirmative relief; Dunlap v. Plummer, 1 Cal. App. 428, 82 Pac. 446, holding person of impaired mind who had right to rescind contract could also set up impairment as defense to action on contract.

Party Seeking to Rescind Sale for fraud must be willing and able to return property received by him.

Distinguished in California Farm etc. Co. v. Schiappa-Pietra, 151 Cal. 739, 91 Pac. 595, holding offer of restitution not necessary when accounting was necessary to determine amount due plaintiffs.

98 Cal. 502-513, 33 Pac. 258, WEST COAST LUMBER CO. v. STATE INVEST. & INS. CO.

Provision in Fire Policy Against Loss if building is unoccupied is waived when insurer knows building is vacant when policy is issued.

Approved in *Arnold v. American Ins. Co.*, 148 Cal. 667, 84 Pac. 185, 25 L. R. A. (n. s.) 6, holding adjustment of loss by agent after knowledge of breach of condition waived breach.

Only Willful Misstatements in Proof of loss will avoid fire policy.

Approved in *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 236, 107 Pac. 301, and *Miller v. Fireman's Fund Ins. Co.*, 6 Cal. App. 398, 92 Pac. 333, both following rule.

Beneficiary to Whom Policy is Payable in case of loss may sue thereon as real party in interest.

Reaffirmed in *Loring v. Dutchess Ins. Co.*, 1 Cal. App. 188, 81 Pac. 1026.

Parol Evidence Rule as to Varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies. See note, 16 L. R. A. (n. s.) 1230.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 616.

98 Cal. 514-522, 33 Pac. 486, STEWART v. POWERS.

Mortgage in This State is not Conveyance of real property.

Approved in *Booker v. Castillo*, 154 Cal. 677, 98 Pac. 1069, holding amendments of 1893 and 1897 to section 164, Civil Code, have no application to case where married woman has simply purported to mortgage property as security for debt.

Mortgage Executed by Pre-emption Claimant before final proof is not grant or conveyance within pre-emption statute and is valid.

Approved in *Stark v. Morgan*, 73 Kan. 458, 85 Pac. 569, 6 L. R. A. (n. s.) 934, upholding mortgage by homestead claimant made before final proof.

Miscellaneous.—Cited in *Stewart v. Powers* (Cal.), 33 Pac. 490, on another appeal.

98 Cal. 522-525, 33 Pac. 445, TULLER v. ARNOLD.

Court has Discretion to Allow Plaintiff to introduce further evidence after motion for nonsuit is made, and before it is decided.

Approved in *San Pedro Lumber Co. v. Schroeter*, 156 Cal. 160, 103 Pac. 889, holding case properly reopened to explain variance after motion for nonsuit.

Assignment of Account Due Corporation is sufficient if made by agents usually representing corporation, though no special resolution was adopted by directors to authorize assignment.

Approved in *Dollar v. International Banking Corp.*, 13 Cal. App. 340, 109 Pac. 503, following rule.

98 Cal. 525-526, 33 Pac. 444, KLOPPER v. LEVY.

Where Trial is had Without Objection on theory pleadings raise issue, objection cannot be made on appeal that no issue was in fact raised.

Approved in *Milwaukee etc. Ins. Co. v. Warren*, 150 Cal. 353, 89 Pac. 96, and *Schroeder v. Mauzy*, 16 Cal. App. 447, 118 Pac. 461, both following rule.

98 Cal. 527-531, 33 Pac. 458, GARBEE v. GIANELLA.

Provisions of Recording Acts are for protection of subsequent purchasers and encumbrancers from common grantor, and do not affect rights of strangers to title.

Approved in *Bothin v. California Title Ins. Co.*, 153 Cal. 724, 96 Pac. 503, holding section 1213, Civil Code, inapplicable to conveyance by one not connected with record title.

Court may Allow Plaintiff to Introduce further evidence after denial of motion for nonsuit.

Approved in *Stone v. Boscawen Mills*, 71 N. H. 290, 52 Atl. 121, following rule.

98 Cal. 531-552, 33 Pac. 460, 21 L. R. A. 380, ESTATE OF JOHNSON.

Right of Adoption is Creation of Statute, and statutory mode must be substantially complied with.

Approved in *Woodward's Appeal* (*Woodward v. Meriden Trust etc. Co.*), 81 Conn. 165, 70 Atl. 458, upholding decree of adoption.

Statute of Adoption Should be Construed to accomplish its substantial object, and provision for examination of child is merely directory.

Approved in *County of Mono v. Depauli*, 9 Cal. App. 708, 100 Pac. 718, holding failure to publish name of chairman voting for county ordinance did not invalidate it; *In re Merchants' Estate*, 121 Wis. 532, 99 N. W. 322, holding statute of heirship should be liberally construed to accomplish purpose.

In Interpreting Law, General Scope, object and purpose should always be kept in view.

Approved in *Sires v. Melvin*, 135 Iowa, 472, 473, 113 N. W. 111, following rule.

98 Cal. 553-555, 33 Pac. 549, IN RE HELDT.

Motion for New Trial is not Authorized where ex parte applications for letters of administration are heard together, and no issues are joined as to facts alleged in either petition.

Approved in *Carter v. Waste*, 159 Cal. 25, 27, 112 Pac. 728, holding motion for new trial authorized when issue of fact as to heirship was joined upon hearing inconsistent with petitions for distribution; *In re Antonioli's Estate*, 42 Mont. 223, 111 Pac. 1034, holding motion for new trial did not lie when two ex parte applications for letters of administration were heard together and no issue was joined as to competency of either applicant.

98 Cal. 555-557, 33 Pac. 337, 20 L. R. A. 701, EX PARTE HAYES.

Ordinance Regulating Sale of Liquor is valid exercise of police power of state.

Approved in *Ex parte Thomas*, 56 Fla. 102, 47 So. 796, upholding ordinance regulating hours within which liquor could be sold.

Power of Municipality to Regulate Dealing in intoxicating liquors. See note, 114 Am. St. Rep. 299.

Ordinance Prohibiting Sale of Liquor in places where females attended as waitresses is valid.

Approved in *People v. Case*, 153 Mich. 101, 116 N. W. 560, 18 L. R. A. (n. s.) 657, upholding ordinance prohibiting holder of liquor license from employing or harboring females about his place.

Power to Exclude Women from Saloons. See note, 18 L. R. A. (n. s.) 657, 658.

Discrimination Against Women in police regulations. See note, 49 L. R. A. 112.

Constitutionality of Statutes Restricting Contracts and business. See note, 21 L. R. A. 791.

Miscellaneous.—Cited in *Ex parte Smithz* (Cal.), 33 Pac. 338.

98 Cal. 557-577, 33 Pac. 633, STOCKTON COMBINED HARVESTER WKS. v. GLENN FALLS INS. CO.

Cause of Action upon Agreement to Pay appraised loss is distinct from cause of action upon policy of insurance.

Approved in *Fireman's etc. Ins. Co. v. Palatine Ins. Co.*, 150 Cal. 257, 88 Pac. 909, holding adjustment and apportionment of liability after loss by several insurers constituted new agreement upon which separate action could be maintained against each insurer.

If Fraudulent Representations are Such that but for them contract would not have been made, fraud is material to contract.

Approved in *Van Valkenburg v. Oldham*, 12 Cal. App. 575, 108 Pac. 43, holding menace and undue influence inducing contract not shown.

Principal is Bound by Acts of Agent within scope of employment, though agent disobeys instructions.

Approved in *Browning v. McNear*, 158 Cal. 529, 111 Pac. 542, holding seller dealing with agent was not affected by limitation of agent's authority not disclosed to him; *Castroville Co-op. Creamery Co. v. Col*, 6 Cal. App. 537, 92 Pac. 649, holding principal bound by acts of its manager in permitting fraudulent use of labels.

There can be but One Final Judgment in an action.

Approved in *Estate of Renton*, 3 Cal. Prob. 122, following rule; *Doudell v. Shoo*, 159 Cal. 454, 114 Pac. 582, holding interlocutory decree determining existence of partnership and necessity for accounting was not intended to be final adjudication of merits.

Conditions in Fire Policy as to Keeping, producing, and preserving books and papers. See note, 51 L. R. A. 705.

Miscellaneous.—Cited in *Stockton Combined Harvester etc. Co. v. American Fire Ins. Co.* (Cal.), 33 Pac. 638, *Stockton Combined Harvester etc. Co. v. Hartford Fire Ins. Co.* (Cal.), 33 Pac. 638, and *Stockton Combined Harvester etc. Co. v. Hamburg-Maddeburg Fire Ins. Co.* (Cal.), 33 Pac. 638, all companion cases.

98 Cal. 578-587, 33 Pac. 492, 21 L. R. A. 233, BOYSON v. THORN.

Malicious Motive in Doing Act which does not amount to legal injury cannot render it actionable.

Approved in *Union Labor Hospital Assn. v. Vance etc. Lumber Co.*, 158 Cal. 557, 112 Pac. 889, 33 L. R. A. (n. s.) 1034, *Arnold v. Moffitt*, 30 R. I. 319, 75 Atl. 506, and *Sparks v. McCreary*, 165 Ala. 388, 47 So. 334, 22 L. R. A. (n. s.) 1224, all reaffirming rule; *Parkinson Co. v. Building Trades Council*, 154 Cal. 594, 595, 597, 98 Pac. 1032, 1033, 21 L. R. A. (n. s.) 550, holding where workmen had legal right to quit work, their motive in so doing could not be questioned; *People v. Schmitz*, 7 Cal. App. 371, 94 Pac. 421, holding anyone could, by persuasion or argument, endeavor to persuade police commission to refuse liquor license though actuated by malicious motives against applicants; *People v. Schmitz* (Cal.), 94 Pac. 421, holding no action lay for persuading police officers to refuse to issue liquor license; *Gamble-Robinson Commission Co. v. Chicago etc. Ry. Co.*, 168 Fed. 169, 21 L. R. A. (n. s.) 982, 94 C. C. A. 217, holding fact that carrier, for purpose

of injuring consignee, subjects his business to disadvantage, which is neither undue nor unreasonable, creates no cause of action in favor of consignee.

Distinguished in *Raymond v. Yarrington*, 96 Tex. 450, 97 Am. St. Rep. 914, 73 S. W. 803, 62 L. R. A. 962, holding for person to knowingly induce one to break contract with another gave latter cause of action against former; dissenting opinion in *Parkinson Co. v. Building Trades Council*, 154 Cal. 615, 98 Pac. 1041, 21 L. R. A. (n. s.) 550, majority holding where workmen had legal right to quit work, their motive in so doing could not be questioned.

Mere Fact That One Induces Another to break contract with third person gives no right of action.

Approved in *Banks v. Eastern Ry. & Lumber Co.*, 46 Wash. 613, 90 Pac. 1049, 11 L. R. A. (n. s.) 485, following rule; *Lisman v. Milwaukee etc. Ry. Co.*, 161 Fed. 479, holding in absence of fraud, no liability attached to acts preventing performance of contract by another; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 120, 94 N. W. 82, refusing to enjoin employee of one master from entering into contract to work for another.

Action for Inducing One to Break his contract. See notes, 97 Am. St. Rep. 927; 16 L. R. A. (n. s.) 750.

Civil Liability for Enticing Servant to Quit. See note, 5 L. R. A. (n. s.) 1093.

Duty to Give Recommend or Clearance Card to discharged employee. See note, 62 L. R. A. 926, 967.

Action by General Creditor for Damages against third party for fraud in disposing of debtor's property or preventing collection of claim. See note, 47 L. R. A. 440.

How Case Determined When Proper Foreign Law not proved. See note, 67 L. R. A. 65.

98 Cal. 591-602, 33 Pac. 746, **FLOYD v. DAVIS.**

Court can Enforce Provisions of Trust Will, but it can neither create nor set them aside.

Reaffirmed in *Queen's Hospital v. Cartwright*, 19 Haw. 56, 63.

98 Cal. 602, 33 Pac. 482, **SAN JOAQUIN COUNTY v. SUPERIOR COURT.**

Mandamus Does not Lie to Compel Court to change place of trial when motive is decided without delay.

Approved in *Winfrey v. Benton*, 25 Okl. 447, 106 Pac. 854, holding appeal was remedy when justice erroneously decided motion for change of venue.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 897.

98 Cal. 603-614, 33 Pac. 451, **IN RE PEARSONS.**

"Herein," as Used in Instrument, may refer to section or entire instrument depending on context.

Approved in *Pringle v. Wilson*, 156 Cal. 320, 104 Pac. 319, 24 L. R. A. (n. s.) 1090, "hereunder" held to refer to entire lease.

Not More Than One-third of Distributable Assets of estate of testator, after payment of debts and charges, can be distributed to charity.

Approved in *Estate of Dwyer*, 159 Cal. 694, 115 Pac. 247, and *Estate of Jones*, 2 Cof. Prob. 186, both following rule.

Purchaser of Property from Executor at sale under power in will deals with him as with any other vendor, and he cannot object to confirmation by court by reason of facts impairing title.

Approved in *Goodell v. Sanford*, 31 Mont. 170, 171, 173, 77 Pac. 524, 525, holding beneficiary vendees in sale under power in trust were bound to examine title for themselves, and point out defects.

Miscellaneous.—Cited in *In re Pearsons' Estate* (Cal.), 33 Pac. 456, companion case; *State v. Grimes*, 29 Nev. 85, 124 Am. St. Rep. 883, 84 Pac. 1073, 5 L. R. A. (n. s.) 545, to point that purchaser of realty must see to obtaining abstract showing title.

98 Cal. 614-625, 33 Pac. 720, SAN FRANCISCO v. KIERNAN.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 273, 277.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 113.

Miscellaneous.—Cited in *Heffernan v. Superior Court* (Cal.), 33 Pac. 725, and *Mietzsch v. Berkhout* (Cal.), 35 Pac. 322, both companion cases.

98 Cal. 625-627, 33 Pac. 483, PAINTER v. PAINTER.

Supersedeas Granted to Stay Proceedings in superior court on judgment pending appeal.

Approved in *McAneny v. Superior Court*, 150 Cal. 9, 87 Pac. 1022, holding prohibition did not lie to restrain proceedings on judgment in lower court pending appeal when motion for supersedeas was available.

No Bond for Deficiency is Required to stay execution upon order or decree directing sale of real estate for purpose of satisfying mechanic's lien.

Approved in *Pacific Mut. Life Ins. Co. v. Fisher* (Cal.), 35 Pac. 77, following rule.

98 Cal. 628-632, 33 Pac. 731, WOOLVERTON v. BAKER.

Judgment in Former Action to compel reconveyance of land, alleged to have been conveyed on trust which was broken, estops plaintiff from setting up same transaction in later action between same parties.

Distinguished in *Shively v. Eureka Tellurium etc. Min. Co.*, 5 Cal. App. 242, 89 Pac. 1075, holding judgment in former action against corporation based on notes adjudged invalid, but which did not pass on consideration of notes, was not bar to subsequent action based on consideration.

Judgment is Conclusive of All Matters which might have been presented in support of cause of action and litigated in action.

Approved in *Simmons v. Rowe*, 4 Cal. App. 758, 89 Pac. 624, judgment on foreclosure in favor of member of partnership held to be res adjudicata against him in partition suit.

98 Cal. 633-636, 33 Pac. 725, GRAY v. GALPIN.

Fraud must be Specifically Charged, and burden of proof is on him who alleges it.

Approved in *Fox v. Hale etc. Silver Min. Co.* (Cal.), 53 Pac. 36, following rule; *Dorris v. McManus*, 3 Cal. App. 581, 86 Pac. 911, up-

holding finding against fraudulent transfer when it was neither pleaded nor directly proved; *Shea v. Hynes*, 89 Minn. 425, 95 N. W. 215, holding burden of proving transfer of property from father to son was fraudulent was upon creditor alleging it.

98 Cal. 636-642, 33 Pac. 744, IN RE SMITH.

Subdivision 2, Section 963, Code of Civil Procedure, does not apply to judgment refusing to admit will to probate.

Approved in *Estate of Wittmeier*, 118 Cal. 256, 50 Pac. 393, nor to order adjudging executor in contempt for disobedience to decree in distribution.

Final Judgment from Which Appeal can be taken under section 963, Code of Civil Procedure, means ultimate or last judgment which puts an end to proceeding.

Approved in *Doudell v. Shoo*, 159 Cal. 453, 114 Pac. 581, holding decree determining existence of partnership and ordering accounting did not finally dispose of merits of case; *Crockett v. Crockett*, 132 Iowa, 394, 106 N. W. 947, holding as final decree providing for custody of child of parties in divorce case.

98 Cal. 648-654, 33 Pac. 791, PEOPLE v. HAWES.

Where Witness Testifies He is Expert, he may be cross-examined as to qualifications before testimony is admitted, and objection to competency should then be made.

Reaffirmed in *People v. Wilkins*, 158 Cal. 535, 111 Pac. 615.

Clothing Worn by Deceased at Time of homicide held admissible on trial for murder.

Reaffirmed in *Saunders v. State*, 4 Okl. Cr. 277, 111 Pac. 971.

Section 1105, Penal Code, as to Burden of proof of circumstances of mitigation or excuse of homicide, may be read to jury where other instructions clearly informed jury of defendant's right to have reasonable doubts resolved in his favor.

Approved in *People v. Grill*, 151 Cal. 597, 91 Pac. 517, *People v. Gee Gong*, 15 Cal. App. 32, 114 Pac. 79, and *People v. Richards*, 1 Cal. App. 572, 82 Pac. 693, all following rule; *People v. Button* (Cal.), 38 Pac. 202, 203, holding where one accused commenced combat, but sought in good faith to withdraw before homicide, but was followed by deceased, fact that deceased, by reason of injuries, did not realize defendant sought to withdraw, did not limit his right to plead self-defense; *State v. Hunter*, 118 Iowa, 695, 92 N. W. 875, disapproving instruction to effect that jury was not bound to believe testimony of accused further than corroborated by other credible evidence; *Prince v. United States*, 3 Okl. Cr. 705, 109 Pac. 243, approving instruction in regard to proof of circumstances in mitigation.

Admissibility of Dying Declarations. See note, 86 Am. St. Rep. 662.

98 Cal. 658-661, 33 Pac. 750, FREDERICKS v. TRACY.

To Sustain Action of Claim and Delivery, plaintiff must have right to immediate and exclusive possession of property at commencement of action.

Approved in *Kierbrow v. Young*, 20 S. D. 417, 107 N. W. 372, 8 L. R. A. (n. s.) 216, *Manti City Sav. Bank v. Peterson*, 30 Utah, 477, 116 Am. St. Rep. 862, 86 Pac. 414, and *Chan v. Slater*, 33

Mont. 158, 82 Pac. 658, all following rule; Masterson v. Clark (Cal.), 41 Pac. 797, both holding defective complaint in replevin which failed to state plaintiff was owner and entitled to possession of property at commencement of action; Glass v. Basin etc. State Min. Co., 31 Mont. 29, 77 Pac. 303, holding complaint, which showed defendant at commencement of action did not wrongfully retain possession of property from plaintiff, did not state cause of action in claim and delivery.

Complaint must State Ultimate and not probative facts.

Approved in Ahlers v. Smiley, 11 Cal. App. 346, 104 Pac. 998, sustaining demurrer to evidentiary matter in complaint.

Presumption of Continuance of Things once shown to exist is one of evidence and not of pleading.

Approved in Herzog v. Atchison etc. R. R., 153 Cal. 501, 95 Pac. 900, 17 L. R. A. (n. s.) 428, following rule; Lilly-Brackett Co. v. Sonnemann, 157 Cal. 198, 106 Pac. 717, rule holds for presumption that law of foreign state is same as in this state; Melvin v. Melvin, 8 Cal. App. 688, 97 Pac. 698, holding complaint to quiet title against adverse claim which only alleged title as of date of deed and showed no title at commencement of action stated no cause of action

98 Cal. 661-665, 33 Pac. 630, PEOPLE v. GIBBS.

In Prosecution for Obtaining Money under false pretenses, instruction that only one false pretense need be proved if relied on by defrauded party is abstractly correct.

Approved in People v. Leavens, 12 Cal. App. 185, 106 Pac. 1106, where information averred money obtained was property of two persons and intent was to defraud both, proof of property in one and intent to defraud him was sufficient; People v. Smith, 3 Cal. App. 66, 84 Pac. 450, approving similar instruction.

98 Cal. 665-671, 33 Pac. 728, PEOPLE v. EEL RIVER ETC. R. R. CO.

Right of Way for Public may be acquired over railroad by user for long period of time.

Distinguished in Matthews v. Seaboard etc. Ry. Co., 67 S. C. 505, 46 S. E. 336, 65 L. R. A. 286, holding railroad liable to one injured in using path over right of way, use of which it had long acquiesced in.

Power of Corporation to Dedicate Property for public use. See note, 8 L. R. A. (n. s.) 967.

Validity of Sale of Realty by Railroad. See note, 25 L. R. A. 139.

98 Cal. 671-674, 33 Pac. 765, ESTERBROOK v. O'BRIEN.

Where Party Seeking to Enjoin Tax Sale of his land on ground levy is irregular is bound in good conscience to pay any portion of tax, he must tender such portion before asking relief in equity.

Approved in San Diego Realty Co. v. Cornell, 150 Cal. 639, 89 Pac. 604, upholding order requiring payment of taxes as condition to granting injunction against sale of land for taxes on levy alleged to be void; Fisk v. Keokuk, 144 Iowa, 194, 122 N. W. 899, holding property owner could not attack sale of land for nonpayment of

special street assessment without offering to pay amount of assessment with interest.

Distinguished in *Hotchkiss v. Hamsberger*, 15 Cal. App. 610, 115 Pac. 960, holding where tax deeds under which defendant claimed were void on face, payment of taxes due state was not required as condition to quieting title.

So Long as There is Moral Obligation to pay tax, equity will not lend its aid to prevent cloud on title by tax deed, but will leave party to remedy at law.

Approved in *Flannigan v. Towle*, 8 Cal. App. 231, 96 Pac. 507, refusing to quiet title against purchaser from state for delinquent taxes after twelve years, when plaintiff alleged deeds void for insufficient publication but did not offer to pay taxes.

98 Cal. 678-681, 35 Am. St. Rep. 199, 33 Pac. 772, **MAGEE v. PACIFIC IMP. CO.**

In Action to Recover Value of Personal Property lost by burning of inn, whether plaintiff was guest or boarder is question of fact which must be determined.

Approved in *Haff v. Adams*, 6 Ariz. 402, 59 Pac. 112, holding plaintiff was boarder and not guest at inn.

Who are Guests at Inn. See note, 105 Am. St. Rep. 937, 939.

Payment of Board by Week as Affecting Relation between hotel proprietor and guest. See note, 14 L. R. A. (n. s.) 476.

Corporation Acting as Innkeeper cannot in action on innkeeper's liability plead its acts in keeping inn were ultra vires.

Approved in *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa, 596, 103 N. W. 960, holding insurance company which received bank stock and certificates of deposit in insolvent bank could not repudiate transaction on ground acquisition of such stock was outside general scope of business.

98 Cal. 681-686, 33 Pac. 799, **EX PARTE HONG SHEN.**

Ordinance Restricting Sale of Opium is within police power of city.

Approved in *In re Hallawell*, 8 Cal. App. 565, 97 Pac. 321, upholding act regulating sale of opium.

City Ordinance is not Inconsistent with general law of state merely because it makes another regulation for sale of article of commerce than provided by state law, where there is no direct conflict between them.

Approved in *In re Hoffman*, 155 Cal. 157, 132 Am. St. Rep. 75, 99 Pac. 519, holding conflicting ordinance regulating sale of milk superseded by state law; *Ex parte Snowden*, 12 Cal. App. 525, 107 Pac. 725, holding city ordinance regulating speed of motor vehicles was not inconsistent with state law on same subject; *Rossberg v. State*, 111 Md. 417, 134 Am. St. Rep. 636, 74 Atl. 584, holding city ordinance not invalid because imposing heavier penalties than state law for same offense.

Power of Municipality to Punish Act also an offense under state law. See note, 17 L. R. A. (n. s.) 56, 72.

Identity of Offenses on Plea of former jeopardy. See note, 92 Am. St. Rep. 100.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 99 CALIFORNIA.

99 Cal. 1-8, 33 Pac. 782, PEOPLE v. HYNDMAN.

Information for Murder Need not Allege means used to produce death.

Reaffirmed in *Molina v. Territory*, 12 Ariz. 16, 95 Pac. 103, and *State v. Nielson*, 38 Mont. 455, 100 Pac. 231.

After Reconciliation, Instructions as to previous threats should be so framed as to prevent misconception of their weight.

Reaffirmed in *State v. Hossack*, 116 Iowa, 204, 89 N. W. 1080.

99 Cal. 9-17, 33 Pac. 741, KOHLER v. AGASSIZ.

Affidavit for Attachment Against Nonresident need not show payment of claim is unsecured or that claim is on contract.

Approved in *Foore v. Simon Piano Co.*, 18 Idaho, 174, 108 Pac. 1040, reaffirming rule.

Complaint, to Support Attachment, must be on contract, and must state cause of action.

Approved in *Ross v. Gold Ridge Min. Co.*, 14 Idaho, 697, 95 Pac. 825, reaffirming rule; *Pinkiert v. Kornblum*, 5 Cal. App. 525, 90 Pac. 969, complaint for damages will not support attachment; *Pajaro Valley Bank v. Scurich*, 7 Cal. App. 733, 95 Pac. 912, query, must complaint be amended to state cause of action before determination of motion to dismiss attachment?

Motion to Dissolve Attachment cannot be turned into demurrer to complaint.

Approved in *Ross v. Gold Ridge Min. Co.*, 14 Idaho, 691, 95 Pac. 823, reaffirming rule.

Proceedings to Dissolve Attachments. See note, 123 Am. St. Rep. 1034.

Affidavit must Show That Attachment is not sought to hinder, delay or defraud creditors.

Approved in *Merchants' Nat. Union v. Buisseret*, 15 Cal. App. 447, 115 Pac. 59, affidavit for attachment invalid which stated that "judgment" was not sought to hinder, delay or defraud creditors.

Stockholder's Agreement to Pay for Stock enforceable by corporation.

Approved in *Horsehoe Pier etc. Co. v. Sibley*, 157 Cal. 447, 108 Pac. 309, subscriber to capital stock of corporation to be formed in

future is liable to corporation for amount of subscription; *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 70, 97 Pac. 7, assessment is proper method of collecting unpaid portion of capital stock, but assessment not necessary; *People's Home Savings Bank v. Sadler*, 1 Cal. App. 197, 81 Pac. 1032, agreement of stockholder to pay for stock is enforceable by corporation without assessment.

99 Cal. 17-24, 37 Am. St. Rep. 17, 33 Pac. 753, 21 L. R. A. 474, CONLIN v. SAN FRANCISCO.

Appropriation by Municipality for Payment to one having no legal claim is illegal.

Approved in *Union Trust Co. v. State*, 154 Cal. 726, 99 Pac. 187, 24 L. R. A. (n. s.) 1111, where work done for city to be paid for by assessments, city not liable where assessments fail.

Appropriation of Public Money for Pensions. See note, 99 Am. St. Rep. 995.

Contractor Who Expressly Waives All Right to recover from the city is bound by such agreement.

Approved in *Connolly v. San Francisco (Cal.)*, 33 Pac. 1111, reaffirming rule.

99 Cal. 25-30, 33 Pac. 781, BAY VIEW SCHOOL DISTRICT v. LINSOTT.

Portion of School District Included within limits of incorporated city ceases to be portion of such district.

Approved in *Frankish v. Goodrich*, 157 Cal. 615, 108 Pac. 685, reaffirming rule; *Allen v. Board of Trustees*, 157 Cal. 726, 109 Pac. 489, incorporation of portion of school district into new district does not dissolve old district; *Pass School District v. Hollywood School District*, 156 Cal. 419, 105 Pac. 123, 26 L. R. A. (n. s.) 485, school property within limits of newly formed school district becomes property of that district.

Legislature has Plenary Power to divide, change or abolish school districts.

Approved in *Pass School District v. Hollywood School District*, 156 Cal. 418, 105 Pac. 123, 26 L. R. A. (n. s.) 485, reaffirming rule.

99 Cal. 36-39, 33 Pac. 735, 21 L. R. A. 416, SPRING VALLEY WATERWORKS v. BARBER.

Mere Right of Way for Pipe-line is not franchise.

Approved in *Stockton Gas etc. Co. v. San Joaquin Co.*, 148 Cal. 321, 83 Pac. 57, 5 L. R. A. (n. s.) 174, franchise consists of easement with right to take profit therefrom.

Value of Franchise Equals Value of Stock, less value of tangible property.

Reaffirmed in *Crocker v. Scott*, 149 Cal. 592, 87 Pac. 109.

Taxation of Corporate Franchises. See note, 57 L. R. A. 37.

99 Cal. 39-50, 31 Pac. 849, 33 Pac. 732, MERCED BANK v. ROSENTHAL.

Instrument cannot be Acknowledged before agent of grantee.

Approved in *Ogden Building Assn. v. Mensch*, 196 Ill. 563, 565, 89 Am. St. Rep. 330, 63 N. E. 1051, 1052, and *First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 59, 100 Am. St. Rep. 925, 70 Pac. 729,

both holding stockholder of corporation mortgagee is disqualified to take acknowledgment of mortgage.

Distinguished in *Greve v. Echo Oil Co.*, 8 Cal. App. 284, 96 Pac. 908, upholding deed of corporation acknowledged before notary, who is stockholder.

Deed of Homestead not Acknowledged under Civil Code, section 1242, creates no encumbrance on homestead.

Approved in *MacLeod v. Moran*, 153 Cal. 99, 94 Pac. 605, execution of deed as security for debt is not abandonment of homestead on property granted.

Defendant not Served, nor Appearing in Action, nor party to judgment, need not be served with notice of appeal.

Reaffirmed in *Nason v. John*, 1 Cal. App. 540, 82 Pac. 566.

Judge Holding Court Bona Fide on first Monday in January next after election of successor is judge de facto.

Approved in *People v. Nye*, 9 Cal. App. 165, 98 Pac. 247, term begins first Monday after first day of January.

99 Cal. 52-56, 33 Pac. 760, BERGIN v. HAIGHT.

Probate Sale Procured by Fraud may be set aside at instance of any party injured.

Approved in *Hanley v. Hanley*, 4 Cal. Prob. 479, order setting apart homestead may be set aside for fraud; *Dane v. Layne*, 10 Cal. App. 370, 101 Pac. 1069, judgment will be set aside for extrinsic and collateral fraud.

Attack on Judgment for Fraud is Direct.

Approved in *Campbell-Kawannanako v. Campbell*, 152 Cal. 209, 92 Pac. 187, and *Bacon v. Bacon*, 150 Cal. 486, 494, 89 Pac. 321, 324, both reaffirming rule.

Imposition upon Court and Absent Heirs is extrinsic fraud.

Approved in *Campbell-Kawannanako v. Campbell*, 152 Cal. 210, 92 Pac. 187, reaffirming rule.

Administrator and His Attorneys are trustees for owners of property.

Approved in *Campbell-Kawannanako v. Campbell*, 152 Cal. 210, 92 Pac. 187, administrator is trustee for heirs; *McCabe v. Healy*, 138 Cal. 95, 70 Pac. 1013, administrator and his attorneys are trustees for heirs and creditors; *In re Healy's Estate* (Cal.), 66 Pac. 177, 178, administrator's attorneys are his agents and occupy same confidential relation to heirs.

Who may not Purchase at Judicial, execution and other compulsory sales. See note, 136 Am. St. Rep. 802.

99 Cal. 57-74, 33 Pac. 786, ZELLERBACH v. ALLENBERG.

Pledgor cannot Recover Pledge without paying debt, though barred by statute.

Approved in *Puckhaber v. Henry*, 152 Cal. 424, 125 Am. St. Rep. 75, 93 Pac. 116, reaffirming rule; *Cory v. Santa Ynez Land etc. Co.*, 151 Cal. 782, 91 Pac. 648, running of statute on mortgage debt does not entitle mortgagor to recover possession of mortgaged premises without paying mortgage debt; *Raggio v. Palmtag*, 155 Cal. 802, 103 Pac. 314, mortgagor cannot quiet title as to mortgagee in possession under foreclosure without paying mortgage debt, though barred by statute.

Rights, Remedies and Liabilities of Pledges of corporate stock. See note, 121 Am. St. Rep. 205.

Court of Equity will Grant Any Relief proper under pleadings and proof.

Reaffirmed in *De Leonis v. Hammel*, 1 Cal. App. 394, 82 Pac. 351; *Cordano v. Ferretti*, 15 Cal. App. 675, 115 Pac. 660.

Secondary Evidence may be Given to Prove Contents of paper beyond borders of state, as of lost paper.

Approved in *Johnson v. Union Pac. R. R. Co.*, 35 Utah, 301, 100 Pac. 395, contents of writing not within the state may be proved by secondary evidence; *Missouri etc. Ry. Co. v. Dilworth*, 95 Tex. 332, 67 S. W. 89, witness may testify as to contents of paper beyond jurisdiction of court without accounting for nonproduction of paper.

99 Cal. 74-82, 33 Pac. 766, HAYES v. COUNTY OF LOS ANGELES.

Under Political Code, Section 3804, supervisors cannot refuse to refund taxes erroneously paid.

Approved in *Brenner v. Los Angeles*, 160 Cal. 78, 116 Pac. 400, construing Los Angeles city ordinance, section 63, relating to taxes, as entitling taxpayer to recover excess of taxes paid under protest; *Slade v. County of Butte*, 14 Cal. App. 459, 460, 112 Pac. 487, holder of certificate of purchase of lieu land, which has been rejected by government, and who has by mistake paid taxes thereon, may recover taxes paid under Political Code, section 3804.

Where Public Interest, or Private Right, or justice, requires that thing to be done by public officers should be done, word "may" is generally to be construed as meaning same as "shall" or "must."

Approved in *In re Chadbourne*, 15 Cal. App. 369, 114 Pac. 1014, construing Code of Civil Procedure, section 1511, as discretionary; *Ex parte Prindle* (Cal. App.), 94 Pac. 873, holding "may," as used in section of Constitution providing for division of state into fish and game districts, means "must"; *License to Practice Law*, 67 W. Va. 222, 67 S. E. 601, holding "may," as used in statute providing for admission to practice law in supreme court, was used in popular or permissive sense; *Estate of Graber*, 2 Cal. Prob. 351, statute prescribing time for filing inventory is directory merely.

"May" in Constitutional or Statutory Provision as mandatory, See note, 5 L. R. A. (n. s.) 342.

Where Taxes on Land Paid by Owner, county has no power to sell on another assessment.

Approved in *Commercial Nat. Bank v. Schlitz*, 6 Cal. App. 184, 91 Pac. 754, payment of taxes gives no title by adverse possession under Code of Civil Procedure, section 325, where taxes already paid by true owner.

Beginning of Limitations to Run against action to recover money paid by mistake. See note, 11 L. R. A. (n. s.) 1197.

99 Cal. 83-89, 37 Am. St. Rep. 23, 33 Pac. 757, NAFTZGER v. GREGG.

Complaint on Purchase Money Notes considered and held defective in not alluding to contract or alleging tender of deed when answer set forth contract and averred it was part of same transaction with notes.

Criticised in *McGue v. Rommel*, 148 Cal. 545, 546, 83 Pac. 1002, 1003, holding in action on note, where complaint contained usual

allegations, plaintiff could rest his case upon introduction in evidence of note sued on.

Judgment is not Estopped While Appeal is pending or until time for appeal has expired.

Approved in *Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 4, 82 Pac. 1120, and *Contra Costa Water Co. v. Oakland*, 165 Fed. 529, both following rule; *Kern Valley Bank v. Koehn*, 157 Cal. 240, 107 Pac. 112, holding order denying motion to vacate attachment which had not become final could not be considered on appeal from order refusing to dissolve subsequent writ in same action.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

99 Cal. 89-99, 37 Am. St. Rep. 32, 33 Pac. 737, **BORLAND v. NEVADA BANK OF SAN FRANCISCO.**

Pledgee of Stock as Collateral Security is not to be deemed stockholder as respects personal liability for debts of corporation.

Reaffirmed in *Tierney v. Ledden*, 143 Iowa, 290, 121 N. W. 1051.

Rights, Remedies and Liabilities of pledgees of corporate stock. See note, 121 Am. St. Rep. 197.

Liability of Pledgee of Stock as shareholder. See note, 36 L. R. A. 139.

Sale is Contract by Which, for Pecuniary Consideration called price, one transfers to another interest in property.

Approved in *Mansfield v. District Agricultural Assn.*, 154 Cal. 148, 97 Pac. 151, holding transfer of land for legal services was sale.

What Constitutes a Transaction a Sale. See note, 94 Am. St. Rep. 210.

Effect on Contract of Leaving Price Indefinite. See note, 53 L. R. A. 291.

99 Cal. 100-104, 33 Pac. 733, **STRONG v. GRANT.**

Mandamus Does not Lie to Compel Dismissal of criminal prosecution where defendant has not been brought to trial within statutory period.

Overruled in *Matter of Ford*, 160 Cal. 342, 343, 345, 346, 348, 116 Pac. 760, 761, 762, holding mandamus lies to compel dismissal of prosecution where trial has been delayed beyond sixty days without good cause.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 906.

Delay of Prosecution as Ground for Discharge. See note, 56 L. R. A. 540.

Right to Speedy Trial. See note, 85 Am. St. Rep. 202, 204.

99 Cal. 104-125, 33 Pac. 836, **COX v. DELMAS.**

Demand Before Suit is Unnecessary where it would be unavailing.

Approved in *Kuykendall v. Fisher*, 61 W. Va. 104, 56 S. E. 55, 8 L. R. A. (n. s.) 94, holding demand for return of property unnecessary where defendant asserted title in himself independent of any contract.

Demand as Condition of Action to Recover Money collected by agent. See note, 28 L. R. A. (n. s.) 631.

Relation Between Attorney and Client is fiduciary relation of highest character, and binds attorney to most conscientious fidelity.

Approved in *Matter of Danford*, 157 Cal. 429, 108 Pac. 324, disbaring attorney who obtained money from client on representation he could perform certain services which he knew he could not perform; *Lynch v. McDonald*, 155 Cal. 707, 102 Pac. 919, holding attorney in action on contract with client bound to show good faith affirmatively.

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 186.-

Right and Duty of Attorney as to Purchase of subject matter of litigation or of retainer from client. See note, 23 L. R. A. (n. s.) 680, 682, 686, 689.

99 Cal. 137-142, 33 Pac. 774, **WOOD v. CURRAN.**

Whether a Personal Liability may be Created for an assessment. See note, 133 Am. St. Rep. 930.

99 Cal. 143-145, 33 Pac. 773, **DREXLER v. McGLYNN.**

Notice of Dishonor of Note may be Given after death of indorser to those appointed as executors by his will, though not yet appointed by court.

Approved in *Bank of Ravenswood v. Wetzel*, 58 W. Va. 4, 50 S. E. 887, 70 L. R. A. 305, holding sufficient notice of dishonor addressed to indorser as if living and actually received by his administrator.

99 Cal. 146-153, 33 Pac. 769, **IN RE WETMORE.**

City Council of Oakland, as Distinguished from board of education, had power under act of March 19, 1889, to submit question of issuing bonds for construction of schoolhouses.

Approved in *Los Angeles School District v. Longden*, 148 Cal. 382, 387, 83 Pac. 247, 248, holding school district which included city and certain outlying territory had independent power to issue bonds for school purposes under sections 1880-1887, Political Code.

Distinguished in *Board of Education of Ardmore v. State*, 26 Okl. 374, 109 Pac. 566, holding under Constitution, city could not by charter vest authority to issue bonds for school purposes in school board.

99 Cal. 157-161, 33 Pac. 796, **SULLIVAN v. MOORHEAD.**

Fact That Party Seeking to Reform Deed for mistake read it before executing it does not prevent finding it was given under mistake.

Approved in *Los Angeles etc. R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 27, 87 Pac. 1031, following rule.

Mere Conflict of Testimony as to Mistake in instrument does not necessitate denial of reformation.

Approved in *Home & Farm Co. v. Freitas*, 153 Cal. 684, 96 Pac. 310, reforming deed where testimony as to mistake was conflicting; *Stuart v. Hauser*, 9 Idaho, 71, 72 Pac. 725, refusing to disturb finding on conflicting evidence that deed was not mortgage.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 885, 918, 921, 923.

99 Cal. 162-166, 37 Am. St. Rep. 42, 33 Pac. 794, 21 L. R. A. 399, **LOWENBERG v. GREENEBAUM.**

Broker's Seat in Stock and Exchange Board is not subject to levy and sale under execution.

Approved in *Shannon v. Cheney*, 156 Cal. 570, 105 Pac. 590, holding seat in stock exchange was personal privilege and could be sold only subject to rules of exchange; *Baltimore v. Johnson*, 96 Md. 739, 54 Atl. 646, 61 L. R. A. 568, holding seat in stock exchange was not "property" subject to taxation as such; *Spotswood v. Morris*, 12 Idaho, 380, 85 Pac. 1100, 6 L. R. A. (n. s.) 665, *arguendo*.

99 Cal. 169-172, 37 Am. St. Rep. 45, 33 Pac. 864, **ROWE v. BLAKE.**

Right to Bring Civil Action on Judgment is limited to five years from entry of judgment.

Reaffirmed in *Feeney v. Hinckley* (Cal.), 64 Pac. 409.

99 Cal. 173-178, 33 Pac. 887, **FORNI v. YOELL.**

Where Record Shows Defendant had Actual Knowledge of date of filing of decision, notice of motion for new trial made after statutory time from such date elapsed comes too late.

Approved in *Estate of Keating*, 158 Cal. 114, 110 Pac. 111, holding appellant, who had actual notice of entry of order, was not entitled to written notice; *Bell v. Thompson*, 8 Cal. App. 486, 97 Pac. 159, holding where opposite party had actual knowledge of time of filing cost bill, he could not claim right to retax costs for want of written notice.

Where Appeal from Judgment was not taken within sixty days, exceptions to sufficiency of evidence to support decision contained in statement used on motion for new trial cannot be considered.

Reaffirmed in *People v. Jones* (Cal.), 70 Pac. 1063.

99 Cal. 179-186, 33 Pac. 859, **DALEY v. QUICK.**

Liability of Principal for Unauthorized Acts of Agent. See note, 88 Am. St. Rep. 795.

Liability of Landlord for Injury to Tenant from defect in premises. See note, 34 L. R. A. 830.

99 Cal. 187-194, 33 Pac. 862, **SULLIVAN v. SULLIVAN.**

Debt Barred by Limitations is sufficient consideration for new promise.

Reaffirmed in *Hoover v. Wasson*, 11 Cal. App. 595, 105 Pac. 948.

Neither Promise to Perform Duty nor performance thereof is consideration for contract.

Approved in *Marinovich v. Kilburn*, 153 Cal. 642, 96 Pac. 304, holding contract to repurchase stock made to induce purchaser to pay up subscriptions was without consideration; *Alaska Packers' Assn. v. Domenico*, 117 Fed. 105, 54 C. C. A. 485, holding agreement to perform work which party had already contracted to do was not consideration for agreement to pay additional compensation.

Distinguished in *Lyon v. Robertson* (Cal.), 59 Pac. 990, holding widow liable on her note given in renewal of prior notes to which her deceased husband was party, though done under misapprehension as to her liability for his debts.

99 Cal. 194-196, 33 Pac. 889, **JORDAN v. GROVER.**

When Fraud in Procurement of Note is shown by maker, burden is cast on indorsee to show he is innocent holder.

Approved in *In re Hopper-Morgan Co.*, 154 Fed. 261, following rule; *Le Tourneux v. Gilliss*, 1 Cal. App. 552, 82 Pac. 629, *Meyer v. Lovdal*,

6 Cal. App. 376, 92 Pac. 325, and *Union Collection Co. v. Buckman*, 150 Cal. 162, 119 Am. St. Rep. 164, 88 Pac. 709, 9 L. R. A. (n. s.) 568, all holding proof of illegal consideration cast upon purchaser of note burden of proving he was innocent holder; *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 769, 118 Pac. 95, holding holder of note not required to show consideration for transfer until maker had established want of consideration of note itself.

Inadequacy of Price Paid for Note is circumstance to be considered by jury in determining whether purchase was made in good faith.

Reaffirmed in *Jobes v. Wilson*, 140 Mo. App. 292, 124 S. W. 551.

99 Cal. 202-204, 37 Am. St. Rep. 48, 33 Pac. 890, **IN RE ROBB.**

Exemption of Tools and Implements. See note, 123 Am. St. Rep. 141.

99 Cal. 204-206, 33 Pac. 853, **DOWLING v. COMERFORD.**

Where Appeal is Taken on Judgment-roll Alone, order allowing amendment to summons is no part of record, and its existence will be presumed in support of judgment which recites due service of summons.

Reaffirmed in *Baldwin v. Foster*, 157 Cal. 647, 108 Pac. 716.

99 Cal. 207-210, 33 Pac. 855, **CALIFORNIA ACADEMY OF SCIENCES v. FLETCHER.**

Revocation of Agreements to Arbitrate. See note, 138 Am. St. Rep. 641, 645.

Miscellaneous.—Cited in *California Academy of Sciences v. Fletcher* (Cal.), 33 Pac. 857, companion case.

99 Cal. 210-213, 33 Pac. 885, **KELLETT v. OLAYTON.**

"Thereupon" Does not of Necessity mean "immediately."

Approved in *Dudley v. Superior Court*, 13 Cal. App. 276, 110 Pac. 148, and *Hagerty v. Conlan*, 15 Cal. App. 648, 115 Pac. 765, both holding "thereupon," as used in section 1118, Code of Civil Procedure, imported reasonable time.

99 Cal. 223-227, 33 Pac. 851, **GAMBLE v. TRIPP.**

Party Seeking to Rescind Contract must restore or offer to restore everything of value received under it.

Distinguished in *Richards v. Farmers' etc. Bank*, 7 Cal. App. 393, 94 Pac. 397, holding complaint in action to rescind partnership settlement need not allege offer to restore money received when accounting was demanded and greater sum claimed due.

99 Cal. 227-234, 33 Pac. 901, **PEOPLE v. GORDON.**

Conviction of Lesser Offense Included within charge of greater is acquittal of major crime.

Cited in *People v. Ham Tong*, 155 Cal. 584, 132 Am. St. Rep. 110, 102 Pac. 265, 24 L. R. A. (n. s.) 481, *arguendo*.

Where Defendant Charged With Murder is found guilty in second degree, and new trial is given on his motion, he may be convicted of murder in first degree.

Approved in *People v. Grill*, 151 Cal. 598, 91 Pac. 517, holding conviction of murder in first degree with penalty of life imprisonment was not bar to conviction with death penalty on new trial; dissenting

opinion in *Trono v. United States*, 199 U. S. 540, 26 Sup. Ct. 121, 50 L. Ed. 300, 4 Ann. Cas. 773, majority holding one not placed twice in jeopardy by conviction of homicide in Philippine supreme court, on appeal from trial court judgment, which after acquitting of murder convicted of assault.

Criticised in dissenting opinion in *People v. Bennett* (Cal.), 50 Pac. 706, majority holding defendant could be convicted of greater offense on new trial ordered for insufficiency of evidence to sustain conviction of lesser offense included within greater.

Waiver and Estoppel of Defendant to plead former jeopardy. See note, 135 Am. St. Rep. 77.

Former Jeopardy in Retrial on Higher after setting aside verdict for lower charge. See note, 5 L. R. A. (n. s.) 571.

Stenographer's Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 360, 362.

99 Cal. 236-240, 33 Pac. 904, BEDELL v. KOWALSKY.

Where Purchaser has Contracted for Sale of two lots of wheat by sample to be delivered in ten days, he is liable for larger quantity, portion of which is delivered to agent at later period and accepted pursuant to orders, but is not liable for delivery of excess to agent against his consent.

Approved in *Bamberger Bros. v. Burrows*, 145 Iowa, 452, 124 N. W. 337, holding receipt and retention of part of stock of goods ordered in expectation of receiving balance immediately was not waiver of buyer's right to rescind for failure to deliver balance within time fixed.

99 Cal. 240-248, 33 Pac. 908, JOHNSON v. POLHEMUS.

Where Cause of Action is of Equitable Character, right to relief does not depend upon prayer, but upon facts pleaded.

Approved in *Wakefield v. Wakefield*, 16 Cal. App. 117, 116 Pac. 311, holding in suit for custody of child, prayer in cross-complaint for divorce was immaterial when both parties appeared and proceeded to trial as though answer to cross-complaint had been filed.

99 Cal. 248-258, 33 Pac. 924, HOGAN v. PACIFIC ENDOWMENT LEAGUE.

No Change in Articles of Association of unincorporated society can be made which will impair original contract with members.

Approved in *Lewine v. Knights of Pythias*, 122 Mo. App. 555, 99 S. W. 823, holding void subsequent by-law reducing amount of recovery in case of suicide.

99 Cal. 259-262, 33 Pac. 848, SHIVELY v. SEMI-TROPIC LAND ETC. CO.

Where Contract of Sale is Rescinded by parties, purchaser, though in default, may recover back installments paid less damages to vendor occasioned by breach.

Approved in *Christy v. Arnold*, 4 Ariz. 270, 36 Pac. 920, holding effect of rescission of contract by vendor, even though vendee was in default, was to render former liable for purchase price already paid; *Foxley v. Rich*, 35 Utah, 178, 99 Pac. 672, holding where contract to convey required payment at certain times, with proviso that in case of default escrow deed was to be returned to vendor and previous pay-

ments be held as rent, purchase price paid could not be recovered on default of vendee; *Norris v. Hay*, 149 Cal. 700, 87 Pac. 383, *arguendo*.

Sale of Land to Third Party by One who has already contracted for its sale does not warrant rescission of contract.

Approved in *Hall v. Northern & Southern Co.*, 55 Fla. 242, 46 So. 180, following rule; *Hanson v. Fox*, 155 Cal. 108, 132 Am. St. Rep. 72, 99 Pac. 490, 20 L. R. A. (n. s.) 338, and *Backman v. Park*, 157 Cal. 610, 137 Am. St. Rep. 153, 108 Pac. 687, both upholding contract to sell land when vendor had no title at time of contract.

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 44.

Defect of Complaint in Failing to Allege material facts is cured when answer supplies them.

Reaffirmed in *Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 3, 82 Pac. 1120.

99 Cal. 265-270, 33 Pac. 1103, HARPER v. HILDBRETH.

A Nonappealable Order Does not Become Appealable because of fact that lower court had no authority to make it.

Approved in *Estate of Overton*, 13 Cal. App. 119, 108 Pac. 1022, applying rule on motion to dismiss appeal from order discontinuing family allowance.

Order Refusing to Vacate a Nonappealable Order is not appealable.

Approved in *Title Ins. etc. Co. v. California Dev. Co.*, 159 Cal. 487, 114 Pac. 839, applying rule on appeal from an order (made before judgment) refusing to vacate a prior order appointing a receiver.

Where Original Order is Appealable, subsequent order denying motion to vacate it is not ordinarily appealable.

Approved in *Title Ins. etc. Co. v. California Dev. Co.*, 159 Cal. 487, 114 Pac. 839, reaffirming rule.

"Adverse Party" is One Who Appears by the Record to be adverse.

Approved in *Bell v. San Francisco Savings Union*, 153 Cal. 73, 94 Pac. 229, necessity for serving representative of deceased adverse party who was maker of note to a secured corporation could not be obviated by showing that creditor secured had not presented claim against estate of adverse party; *Estate of Young*, 149 Cal. 175, 176, 85 Pac. 145, devisees who appeared and resisted petitions for partial distribution were adverse parties entitled to service of draft of bill of exceptions; *Porter v. Lassen County Land & Cattle Co. (Cal.)*, 55 Pac. 395, one who by decree of foreclosure was adjudged to hold a second mortgage was a necessary adverse party entitled to notice of appeal from such decree; *Ford v. Cannon*, 5 Cal. App. 187, 89 Pac. 1072, dismissing appeal by part of the defendants in action to enforce agreement as to trust funds, for failure to serve a codefendant with notice of appeal; *Jenkins v. Carroll*, 42 Mont. 307, 112 Pac. 1067, where, after commencement of foreclosure suit, the property was conveyed to one who was not made a party to the record, such party was not entitled to service of notice of appeal; *Anderson v. Red Metal Min. Co.*, 36 Mont. 323, 93 Pac. 47, in action brought on an account by assignee thereof, assignor was not an adverse party entitled to notice of appeal; *Merk v. Bowery Min. Co.*, 31 Mont. 304, 78 Pac. 521, in action to quiet title by owner of mining property against

lessee and a defendant in whose favor lessee had withdrawn from transaction, lessee was not adverse party on whom such defendant was required to serve notice of appeal.

A New Trial of a Motion is not authorized.

Approved in *McDermott v. Halleck*, 65 Kan. 410, 69 Pac. 337, motion for new trial in lower court was unnecessary to authorize review of errors arising on hearing of motion for order directing receiver to allow claims; *Powell v. Nichols*, 26 Okl. 735, 110 Pac. 762, contested question of fact arising on a motion can be reviewed in absence of motion for new trial.

99 Cal. 271-278, 37 Am. St. Rep. 50, 33 Pac. 857, HERBLICH v. KAUFMANN.

Proceedings Supplementary to Execution are Intended as a substitute for equitable remedy by creditor's bill.

Approved in *Nordstrom v. Corona City Water Co.*, 155 Cal. 211, 132 Am. St. Rep. 81, 100 Pac. 244, judgment creditor's right to recover debt from garnishee is superior to any claim or demand accruing subsequent to garnishment; *Phillips v. Price*, 153 Cal. 148, 150, 94 Pac. 618, 619, upholding creditor's bill in equity to reach property of judgment debtor where proceedings supplementary to execution would be inadequate; *McKenzie v. Hill*, 9 Cal. App. 80, 98 Pac. 56, judgment debtor, who was not a party to the proceedings supplementary to execution, was not entitled to notice of appeal from order entered against garnishees.

Before Equity can be Invoked in creditors' bill, it must be shown remedies at law are unavailing.

Approved in *Calkins v. Howard*, 2 Cal. App. 237, 83 Pac. 281, execution issued and returned nulla bona is sufficient to show that no other property is available to satisfy judgment.

Distinguished in *Beswick v. Dorris*, 174 Fed. 507, creditor of estate of one who conveyed his property in fraud of creditors may make application to have action brought by representative of estate before such creditor has right to pursue alternative remedy.

Conditions Precedent to Equitable Remedies of Creditors. See note, 23 L. R. A. (n. s.) 60.

99 Cal. 278-285, 33 Pac. 878, COLTON LAND ETC. CO. v. SWARTZ.

Where Two Judgments Appear in Judgment-roll, later in time is presumed to be only valid judgment.

Approved in *Moore v. Mott* (Cal.), 34 Pac. 346, holding finding in action on attachment bond that judgment was not rendered not warranted where in record of attachment suit judgment appeared, legality of which was not questioned; *In re Sullivan's Estate*, 40 Wash. 210, 111 Am. St. Rep. 895, 82 Pac. 298, holding trial court would be presumed to have power to set aside order dismissing will contest when second order to same effect appeared.

Circumstances may Arise Which Justify Court in vacating first findings and judgment and entering others.

Approved in *Ballerino v. Superior Court*, 2 Cal. App. 760, 84 Pac. 226, holding court could on motion vacate judgment inconsistent with findings and enter another.

In Action for Possession of Property sold at execution sale, judgment must be given in evidence as basis of execution.

Reaffirmed in *Purser v. Cady* (Cal.), 49 Pac. 181.

Under General Objection to Evidence, special objection cannot be urged on appeal.

Reaffirmed in *Yaeger v. Southern Cal. Ry. Co.* (Cal.), 51 Pac. 192.

99 Cal. 286-290, 33 Pac. 844, PEOPLE v. BEEVERS.

Marriage Under Age of Consent is only voidable, and if followed by cohabitation after age of consent is sufficient to support charge of bigamy.

Approved in *People v. Gonzalez*, 6 Cal. App. 258, 91 Pac. 1013, holding in prosecution for rape of girl under age of consent, proof that she was not defendant's wife was insufficient.

What Marriages are Void. See note, 79 Am. St. Rep. 379.

Marriage in Fact must be Proved where charge is bigamy.

Distinguished in *People v. Le Doux*, 155 Cal. 548, 102 Pac. 522, holding in murder case evidence was sufficient to show defendant's belief she was married to deceased, when it was not necessary to prove marriage in fact.

Crime of Bigamy. See note, 126 Am. St. Rep. 203, 215.

Judgment in Divorce Establishing first marriage is inadmissible on charge of bigamy when appeal therefrom is pending.

Approved in *Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 4, 82 Pac. 1120, holding judgment, appeal from which was pending, was properly refused admission in evidence; *Busby v. State*, 51 Tex. Cr. 308, 103 S. W. 648, holding judgment in civil action inadmissible in prosecution for embezzlement.

Distinguished in *Sims v. State*, 54 Fla. 102, 44 So. 737, admitting judgment in civil action in evidence in prosecution for embezzlement.

Admissibility of Civil Judgment in criminal prosecution. See note, 26 L. R. A. (n. s.) 464, 465.

Res Judicata in Criminal Proceedings. See note, 103 Am. St. Rep. 21, 28.

99 Cal. 299-303, 33 Pac. 1088, BIRCH v. HALE.

Declaration of Agent Made During Agency in regard to transaction pending is part of *res gestae* and binds principal.

Approved in *Bundy v. Sierra Lumber Co.*, 149 Cal. 778, 87 Pac. 624, holding statement of defendant's agent as to defective condition of trestle which collapsed, causing injury, was admissible as part of *res gestae*; *Waldeck v. Pacific Coast S. S. Co.*, 2 Cal. App. 170, 83 Pac. 159, holding letter to plaintiff from agent of defendant was inadmissible as part of *res gestae* when not relating to transaction in question; *Mutter v. L. X. L. Lime Co.* (Cal.), 42 Pac. 1070, holding declaration of agent not made under such circumstances as to bind principal; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 530, 99 Pac. 96, holding statement of engineer of train made several minutes after accident to be part of *res gestae*; *Hogan v. Kelly*, 29 Mont. 489, 75 Pac. 82, holding declarations of agent were not made in connection with agency.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 324.

To Impeach Witness by Proof of former statements, circumstances of time, place, and persons present must be related to him before asking whether he made statements.

Approved in *Big Three Min. & Mill. Co. v. Hamilton*, 157 Cal. 145, 137 Am. St. Rep. 118, 107 Pac. 308, holding foundation not laid for impeachment.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 41.

99 Cal. 302-310, 33 Pac. 1099, HECKMAN v. SWETT.

Patent to Land Bounded by Navigable River conveys title to high-water mark at date of patent.

Approved in *Bouchard v. Abrahamsen*, 160 Cal. 796, 118 Pac. 235, holding patent to survey bounded by meander line gave title only to high-water mark, and did not include island subsequently formed.

Title to Land Under Water. See note, 42 L. R. A. 163.

Effect of Sudden Submergence upon title to land. See note, 38 L. R. A. 849.

Law of Fishing. See note, 131 Am. St. Rep. 760.

Right to Fish. See note, 60 L. R. A. 497, 525.

Governmental Control Over Right of Fishery. See note, 39 L. R. A. 583.

99 Cal. 311-315, 33 Pac. 929, DORAN v. DORAN.

Gifts Causa Mortis. See note, 99 Am. St. Rep. 914.

Creation of Trusts in Land by parol. See notes, 115 Am. St. Rep. 777, 795; 5 Cal. Prob. 248, 265.

99 Cal. 316-323, 33 Pac. 913, GREIG v. RIORDAN.

Where There is Valid Contract between owner and contractor, it is measure of owner's liability.

Approved in *Hoffman-Marks Co. v. Spires*, 154 Cal. 115, 97 Pac. 153, following rule.

General Managing Agent of Corporation may assign chose of action of corporation for collection.

Approved in *Coghlan v. Quartararo*, 15 Cal. App. 668, 115 Pac. 667, holding general manager of corporation could make and file claim of lien for corporation; *Dollar v. International Banking Corp.*, 13 Cal. App. 340, 109 Pac. 503, holding general managing agent of corporation had power to transfer chose in action to creditors; *Preston v. Central Cal. etc. Irr. Co.*, 11 Cal. App. 201, 104 Pac. 466, upholding assignment of claim in favor of corporation made by general manager; *Judell v. Goldfield Realty Co.*, 32 Nev. 359, 108 Pac. 458, upholding settlement of claims against corporation taken over by another corporation made with secretary and general manager of latter; *Cook v. American Tubing etc. Co.*, 28 B. L. 67, 65 Atl. 651, 9 L. R. A. (n. s.) 193, arguendo.

99 Cal. 327-332, 33 Pac. 1092, PEOPLE v. SQUIRES.

Evidence That Witness Told Others of efforts to bribe him is admissible in prosecution for bribery.

Approved in *People v. Bunkers*, 2 Cal. App. 207, 209, 84 Pac. 369, 370, holding plan to entrap defendant in bribery did not render inadmissible testimony of those engaged in it.

Bribery and Solicitation of Bribe. See note, 116 Am. St. Rep. 39, 44.

99 Cal. 333-336, 33 Pac. 1097, PEOPLE v. NONELLA.

To Impeach Witness With Evidence of previous contradictory statements, circumstances surrounding making statements must be called to his attention.

Approved in *Keyes v. Geary St. etc. R. R. Co.*, 152 Cal. 442, 93 Pac. 90, holding foundation for impeachment properly laid.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 40.

99 Cal. 340-345, 33 Pac. 906, PEARCE v. BOGGS.

Change of Possession is Essential to render sale valid as against creditors.

Approved in *Kennedy v. Conroy* (Cal.), 44 Pac. 796, holding sale of stock on ranch to son living at home was void when there was no change in conduct of ranch.

99 Cal. 345-348, 33 Pac. 928, SAN JOAQUIN LAND ETC. CO. v. WEST.

Decision of Court Consisting of Findings of fact and conclusions of law when filed with clerk is rendition of judgment.

Approved in *Brownell v. Superior Court*, 157 Cal. 707, 109 Pac. 93, holding where findings were not required, there was no rendition of judgment until decision was entered on official minutes of court.

What Waters are Navigable. See note, 126 Am. St. Rep. 730.

99 Cal. 349-354, 33 Pac. 1105, GUNN v. BANK OF CALIFORNIA.

Mere Finding of Purchaser Who Verbally Agrees to purchase and makes deposit to be returned should title prove defective, which is so returned, does not entitle broker to commission for sale.

Approved in *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 398, 401, 402, 107 Pac. 624, reversing judgment for broker's commission; *Mott v. Minor*, 11 Cal. App. 779, 106 Pac. 246, holding purchaser who offered in his own right to purchase was not found by broker; *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 110, 89 Pac. 982, holding broker not entitled to commission when no sale was negotiated; *Logan v. McMullen*, 4 Cal. App. 156, 87 Pac. 286, holding broker not entitled to commission when his contract did not purport to employ him as agent, and no proof was offered that binding contract was procured; *Levy v. Wolf*, 2 Cal. App. 495, 84 Pac. 315, holding broker entitled to commission when he procured oral offer on terms of owner, and sale was consummated by another broker after expiration of his contract; *Johnson Bros. v. Wright*, 124 Iowa, 63, 99 N. W. 103, holding parol offer to agent insufficient to entitle him to commission; *Watters v. Dancy*, 23 S. D. 484, 139 Am. St. Rep. 1071, 122 N. W. 431, holding broker entitled to no commission when he procured contract to purchase from himself; *Runck v. Dimmick*, 51 Tex. Civ. App. 216, 111 S. W. 780, holding broker who negotiated mere option to purchase not entitled to commission where no sale was made.

Performance by Real Estate Broker of contract to find purchaser or effect exchange. See note, 44 L. R. A. 597, 604, 607.

Fraud and Secret Dealings or Interest of real estate brokers as affecting commissions. See note, 45 L. R. A. 46.

99 Cal. 355-358, 33 Pac. 1107, **MARTEN v. BURNS WINE CO.**

To Rescind Contract for Fraud, party must restore or offer to restore other party to statu quo.

Distinguished in *Maionchi v. Nicholini*, 1 Cal. App. 694, 82 Pac. 1054, holding findings did not support judgment for rescission; *Richards v. Farmers' etc. Bank*, 7 Cal. App. 393, 94 Pac. 397, holding in action to rescind settlement and release of partnership for money paid by defendants to plaintiff, offer to restore was not necessary where complaint asked accounting and alleged greater sum due.

Where Stockholder Votes for Assessment on stock and pays assessment after knowledge of fraud in its sale to him, he ratifies fraud.

Approved in *Campbell v. Santa Maria Oil etc. Co.*, 153 Cal. 284, 95 Pac. 41, holding director who voted for assessment on stock estopped to question validity of such assessment.

Party Entitled to Rescind Contract must do so promptly upon knowledge of facts entitling him to rescind.

Approved in *Wills v. Porter* (Cal.), 61 Pac. 1111, holding delay for two years barred action by stockholders to recover payments made before to principal stockholder.

Disapproved in *St. Louis etc. R. R. Co. v. Richards*, 23 Okl. 279, 102 Pac. 101, 23 L. R. A. (n. s.) 1032, holding where release from damages had been fraudulently procured, rescission was not necessary before bringing action for damages.

99 Cal. 359-360, 37 Am. St. Rep. 56, 33 Pac. 1111, **PEOPLE v. GLEASON.**

What Amounts to an Attempt to Commit Crime. See note, 93 Am. St. Rep. 600.

Crime of Incest. See note, 111 Am. St. Rep. 21, 25.

99 Cal. 360-363, 37 Am. St. Rep. 57, 33 Pac. 1112, 21 L. R. A. 751, **EX PARTE GOULD.**

Contempt of Court is Specific Criminal Offense.

Approved in *Reymert v. Smith*, 5 Cal. App. 382, 90 Pac. 471, holding where contempt was committed out of presence of court, no step essential to proper accusation and plea could be omitted; *Hammond Lumber Co. v. Sailors' Union*, 167 Fed. 821, holding in contempt proceeding no discovery or evidence obtained from party or witness in judicial proceeding is admissible; *State v. Clancy*, 30 Mont. 195, 197, 76 Pac. 10, 11, holding civil statutes relating to change of venue did not apply to contempt proceedings; *State v. Sieber*, 49 Or. 10, 88 Pac. 316, holding proceedings to punish for contempt in violating injunction to restrain interference with waters of stream did not amount to criminal prosecution and defendant could be compelled to testify; *In re Nevitt*, 117 Fed. 458, 54 C. C. A. 622, *arguendo*.

Character of Contempt for Violation of injunction to protect private rights. See note, 13 L. R. A. (n. s.) 593.

Constitutional Protection Against Being Forced to furnish evidence against one's self in a civil case. See note, 29 L. R. A. 821.

99 Cal. 363-373, 33 Pac. 916, BURNS v. SENNETT.

Master is not Liable for Injury to servant caused by negligence of another servant unless such other was intrusted with duty which employer owed personally to servant.

Approved in *McDonald v. Hoffman*, 10 Cal. App. 518, 102 Pac. 674, holding negligence of foreman in superintending scaffold was that of fellow-servant; *Rincicotti v. O'Brien Contracting Co.*, 77 Conn. 620, 60 Atl. 116, 69 L. R. A. 936, holding master liable for injury caused by defective derrick furnished employees doing masonry work; *South Baltimore Car Wks. v. Schaefer*, 96 Md. 108, 94 Am. St. Rep. 560, 53 Atl. 668, holding master not liable for injury to servant resulting from insufficient adjustment of machine by fellow-servant; *Metzler v. McKenzie*, 34 Wash. 478, 76 Pac. 117, holding employer not liable for negligence of servant employed to erect scaffolding for use of other servants.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 111, 141.

Where Employees are to Adjust Appliances with which they work, employer is bound only to furnish proper materials for appliances.

Approved in *Bridges v. Los Angeles Pacific Ry.*, 156 Cal. 495, 105 Pac. 587, 25 L. R. A. (n. s.) 914, holding proprietor of electric station not liable for injury to employee therein by contact with live wire, due to negligence of fellow-servant having control of current; *Manning v. App Cons. Gold Min. Co.*, 149 Cal. 42, 84 Pac. 660, holding employer not responsible for failure of employee to properly adjust appliances furnished him; *Leishman v. Union Iron Works*, 148 Cal. 280, 113 Am. St. Rep. 243, 83 Pac. 33, 3 L. R. A. (n. s.) 500, holding foundryman not liable for injury to molder caused by negligence of pattern-maker in preparing pattern; *The Fulton*, 143 Fed. 593, holding ship not liable for defect in sling arising from daily use.

Liability to Servant for Injuries due to defective machinery and appliances. See note, 98 Am. St. Rep. 291, 301, 305.

Duty of Master to Furnish Safe Appliances as affected by fact that defective appliances are prepared by fellow-servants. See note, 4 L. R. A. (n. s.) 221, 222, 224.

Usage cannot be Given in Evidence to relieve party from express stipulation or to vary contract certain in its terms.

Approved in *Leonhart v. California Wine Assn.*, 5 Cal. App. 24, 89 Pac. 849, *Fish v. Correll*, 4 Cal. App. 524, 88 Pac. 490, and *Stockton etc. Co. v. California etc. Co.*, 10 Cal. App. 201, 101 Pac. 542, all holding evidence of usage inadmissible to vary clear and certain contract; *Withers v. Moore* (Cal.), 71 Pac. 700, holding custom of port could not be shown to relieve seller of coal from payment of duty on coal imported under contract.

Miscellaneous.—Cited in *Burns v. Sennett* (Cal.), 44 Pac. 1068, on another appeal.

99 Cal. 374-380, 37 Am. St. Rep. 60, 33 Pac. 1122, IN RE JAMES.

Judgment cannot be Collaterally Attacked on ground complaint was defective and not sufficient to entitle plaintiff to relief demanded and awarded.

Approved in *Baldwin v. Foster*, 157 Cal. 646, 647, 108 Pac. 716, holding sufficiency of complaint in partition not collaterally assailable;

Estate of McNeil, 155 Cal. 340, 344, 100 Pac. 1089, 1090, holding divorce decree could not be collaterally attacked on ground complaint showed defective allegation as to plaintiff's residence; Lange v. Superior Court, 11 Cal. App. 4, 103 Pac. 909, wrong decision as to sufficiency of complaint could not be inquired into upon prohibition to restrain judgment for contempt in violating injunction; In re Estate of Nelson, 81 Neb. 367, 115 N. W. 1088, refusing to set aside divorce decree on collateral attack on ground complaint did not state cause of action.

Divorce Decree Regularly Obtained by citizen of one state against nonresident defendant on service by publication is valid in sister state.

Cited in Haddock v. Haddock, 201 U. S. 586, 620, 26 Sup. Ct. 525, 50 L. Ed. 876, 5 Ann. Cas. 1, mere domicile within state of one spouse does not give courts of that state jurisdiction to render divorce decree enforceable in all other states against nonappearing nonresident constructively served only.

Judgment of Divorce Rendered in another state may be collaterally impeached by extrinsic evidence showing jurisdictional facts did not exist.

Approved in Estate of Hancock, 156 Cal. 807, 808, 134 Am. St. Rep. 177, 106 Pac. 59, 60, holding void divorce decree of foreign state for lack of jurisdiction; In re Culp, 2 Cal. App. 80, 83 Pac. 93, holding modification of divorce decree of foreign state changing custody of children could be collaterally attacked for want of jurisdiction of parties.

Extraterritorial Effect of Decree of Divorce. See note, 83 Am. St. Rep. 623.

Conflict of Laws on Divorce. See note, 59 L. R. A. 167, 168, 183.

Right to Contest Validity of Divorce Decree after death of one or both parties. See note, 57 L. R. A. 593.

99 Cal. 380-382, 33 Pac. 1121, **PENNEY v. SIMMONS.**

Where Evidence is Conflicting, Finding that deed is not mortgage will not be disturbed on appeal.

Approved in Wadleigh v. Phelps, 149 Cal. 638, 87 Pac. 98, following rule; Meeker v. Shuster (Cal.), 47 Pac. 582, holding deed was given as mortgage.

99 Cal. 383-386, 33 Pac. 1125, **KREISS v. HOTALING.**

Court has Discretion to Dismiss Cause for delay of nearly two years in service of summons.

Approved in Bernard v. Parmelee, 6 Cal. App. 545, 92 Pac. 661, upholding dismissal for delay of four months when defendant was prejudiced thereby; Castro v. San Francisco (Cal.), 35 Pac. 1035, upholding dismissal where summons was not served for two years; Luke v. Bennion, 36 Utah, 67, 106 Pac. 714, holding action in justice's court did not fail merely because summons was not served within year.

99 Cal. 386-392, 34 Pac. 71, **MCDONALD v. CONNIFF.**

Remedy for Improper Assessment of Street Work is by appeal to supervisors.

Reaffirmed in Beckett v. Morse, 4 Cal. App. 234, 87 Pac. 410.

Statute Which Affects All Individuals of class is general law.

Approved in Title etc. Restoration Co. v. Kerrigan, 150 Cal. 323, 119 Am. St. Rep. 199, 88 Pac. 365, 8 L. R. A. (n. s.) 682, upholding McEnerney Act; Smith v. State, 54 Tex. Cr. 310, 113 S. W. 294, holding statute providing special mode for drawing jurors in cities of thirty thousand or over was general law.

99 Cal. 392-396, 34 Pac. 103, BOWIE v. GRAND LODGE LEGION OF WEST.

Where Constitution and By-laws of mutual benefit association are part of contract with members, members are bound by future changes in by-laws as made.

Approved in Ross v. Brotherhood of America, 120 Iowa, 695, 95 N. W. 209, holding member bound by definition of broken leg adopted after he became member.

Effect of Changes in By-laws of beneficial association as against pre-existing members. See note, 83 Am. St. Rep. 715, 716.

99 Cal. 397-401, 33 Pac. 1126, TOWLE v. CARMELO LAND & COAL CO.

Where Subject Matter is so Described in contract for sale of land as to render it certain upon introduction of extrinsic evidence disclosing situation of parties, it is sufficient to sustain specific performance.

Approved in Carr v. Howell, 154 Cal. 377, 97 Pac. 887, and Howard v. Adkins, 167 Ind. 189, 78 N. E. 666, both following rule; Moayon v. Moayon, 114 Ky. 873, 102 Am. St. Rep. 303, 72 S. W. 38, 60 L. R. A. 415, holding conveyance of "all other estate owned by me" contained sufficient description.

Contracts by Telegraph. See note, 110 Am. St. Rep. 761.

99 Cal. 401-406, 33 Pac. 897, HARVEY v. DUFFEY.

Parties to Valid Contract must have assented to same subject matter in same sense.

Approved in Philip Wolf & Co. v. King, 1 Cal. App. 751, 82 Pac. 1055, holding no contract closed by qualified acceptance.

Right to Withdraw Order Given Agent before acceptance. See note, 10 L. R. A. (n. s.) 1139.

99 Cal. 407-411, 33 Pac. 1132, ILLINOIS TRUST ETC. BANK v. ALVORD.

Order Made Before Judgment in Action to foreclose mortgage on railroad making indebtedness contracted by receiver in another action lien prior to first mortgage can be reviewed on appeal from judgment and is not subject for separate appeal.

Approved in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 486, 490, 491, 493, 114 Pac. 839, 840, 841, 842, holding order refusing to vacate appointment of receiver not appealable.

99 Cal. 412-415, 33 Pac. 1128, LEWIS v. WIDBER.

Salary of Clerk of Registrar of Voters of San Francisco is payable from general fund without regard to revenues of previous year.

Approved in Harrison v. Horton, 5 Cal. App. 419, 90 Pac. 717, holding mandamus lies to compel auditor to draw warrant on general fund for salary of assistant district attorney of San Francisco, whose

appointment was by ordinance; *Swanson v. Ottumwa*, 118 Iowa, 173, 91 N. W. 1052, 59 L. R. A. 620, upholding contract for waterworks, bonds for which were secured by mortgage on works, though constitutional limit of city's debt was already reached.

What Constitutes "Indebtedness" of Municipality within constitutional and statutory restrictions. See note, 23 L. R. A. 404, 405.

99 Cal. 416-419, 37 Am. St. Rep. 67, 34 Pac. 102, **BLUMBERG v. BIRCH**.

Deficiency Judgment on Foreclosure is void when defendant is non-resident and is served by publication only.

Approved in *Chapman v. Pennie* (Cal.), 39 Pac. 15, holding action could not be maintained against administrator for deficiency judgment on foreclosure, where decedent mortgagor was nonresident at time of foreclosure and service was by publication.

Though No Valid Judgment for Deficiency can be rendered against nonresident mortgagor, such deficiency is subsisting debt on which action may be brought after mortgage security is exhausted.

Reaffirmed in *Boncofski v. Jacobsen*, 36 Utah, 178, 104 Pac. 122.

Service of Process Sufficient to Constitute due process of law. See note, 50 L. R. A. 583.

99 Cal. 419-421, 34 Pac. 104, **GISSON v. SCHWABACHER**.

Contributory Negligence in Entering or remaining in an employment. See note, 49 L. R. A. 34.

Whether Servant may Assume Risk of Dangers created by master's negligence. See note, 28 L. R. A. (n. s.) 1223.

99 Cal. 421-424, 33 Pac. 1084, **JOSHUA HENDY MACHINE WORKS v. PACIFIC CABLE CONSTR. CO.**

Constitutionality of Compulsory Reference in actions at law. See note, 13 L. R. A. (n. s.) 146.

99 Cal. 425-428, 34 Pac. 76, **PEARSON v. DROBAZ FISHING CO.**

Upon Application to Open Default, doubt should be resolved in favor of trial on merits.

Approved in *Vermont Marble Co. v. Black* (Cal.), 38 Pac. 513, ordering default to be opened.

Vacation of Judgment for Negligence or mistake of attorney. See note, 96 Am. St. Rep. 109.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 269.

99 Cal. 429-430, 34 Pac. 101, **FAIRBANKS v. LAMPKIN**.

Appeal from Order Made After Final Judgment taxing cost bill is not appealable where amount involved is less than three hundred dollars.

Approved in *Ertle v. Placer County* (Cal.), 44 Pac. 230, and *Randall v. Duff* (Cal.), 40 Pac. 386, both following rule; *Aronson v. Levison*, 148 Cal. 366, 83 Pac. 155, holding appeal from portion of judgment concerning less than three hundred dollars would not be considered.

99 Cal. 431-440, 37 Am. St. Rep. 70, 34 Pac. 128, **EDWARDS v. SAN JOSE PRINTING & PUB. CO.**

Where Libel is Couched in Covert Language, plaintiff must allege and prove libelous sense in which language was used.

Approved in *Ervin v. Record Publishing Co.*, 154 Cal. 82, 97 Pac. 22, 18 L. R. A. (n. s.) 622, holding complaint properly alleged injurious meaning intended by defendant's words; *State v. Sheridan*, 14 Idaho, 234, 93 Pac. 659, 15 L. R. A. (n. s.) 497, holding alleged libelous words should be construed in popular sense unless it affirmatively appeared they were understood in some other sense.

Belief of Editor in Truth of Charges against citizen is not ground for mitigation of damages unless based on information from reliable source.

Approved in *Davis v. Hearst*, 160 Cal. 182, 116 Pac. 547, holding where alleged libelous publication asserted existence of rumors reflecting on plaintiff, evidence of existence and character of rumors is inadmissible in mitigation of compensatory damages; *Times v. Times-Mirror*, 151 Cal. 26, 89 Pac. 1107, holding allegation there were rumors of matters set up in plea in mitigation of damages was insufficient; *Hess v. Gansz*, 90 Mo. App. 445, holding general rumor of truth of libel could be given in evidence in mitigation.

Liberty of Press is No Greater than liberty of ordinary speech.

Approved in *Morse v. Times etc. Printing Co.*, 124 Iowa, 724, 100 N. W. 873, following rule.

In Fixing Damages for Libel defendant is entitled to instruction that jury may consider previous character of plaintiff as they may believe it to be from evidence.

Approved in *Davis v. Hearst*, 160 Cal. 186, 116 Pac. 548, holding affirmative evidence of plaintiff's good reputation in advance of attack thereon is inadmissible in action for libel.

What Words are Libelous Per Se. See note, 116 Am. St. Rep. 808.

What Libelous Statements are Privileged. See note, 104 Am. St. Rep. 137.

Libel by Charging Raising or Disbursing of campaign funds. See note, 2 L. R. A. (n. s.) 691.

Facts of Which Court will take judicial notice. See note, 124 Am. St. Rep. 45.

99 Cal. 440-442, 34 Pac. 105, PEOPLE v. WONG AH LEONG.

Defendant in Criminal Action who testifies in his own behalf can be cross-examined only as to matters to which he testifies in chief.

Reaffirmed in *People v. Smith*, 9 Cal. App. 648, 99 Pac. 1113.

99 Cal. 449-452, 34 Pac. 77, ESTATE OF SMITH.

Court Should Set Aside Homestead to widow regardless of fact it may be worth more than five thousand dollars.

Reaffirmed in *Estate of Hessler*, 2 Cal. Prob. 359.

99 Cal. 443-448, 34 Pac. 87, FRESHOUR v. HIHN.

Where Only One Line of a Road is described as to course and distance, it will be deemed to be center line.

Reaffirmed in *Graham v. Bailard*, 157 Cal. 101, 106 Pac. 217.

Under Act of March 31, 1876, Five Years' Use of road by public preceding passage of act constituted it public highway.

Approved in *Juliaetta v. Smith*, 12 Idaho, 294, 85 Pac. 925, holding five years' use and work of road constituted it public highway.

Right to Recover Penalty for Obstruction of highway given by Political Code extends only to highway established in manner prescribed by law, and not to one established merely by user.

Approved in *Meservey v. Gulliford*, 14 Idaho, 141, 156, 93 Pac. 782, 788, holding section 960, Revised Statutes of 1887, did not apply to highways established by user.

Road Overseer may Bring Action to abate obstruction in highway as nuisance.

Reaffirmed in *Meservey v. Gulliford*, 14 Idaho, 142, 93 Pac. 783.

99 Cal. 452-455, 34 Pac. 106, **KIESSIG v. ALLSPAUGH.**

Statute Making Void Building Contract for over one thousand dollars not filed with recorder will not be extended to contract not falling strictly within the letter.

Approved in *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 518, 97 Pac. 416, holding failure to file contract rendered it void only as limitation on liability of owner.

99 Cal. 456-461, 34 Pac. 96, **PEOPLE v. NOYO LUMBER CO.**

Action by State to Cancel Patent for fraud is governed as to limitations by section 538, Code of Civil Procedure.

Approved in *State v. Campbell*, 3 Cal. App. 605, 86 Pac. 842, holding action by state is governed as to place of trial by provisions of code; *Murphy v. Crowley* (Cal.), 70 Pac. 1026, holding action to cancel deed on ground of fraud was barred in three years.

99 Cal. 462-472, 34 Pac. 84, **SMITH v. OCCIDENTAL ETC. STEAMSHIP CO.**

In Negligence Case It is Sufficient for plaintiff to show in first instance that injury resulted from negligence of defendant.

Reaffirmed in *Wistrom v. Redlick Bros.*, 6 Cal. App. 675, 92 Pac. 1049, and *Matthews v. Bull* (Cal.), 47 Pac. 774.

Release from Damages for Injuries may be avoided when obtained under misunderstanding of its purpose.

Approved in *Rauen v. Prudential Ins. Co. of Am.*, 129 Iowa, 736, 106 N. W. 202, holding void release from insurance policy to which there was no defense, given upon representation that it was receipt for part payment.

Distinguished in *Koffman v. Southwest Missouri Electric Ry. Co.*, 95 Mo. App. 473, 68 S. W. 216, holding party could not recover in legal action on verbal contract relative to same subject matter contained in written one signed by him on proof he was misled as to contents of latter; *Mensforth v. Chicago Brass Co.*, 142 Wis. 550, 135 Am. St. Rep. 1084, 126 N. W. 42, upholding verdict release was procured by fraud.

99 Cal. 472-476, 34 Pac. 108, **IN RE BLYTHE.**

Judgment is Inadmissible as Evidence of facts therein recited until time for appeal has expired.

Approved in *Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 4, 82 Pac. 1120, following rule; *Kern Valley Bank v. Koehn*, 157 Cal. 240, 107 Pac. 112, holding order denying motion to vacate prior writ of attachment, which was not shown to have become final, could not be considered on appeal from order refusing to dissolve subsequent writ in same action; *Fresno Milling Co. v. Fresno Canal etc. Co.* (Cal.), 36 Pac. 414, holding judgment could not be pleaded in bar pending appeal therefrom; *Estate of Renton*, 3 Cal. Prob. 122, holding probate of will not final until time to contest has expired.

Disapproved in *Rodney v. Gibbs*, 184 Mo. 13, 82 S. W. 190, holding judgment operated as estoppel, though appeal was pending without supersedeas bond having been given.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

99 Cal. 481-486, 34 Pac. 116, TOWNSEND v. BRIGGS.

Expulsion of Trespasser. See note, 93 Am. St. Rep. 258.

Right to Use Deadly Weapon in resisting trespass. See note, 22 L. R. A. (n. s.) 726.

99 Cal. 488-490, 34 Pac. 80, ROEBLING SONS CO. v. BEAR VALLEY LBR. CO.

To Support Lien of Materialman, materials must have been by express terms of contract furnished for building on which lien is claimed.

Approved in *Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 112, 75 Pac. 151, holding materialman not entitled to lien when he failed to show that he knew materials furnished were to be used in building on which lien was claimed; *Ashford v. Iowa & Minn. Lumber Co.*, 81 Neb. 564, 116 N. W. 273, holding lien not acquired when materials were not used in construction of building.

99 Cal. 493-497, 32 Pac. 310, BURBRIDGE v. LEMMERT.

Concurrent Agreement of Mortgagor to pay taxes assessed or mortgage renders note and mortgage void as to payment of interest specified therein.

Approved in *Daw v. Niles* (Cal.), 33 Pac. 1115, holding parol evidence admissible to show concurrent agreement of mortgagor to pay taxes assessed on mortgage.

99 Cal. 497-503, 34 Pac. 80, SAM YUEN v. McMANN.

When Appeal and Undertaking to Stay Execution are perfected, it is duty of sheriff to release from levy property taken on execution, regardless of question of sufficiency of sureties.

Distinguished in *Maze v. Langford*, 16 Cal. App. 746, 117 Pac. 930, holding undertaking to stay execution was ineffectual when sureties failed to make affidavit they were householders or freeholders in state; *Anderson v. Phegley*, 54 Or. 105, 102 Pac. 604, holding appeal operated as supersedeas from date of service and filing.

Acts for Which Sureties on Official Bonds are liable. See note, 91 Am. St. Rep. 543.

99 Cal. 511-516, 34 Pac. 109, VON SCHMIDT v. WIDBER.

Court is Tribunal Presided Over by one or more judges, for exercise of such judicial power as has been conferred upon it by law.

Approved in *Fleming v. Hance*, 153 Cal. 167, 94 Pac. 622, holding attorney for police court was not part of court.

It is Essential That Order of Court be made matter of record in order there may be no uncertainty.

Approved in *Ex parte Monckros Von Vetsera*, 7 Cal. App. 139, 93 Pac. 1037, holding appellate court could vacate oral order not entered on minutes.

Entry or Record Necessary to Complete Judgment or order. See note, 28 L. R. A. 622.

99 Cal. 519-523, 33 Pac. 1082, PARTRIDGE v. LUCAS.

Resolution of Intention to Macadamize Street does not include rock gutterways.

Approved in *Pacific Paving Co. v. Verso*, 12 Cal. App. 367, 107 Pac. 592, holding resolution of intention insufficient to support assessment for work done; *Jones v. Plummer*, 137 Mo. App. 343, 118 S. W. 111, holding street was macadamized in accord with resolution; *Healey v. Anglo-Californian Bk., Ltd.*, 5 Cal. App. 283, 90 Pac. 56, *arguendo*.

Street Assessment is Void if it includes cost of work not legally chargeable to property assessed.

Distinguished in *Bates v. Hadamson*, 2 Cal. App. 578, 84 Pac. 53, upholding assessment when error was in rate per front foot, and no appeal to council was taken.

Superiority of Lien of Local Assessment over prior lien. See note; 35 L. R. A. 375.

99 Cal. 523-526, 34 Pac. 83, ORD v. ORD.

Declarations or Acts of Grantor made or done after delivery of deed are not admissible to disparage it.

Reaffirmed in *Bollinger v. Bollinger*, 154 Cal. 705, 99 Pac. 200, and *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 614, 53 So. 814.

99 Cal. 526-536, 37 Am. St. Rep. 78, 34 Pac. 227, 21 L. R. A. 755, IN RE SHORTRIDGE.

Publication of True Report of Evidence during trial cannot be said to embarrass or obstruct administration of justice.

Approved in *Ex parte Foster*, 44 Tex. Cr. 426, 100 Am. St. Rep. 866, 71 S. W. 595, 60 L. R. A. 631, holding trial judge could not prohibit publication of evidence given at murder trial, involving no question of obscenity.

Facts on Which Superior Court based judgment of contempt reviewed on certiorari and held insufficient for exercise of its jurisdiction.

Distinguished in *Hogan v. Superior Court*, 16 Cal. App. 789, 792, 117 Pac. 950, 951, holding question whether evidence was sufficient to justify verdict on trial of misdemeanor in justice's court could not be reviewed on application for writ of prohibition.

Court has Inherent Power to Punish as contempt any act which tends to impede, embarrass, or obstruct court in discharge of duties.

Approved in *Lamberson v. Superior Court*, 151 Cal. 461, 91 Pac. 101, 11 L. R. A. (n. s.) 619, holding court could punish as contempt filing of contemptuous affidavits; *In re Hanson*, 80 Kan. 786, 105 Pac. 695, holding probate court had power to punish witness for contempt in refusing to answer pertinent question; *State v. Thomas*, 74 Kan. 366, 86 Pac. 501, holding penalty for contempt in violating injunctions in liquor cases did not trench on inherent power of court to punish for contempt; *Chicago etc. Ry. Co. v. Gildersleeve*, 219 Mo. 180, 118 S. W. 89, holding circuit court had inherent power to punish for contempt; *State v. Shepard*, 177 Mo. 235, 99 Am. St. Rep. 624, 76 S. W. 88, holding supreme court had summary power to punish for constructive contempt.

Power to Punish for Contempt. See note, 99 Am. St. Rep. 676.

Courts, Tribunals and Persons authorized to punish contempts. See note, 117 Am. St. Rep. 951, 961.

Legislative Power to Abridge Power of courts to punish for contempt. See note, 36 L. R. A. 256.

Under Plea of Liberty of Press, newspaper cannot interfere with course of justice during trial.

Reaffirmed in *In re Egan*, 24 S. D. 334, 123 N. W. 492.

Contempt of Court by Libelous newspaper publications See note, 100 Am. St. Rep. 871.

99 Cal. 536-538, 34 Pac. 222, **HOPPE v. HOPPE.**

Object of Supersedeas is to Stay Proceedings in trial court upon judgment appealed from and suspend enforcement pending appeal.

Approved in *McAneny v. Superior Court*, 150 Cal. 9, 87 Pac. 1022, holding prohibition did not lie when supersedeas was proper remedy.

99 Cal. 538-545, 34 Pac. 224, **SANTA ANA v. HARLIN.**

In Action to Condemn Land for street, necessity for street need not be proven.

Approved in *Laguna Drain. District v. Charles Martin Co.*, 5 Cal. App. 174, 89 Pac. 996, holding determination by trustees of drainage district as to necessity for draining district is final and not subject to review in condemnation proceeding; *Grafton v. St. Paul etc. R. R. Co.*, 16 N. D. 317, 113 N. W. 600, 22 L. R. A. (n. s.) 1, holding public necessity for crossing need not be alleged in action to condemn right of way therefor. 1

In Condemnation Suit Witness cannot give opinion as to market value of property for particular use, but must state market value in view of any use to which adapted.

Approved in *Sacramento etc. R. R. Co. v. Heilbron*, 156 Cal. 411, 412, 104 Pac. 981, following rule; *Los Angeles v. Kerckhoff-Cuzner Co.*, 15 Cal. App. 678, 115 Pac. 655, holding speculative inquiries as to possible future use was inadmissible on question of value; *Guyandot Valley Ry. Co. v. Buskirk*, 57 W. Va. 430, 110 Am. St. Rep. 785, 50 S. E. 526, holding availability of land for all purposes for which it might be used should be considered in fixing market value in condemnation suit; *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 446, 82 Pac. 642, arguendo.

Evidence of Special Value of Property taken for public use. See note, 124 Am. St. Rep. 537.

Special Value of Property for Purpose as element of compensation on condemnation. See note, 11 L. R. A. (n. s.) 999.

Compensation Allowable on Condemnation as affected by adaptability of property for uses other than to which it is put. See note, 15 L. R. A. (n. s.) 680.

Great Latitude Should be Allowed in cross-examination for purpose of testing knowledge, judgment, or bias of witness.

Approved in *Central Pacific Ry. Co. v. Feldman*, 152 Cal. 311, 92 Pac. 852, holding witness who testified as to market value could be asked on cross-examination as to his knowledge of assessed value.

Existence of Public Use as Question for courts. See note, 88 Am. St. Rep. 936.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 86, 112, 113, 117.

99 Cal. 546-549, 34 Pac. 113, CAMPBELL v. FREEMAN.

Where Title is Given to Secure Loan, resulting trust is created, and also deed conveying title becomes mortgage.

Approved in *Windt v. Covert*, 152 Cal. 353, 93 Pac. 68, and *Borrow v. Borrow*, 34 Wash. 688, 76 Pac. 306, both following rule; *Rothenbusch v. Hebel*, 11 Cal. App. 694, 106 Pac. 120, holding resulting trust was created where payment was made by one person and title taken by another; *Wagg v. Herbert*, 19 Okl. 562, 92 Pac. 264, holding where evidence disclosed fraud in purchase by mortgagee of mortgaged property, deed was in equity mortgage; *Hall v. O'Connell*, 52 Or. 168, 169, 95 Pac. 719, holding where purchaser of land had vendor transfer title directly to party lending him purchase money, grantee became trustee of title for purchaser.

Equity Looks Beyond Forms of Transaction and shapes judgment so as to carry out purposes of parties.

Approved in *De Leonis v. Hammel*, 1 Cal. App. 394, 82 Pac. 351, upholding complaint in suit to quiet title of holder of equitable interest.

99 Cal. 549-552, 34 Pac. 114, COLE v. WILCOX.

Granting of New Trial on Ground Decision was not supported by evidence will not be reversed unless discretion of court was abused.

Approved in *Colon v. Tosetti*, 14 Cal. App. 694, 113 Pac. 365, *Crouse-Prouty v. Rogers*, 13 Cal. App. 562, 110 Pac. 142, and *Eidinger v. Sigwart*, 13 Cal. App. 677, 110 Pac. 525, all holding discretion not abused in granting new trial.

Court has Discretion to Relieve Party from failure to secure additional time in which to serve proposed statement on motion for new trial.

Approved in *Utah-Nevada Co. v. De Lamar*, 9 Cal. App. 761, 100 Pac. 885, holding attorney properly relieved from default in failing to prepare statement; *Sherman v. Southern Pac. Co.*, 31 Nev. 289, 102 Pac. 258, holding attorney properly relieved from failure to obtain extension of time to move for new trial.

Objection to New Trial Statement that it was not served in time should point out basis or grounds of objection.

Approved in *Perry v. Noonan Loan Co.*, 1 Cal. App. 611, 82 Pac. 624, holding objection that statement was not presented in time was ineffective when no reason was specified in support of objection.

99 Cal. 554-563, 34 Pac. 239, WOODWARD v. FRUITVALE SANITARY DISTRICT.

Acts of Officers of Sanitary District performed before canvassing of votes for their election cannot be questioned in collateral proceeding by taxpayer to test validity of organization of district.

Approved in *State v. Butte*, 41 Mont. 385, 109 Pac. 712, holding acts of one actually in possession of office under color of title could not be impeached in suit to which he was not party.

That Sanitary District cannot Include territory of incorporated town intimated.

Criticised in *Petition of East Fruitvale Sanitary District*, 158 Cal. 458, 111 Pac. 370, arguendo.

Boards or Bodies to Which Power of taxation delegable. See note, 15 L. R. A. (n. s.) 62.

99 Cal. 564-570, 34 Pac. 231, PEOPLE v. GREEN.

Order Limiting Counsel for Defendant charged with felony to one hour is abuse of discretion where trial occupied five days.

Approved in *People v. Fernandez*, 4 Cal. App. 321, 322, 326, 87 Pac. 1114, 1116, ordering new trial where time for argument of defense was unduly limited; *Reagan v. St. Louis Transit Co.*, 180 Mo. 140, 79 S. W. 444, *State v. Rogoway*, 45 Or. 613, 81 Pac. 235, and *State v. Mayo*, 42 Wash. 549, 85 Pac. 254, all holding time for argument unduly limited.

Right to Limit Time of Argument of counsel for accused. See note, 25 L. R. A. (n. s.) 1034.

It is not Reversible Error to Refuse to administer special oath to Chinese witness.

Approved in *Curtis v. Lehmann*, 115 La. 46, 38 So. 889, holding judge had discretion to refuse to administer special oath.

Miscellaneous.—Cited in *People v. Larsen* (Cal.), 34 Pac. 516.

99 Cal. 574-576, 34 Pac. 238, PEOPLE v. KOENING.

No Inference of Guilt of Accused can be drawn from fact he was in saloon where crime was committed on evening of commission.

Approved in *People v. Sciaroni*, 4 Cal. App. 700, 89 Pac. 134, holding evidence of opportunity to commit crime could not be accepted as evidence of guilt.

Conviction on Testimony of Accomplice. See note, 98 Am. St. Rep. 165.

99 Cal. 577-579, 34 Pac. 237, PEOPLE v. ETTING.

Name of District Attorney may be Signed to indictment by his deputy.

Approved in *State v. Guglielmo*, 46 Or. 261, 79 Pac. 582, 69 L. R. A. 466, upholding information prepared and filed by deputy district attorney.

Unexplained Possession of Stolen Property by defendant is circumstance tending to show guilt.

Approved in *People v. Gibson*, 16 Cal. App. 350, 116 Pac. 989, following rule; *People v. King*, 8 Cal. App. 332, 96 Pac. 918, *People v. Horton*, 7 Cal. App. 36, 93 Pac. 382, and *People v. Peltin*, 1 Cal. App. 615, 82 Pac. 981, all approving instruction in regard to possession of stolen property by defendant.

Court will Take Judicial Notice of county seat.

Reaffirmed in *State v. Buralli*, 27 Nev. 48, 71 Pac. 533, following rule.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 443.

99 Cal. 579-583, 34 Pac. 326, VERMONT MARBLE CO. v. SUPERIOR COURT.

Staying of Execution Otherwise than by statutory proceedings. See note, 127 Am. St. Rep. 712.

Injunctions Against Execution Sales or other proceedings under final process. See note, 30 L. R. A. 124.

99 Cal. 583-587, 34 Pac. 324, WELLS v. MANTES.

Prior Actual Appropriation of Water gives valid right thereto as against later appropriator who complies with code rules for appropriation.

Approved in *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 211, 110 Pac. 930, *Lower Tule River Ditch Co. v. Angiola Water Co.*, 149 Cal. 499, 86 Pac. 1082, *Nielson v. Parker*, 19 Idaho, 731, 115 Pac. 489, *Bean v. Morris*, 159 Fed. 653, 86 C. C. A. 519, and *Morris v. Bean*, 146 Fed. 428, all following rule; *Sand Point etc. Co. v. Panhandle Development Co.*, 11 Idaho, 413, 83 Pac. 349, *arguendo*.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 669.

99 Cal. 587-593, 34 Pac. 331, FULTON v. JANSEN.

Payment of Part of Purchase Price of land and use for cutting wood for family use held not such part performance as to warrant enforcement of oral contract to sell land.

Approved in *Davis v. Judson*, 159 Cal. 132, 113 Pac. 152, holding character of possession insufficient to warrant enforcement of oral contract to sell land; *Cooley v. Miller & Lux*, 156 Cal. 514, 105 Pac. 982, holding payment of purchase price without possession did not warrant enforcement of parol contract to sell land; *Blakely v. Sumner*, 62 Wash. 210, 113 Pac. 258, holding permitting another to cut wood on land was not such act of possession by purchaser as would take parol contract to convey from statute of frauds; *Chamberlain v. Abrams*, 36 Wash. 592, 79 Pac. 206, holding payment of purchase price did not take parol contract to convey land from statute of frauds.

Where Purchase Money is Advanced by one party and title taken by another, who promises to convey to former, resulting trust is created.

Approved in *Levy v. Ryland*, 32 Nev. 466, 468, 470, 109 Pac. 907, 908, following rule; *Moultrie v. Wright*, 154 Cal. 523, 526, 98 Pac. 259, 260, holding where one paid half of purchase price and took whole title, trust to extent of one-half resulted in favor of another who paid remaining half of price.

99 Cal. 593-598, 32 Pac. 581, 34 Pac. 329, COUNTY OF LOS ANGELES v. BALLERINO.

County may Sue in Its Own Name for delinquent taxes.

Cited in *Los Angeles v. Glassell*, 4 Cal. App. 47, 87 Pac. 242, upholding complaint by city to recover municipal taxes; dissenting opinion, *William Ede Co. v. Heywood*, 153 Cal. 620, 621, 96 Pac. 83, 22 L. R. A. (n. s.) 562, *arguendo*.

Owner Who Seeks to Enjoin Collection of tax on ground it is exorbitant must tender or offer to pay whatever taxes may be found justly due.

Approved in *Western Union Tel. Co. v. State*, 190 U. S. 427, 23 Sup. Ct. 730, 47 L. Ed. 1122, following rule; *Sound Investment Co. v. Bellingham Bay Land Co.*, 45 Wash. 644, 88 Pac. 1120, holding in tax foreclosure proceeding tender of taxes by defendant was insufficient.

Distinguished in *Hotchkiss v. Hansberger*, 15 Cal. App. 610, 115 Pac. 960, holding payment of taxes under void tax deeds not essential as condition to quieting title.

99 Cal. 602-603, 34 Pac. 325, ANTHONY v. GRAND.

Where Appeal was Dismissed Without Prejudice, another appeal should not be dismissed on ground prior appeal was pending.

Approved in *Jackson v. Barrett*, 12 Idaho, 467, 86 Pac. 271, holding second appeal could be filed regardless of whether remittitur had been filed in trial court when first appeal was dismissed without prejudice.

99 Cal. 604-606, 34 Pac. 337, BANK OF SHASTA v. BOYD.

Mortgagor of Property to Corporation as such is estopped to deny its corporate existence.

Approved in *Citizens' Bank v. Jones*, 117 Wis. 454, 94 N. W. 332, following rule; *Johnson v. Mason Lodge*, 106 Ky. 846, 51 S. W. 621, and *Toledo Computing Scale Co. v. Young*, 16 Idaho, 191, 101 Pac. 258, both holding party doing business with corporation in corporate name estopped to deny its existence as such.

In Action on Note Payable to Plaintiff, his ownership need not be alleged.

Approved in *Graham v. Light*, 4 Cal. App. 401, 88 Pac. 373, and *Berry v. Barton*, 12 Okl. 247, 71 Pac. 1082, 66 L. R. A. 513, both following rule; dissenting opinion in *McGuffin v. Coyle*, 16 Okl. 702, 86 Pac. 968, 6 L. R. A. (n. s.) 524, majority holding note void as against public policy.

Sham Pleadings. See note, 113 Am. St. Rep. 651.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 550.

99 Cal. 607-612, 34 Pac. 342, HARRALSON v. BARRETT.

Granting of New Trial on Ground of newly discovered evidence is largely discretionary.

Approved in *Rockwell v. Italian-Swiss Colony*, 10 Cal. App. 636, 103 Pac. 164, *James v. Oakland Traction Co.*, 10 Cal. App. 803, 103 Pac. 1090, *Estate of Dolbeer*, 153 Cal. 664, 96 Pac. 271, *O'Connor v. Clarke (Cal.)*, 44 Pac. 483, and *Linforth v. S. F. Gas & Electric Co.*, 156 Cal. 67, 103 Pac. 324, all following rule.

Recovery Back of Voluntary Payment. See note, 94 Am. St. Rep. 423.

99 Cal. 612-617, 37 Am. St. Rep. 87, 34 Pac. 335, HUNT v. WARD.

Liability of Stockholders on Note of corporation is liability created by law and is barred in three years.

Approved in *Foreign Mines Development Co. v. Boyes*, 180 Fed. 596, following rule; *McKee v. Title Ins. etc. Co.*, 159 Cal. 215, 113 Pac. 143, holding stockholder's liability on bonds barred three years from issue; *King v. Armstrong*, 9 Cal. App. 371, 99 Pac. 528, holding action by receiver of insolvent bank of sister state brought to enforce assessment against stockholder in this state was barred in three years; *O'Neill v. Quarnstrom*, 6 Cal. App. 472, 92 Pac. 392, holding stockholder's liability barred in three years; *Dart v. Hughes*, 49 Colo. 474, 109 Pac. 955, holding limitations begin to run against liability of officers of corporation arising on failure to file report sixty days after such failure.

Statute of Limitations in Actions Against Corporate officers and stockholders. See note, 96 Am. St. Rep. 973, 974, 983.

Time of Accrual of Right of Action as to stockholder's liability. See note, 10 L. R. A. (n. s.) 903.

Whether Liability be Absolute or Contingent, it is created by consummation of contract, act, or omission by which liability is incurred.

Approved in *First Nat. Bank v. Consolidated Lumber Co.*, 16 Cal. App. 269, 116 Pac. 680, holding liability incurred by corporation in transferring note payable to it and guaranteeing payment was absolute and not contingent, though right to enforce it depended on default of maker.

99 Cal. 617-620, 34 Pac. 333, REED v. NORTON.

Plaintiff must Recover, if at All, on cause of action set out in complaint, and not on some other which may be developed by proofs.

Approved in Eidinger v. Sigwart, 13 Cal. App. 674, 110 Pac. 524, holding variance defeated cause of action; Star Mill & Lumber Co. v. Porter, 4 Cal. App. 474, 88 Pac. 499, and Lucas v. Rea, 10 Cal. App. 646, 102 Pac. 824, both holding variance immaterial.

99 Cal. 621-623, 34 Pac. 339, STORKE v. STORKE.

Alimony may be Allowed Wife pending suit for separate maintenance.

Approved in Behrle v. Behrle, 120 Mo. App. 682, 97 S. W. 1006, following rule; Holcomb v. Holcomb, 49 Wash. 503, 95 Pac. 1093, allowing wife costs, attorneys' fees, and alimony pending appeal from divorce decree.

Jurisdiction to Award Temporary Alimony, suit money, and counsel fees pending appeal. See note, 27 L. R. A. (n. s.) 713.

99 Cal. 623-628, 34 Pac. 344, BRACKETT v. BANEGAS.

Party cannot be Relieved from Judgment under section 473, Code of Civil Procedure, unless application therefor be made in six months.

Approved in Steen v. Santa Clara Valley etc. Co., 4 Cal. App. 451, 88 Pac. 504, following rule; Forrester v. Lawler, 14 Cal. App. 173, 111 Pac. 285, holding judgment of dismissal which failed to conform to stipulation therefor could not be corrected by summary order of amendment after lapse of six months.

99 Cal. 628-631, 34 Pac. 439, SMITH v. LOS ANGELES COUNTY.

Board of Supervisors has No Power to contract for employment of person to procure bids for county bonds.

Approved in Theis v. Beaver County, 22 Okl. 341, 842, 97 Pac. 976, holding void contract for sale of bonds made by county commissioners.

99 Cal. 631-635, 34 Pac. 438, DE CAMP LUMBER CO. v. TOLHURST.

Owner of Building Who Holds Money to satisfy liens may pay it into court pending contest between contractor and lien claimant.

Approved in Stockton Lumber Co. v. Schuler, 155 Cal. 413, 101 Pac. 308, following rule; Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 523, 97 Pac. 419, holding deposit by owner could not be withdrawn pending appeal.

Attorneys' Fees and Costs may be Taxed against owner of building who resists payment without cause.

Approved in decision of district court of appeals in Union Lumber Co. v. Simon, 150 Cal. 761, 89 Pac. 1080, and overruled by supreme court.

99 Cal. 636-642, 34 Pac. 321, SECURITY LOAN & TRUST CO. v. WILLAMETTE STEAM MILLS ETC. CO.

Purchaser of Land in Possession of third person is chargeable with notice of rights of possessor.

Approved in Robinson v. Muir, 151 Cal. 122, 90 Pac. 523, holding where claimants of miner's liens brought suit thereon, knowing that one defendant in whose favor judgment was rendered was prior grantee under unrecorded deed, no title passed under foreclosure sale; Womble v. Wilbur, 3 Cal. App. 542, 86 Pac. 919, holding purchaser

from grantee not chargeable with notice of interest when escrow agreement under which his vendor had property did not mention it; *Gray v. Maier & Zobelein Brewery*, 2 Cal. App. 656, 84 Pac. 282, holding purchaser from landlord was chargeable with notice of tenant's right to renew.

Possession of Land as Notice of Title. See note, 13 L. R. A. (n. s.) 56, 57.

Lease for Certain Well-defined Purposes considered and held to create relation of landlord and tenant.

Approved in *Shafter Estate Co. v. Alvord*, 2 Cal. App. 604, 84 Pac. 279, holding instrument granting use of lands for hunting and fishing for fixed term created relation of landlord and tenant.

Fixtures Retaining by Agreement the character of personal property. See note, 84 Am. St. Rep. 885.

Character of Building Placed by Consent on another's land, as real or personal property. See note, 14 L. R. A. (n. s.) 441.

99 Cal. 642-644, 34 Pac. 340, MASKELL v. BARKER.

Copy of Writ of Attachment must be Served on occupant of property attached, or posted thereon if unoccupied, to make levy effective.

Approved in *Menager v. Farrell*, 6 Ariz. 318, 57 Pac. 608, holding failure to give notice to owner rendered levy of attachment void as against subsequent mortgagee.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 457.

99 Cal. 645-649, 34 Pac. 513, RHOTON v. BLEVIN.

"Children," as Used in Will, held to include issue of deceased children.

Approved in *Estate of Fitzgerald*, 2 Cal. Prob. 175, holding "heirs," as used in will, should not be construed in technical sense.

Pretermitted Heirs. See note, 115 Am. St. Rep. 582, 584.

99 Cal. 649-655, 34 Pac. 442, BEDAN v. TURNEY.

Bill of Exceptions is Part of Judgment-roll, and on appeal on judgment-roll alone nothing can be assumed or considered which does not appear on face of that roll.

Reaffirmed in *Lunnun v. Morris*, 7 Cal. App. 711, 95 Pac. 910.

In Action for Criminal Conversation, proof of sexual intercourse alone between defendant and wife justifies recovery.

Approved in *Hart v. Knapp*, 76 Conn. 140, 100 Am. St. Rep. 989, 55 Atl. 1023, holding in action by wife for alienation of husband's affections, fact that husband was seducer was no defense.

Burden of Proof in Action of criminal conversation. See note, 98 Am. St. Rep. 593.

99 Cal. 655-661, 34 Pac. 444, BANK OF SAN LUIS OBISPO v. WICKERSHAM.

Party Seeking to Rescind for Fraud must offer to return thing purchased.

Distinguished in *Richards v. Farmers' etc. Bank*, 7 Cal. App. 393, 94 Pac. 397, holding in action to rescind settlement and release of partnership for fraud, offer to repay sums paid plaintiff was not essential where he asked accounting and claimed larger sum due.

Purchase of Capital Stock by Corporation does not extinguish it, but reduces amount of subscribed capital stock, leaving corporation free to reissue it.

Approved in *Maryland Trust Co. v. Mechanics' Bank*, 102 Md. 625, 63 Atl. 76, holding trust company had no power to purchase its own stock; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 359, 101 Am. St. Rep. 569, 74 Pac. 941, holding mere repurchase of capital stock by corporation did not illegally decrease same.

Right of Corporation to Purchase Its Own Stock. See note, 61 L. R. A. 626.

99 Cal. 661-672, 34 Pac. 504, FIELD v. SHORB.

Gift in View of Death to friends to exclusion of distant relatives upheld.

Approved in *Fisher v. Ludwig*, 6 Cal. App. 152, 91 Pac. 661, upholding gift of bank deposit in view of death by delivery of pass-book.

Check or Note as Subject of Gift by Maker. See note, 27 L. R. A. (n. s.) 309.

Where Evidence, Though Conflicting, is strongly against verdict, appellate court will set it aside.

Approved in *Withers v. Massengill*, 148 Cal. 771, 84 Pac. 154, upholding verdict on conflicting evidence; *In re Coburn*, 11 Cal. App. 620, 105 Pac. 931, setting aside verdict against great burden of evidence; *Village of Ilo v. Ramey*, 18 Idaho, 648, 112 Pac. 128, setting aside finding for insufficiency of evidence to sustain it.

99 Cal. 672-676, 34 Pac. 509, CAVANAUGH v. JACKSON.

Adverse Possessor of Land Who has Land Assessed to himself and pays taxes for five years complies with statute though land is also assessed to owner who pays taxes thereon.

Reaffirmed in *Owsley v. Matson*, 156 Cal. 405, 406, 407, 104 Pac. 985.

Party Seeking to Acquire Title by adverse possession must have paid all taxes on property for five years of adverse occupancy. (Concurring opinion).

Approved in *Glowner v. De Alvarez*, 10 Cal. App. 196, 101 Pac. 437, holding failure to pay taxes fifth year barred claim of title by adverse possession; *Commercial Nat. Bank v. Schlitz*, 6 Cal. App. 181, 184, 91 Pac. 753, 754, holding payment of second or double assessment by adverse occupant after payment of first assessment by owner did not constitute payment of tax to sustain title by adverse possession.

99 Cal. 677-684, 34 Pac. 497, FOUNTAIN v. SEMI-TROPIC LAND ETC. CO.

Breach of Minor Condition in Contract which can be compensated for in damages does not entitle injured party to rescind.

Reaffirmed in *Withers v. Moore* (Cal.), 71 Pac. 701.

Right of Vendee to Rescind Land Contract for vendor's breach of covenant to make improvements. See note, 21 L. R. A. (n. s.) 823.

Where Breach of Covenant in Contract renders performance by other party impossible, he may elect to recover costs incurred, or sue for damages for breach.

Approved in *McConnell v. Corona City Water Co.*, 149 Cal. 65, 66, 85 Pac. 930, 931, 8 L. R. A. (n. s.) 1171, holding where owner of

tunnel refused to comply with contract to furnish timbering, making it impossible for contractor to perform, latter could elect to treat contract as repudiated and sue for profits he would otherwise have realized; Shopbell v. Boyd, 9 Cal. App. 139, 140, 98 Pac. 70, holding where contract was procured by fraud, party could, on discovery of fraud, rescind contract or complete it and sue for damages.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 100 CALIFORNIA.

100 Cal. 1-6, 34 Pac. 490, **PEOPLE v. DOUGLASS.**

On Appeal, All Intendments are in favor of regularity of action of court below.

Approved in *People v. Russell*, 156 Cal. 458, 105 Pac. 419, though record is silent, it will not be presumed that court failed to notify accused of his right of challenge to juror; *People v. Boero*, 13 Cal. App. 689, 110 Pac. 526, affirming, though judgment-roll did not show defendant present at trial; *People v. Hatch*, 13 Cal. App. 527, 109 Pac. 1100, in absence of showing to contrary, it will not be presumed that defendant was not held to answer before finding of indictment; *People v. Sykes*, 10 Cal. App. 69, 101 Pac. 21, affirming, though minute order did not show that verdict was read to jury after its return into court; *Grunsky v. Field*, 1 Cal. App. 625, 82 Pac. 979, where it was stipulated that case should be submitted on record of former trial, objections taken on former trial could not be made basis for assignments of error.

Where Record Does not Show that accused objected to continuance, it will be presumed that he consented thereto.

Approved in *People v. Holmes*, 13 Cal. App. 216, 109 Pac. 491, and *People v. Bell* (Cal.), 36 Pac. 94, both reaffirming rule; *State v. Dewey*, 73 Kan. 740, 88 Pac. 881, continuance granted with defendant present and not objecting must be considered as made upon his application.

Right to Speedy Trial. See note, 85 Am. St. Rep. 193, 204.

100 Cal. 11-18, 34 Pac. 523, **WARNER v. WARNER.**

Defendant in Divorce Suit has right to change of venue to county where he resides.

Approved in *Usher v. Usher* (Cal.), 36 Pac. 8, reaffirming rule; *State v. Campbell*, 3 Cal. App. 604, 86 Pac. 841, sections 395 and 396, Code of Civil Procedure, apply to action by state to recover money from superintendent of state insane asylum.

Distinguished in *Cochrane v. McDonald*, 4 Cal. Prob. 538, denying change of venue, asked by some of defendants, to county where land affected was situated, where true basis of action was fraud.

Miscellaneous.—Cited in *Anderson v. Arpin Hardwood Lumber Co.*, 131 Wis. 41, 110 N. W. 792, change of venue refused because demand therefor not in proper form.

100 Cal. 26-30, 34 Pac. 636, SHANKLIN v. HALL.

Point That Conclusions of Law are not supported by findings should be raised upon direct appeal from judgment.

Reaffirmed in *Hayford v. Wallace* (Cal.), 46 Pac. 302.

Contract of Employment of Real Estate Broker must be in writing.

Approved in *Hicks v. Post*, 154 Cal. 28, 96 Pac. 880, refusing to enforce by estoppel oral extension of real estate broker's employment; *Beahler v. Clark*, 32 Ind. App. 226, 68 N. E. 614, real estate broker cannot recover on common count under oral employment; *Keith v. Smith*, 46 Wash. 134, 89 Pac. 474, part performance will not take such contract out of statute.

Necessity That Authority of Agent to Purchase or sell realty be written to enable him to recover compensation. See note, 9 L. R. A. (n. s.) 935.

100 Cal. 30-41, 34 Pac. 671, STORY & ISHAM COMMERCIAL CO. v. STORY.

Matters Growing Out of Same Transaction, constituting independent cause of action, may be set up as counterclaim.

Approved in *Potter v. Lohse*, 31 Mont. 97, 77 Pac. 420, judgment cannot be set off in action of conversion.

In Determining Propriety of Counterclaim, court will look both to complaint and answer.

Approved in *Excelsior Clay Works v. De Camp*, 40 Ind. App. 33, 80 N. E. 983, reaffirming rule; *Mixer v. Mixer*, 2 Cal. App. 230, 83 Pac. 274, permitting counterclaim for services in suit to compel defendant to leave plaintiff's house.

100 Cal. 41-42, 34 Pac. 675, STORY v. STORY & ISHAM COMMERCIAL CO.

Judgment is not Bar so long as time for appeal has not expired or it remains undetermined on appeal.

Reaffirmed in *Estate of Ricks*, 160 Cal. 473, 117 Pac. 541.

Disapproved in *Rodney v. Gibbs*, 184 Mo. 13, 82 S. W. 190, res judicata applies though judgment pending on appeal without supersedeas bond.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

100 Cal. 67-75, 34 Pac. 527, GRIBBLE v. COLUMBUS BREWING CO.

Semble, That President of Corporation empowered to execute mortgage cannot include therein terms not authorized by corporation.

Approved in *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 414, 117 Pac. 1045, authority to execute notes does not include authority to contract for payment of attorneys' fees.

Corporation is Bound by Contract which it led the other parties to believe its president had authority to execute and of which it accepted the benefits.

Approved in *Judell v. Goldfield Realty Co.*, 32 Nev. 359, 108 Pac. 458, reaffirming rule; *Brown v. Crown Gold Milling Co.*, 150 Cal. 387,

89 Pac. 91, corporation bound where majority of directors knew terms of employment and took no steps to disaffirm; *Rideout v. National Homestead Assn.*, 14 Cal. App. 352, 112 Pac. 193, ratification of contract made by organizers will not be presumed, even where corporation has received benefits, without proof of actual knowledge of contract; *Tilden v. Goldy Machine Co.*, 9 Cal. App. 13, 98 Pac. 40, corporation estopped by receipt of money from denying authority of its executive committee to indorse note; *West v. Will C. Prather & Co.*, 7 Cal. App. 83, 93 Pac. 893, evidence held sufficient to show that president of corporation had power to execute contract; *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 466, 84 Pac. 323, after having received benefit of attorney's services, corporation cannot avoid liability therefor on ground that employment is not set forth in its records; *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 397, 84 Pac. 325, board of directors held to have ratified appointment of superintendent by general manager, though not amount of compensation.

When Denials on Information and Belief are permissible. See note, 133 Am. St. Rep. 116.

Denials upon Information and Belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 773.

100 Cal. 75-78, 34 Pac. 622, **EASTON v. CRESSEY.**

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 62.

100 Cal. 78-81, 34 Pac. 521, **IN RE PINGREE.**

Public Administrator Does not, by Virtue of his office, acquire right to administer any particular estate.

Approved in *O'Rourke v. Harper*, 35 Mont. 350, 89 Pac. 66, sureties on second official bond of public administrator are not liable for his prior acts.

100 Cal. 84-87, 34 Pac. 623, **PEOPLE v. MORPHY.**

Opinions as to Value are not unlawful.

Approved in *Boasberg v. Walker*, 111 Minn. 448, 127 N. W. 468, denying recovery for statements of opinion as to value of alley.

100 Cal. 91-93, 34 Pac. 621, **MULKEY v. MULKEY.**

Right of Party Obtaining or Consenting to divorce to contest its validity. See note, 60 L. R. A. 299.

100 Cal. 93-100, 34 Pac. 625, **CEDERBERG v. ROBISON.**

Juries are Often Permitted to exercise their individual judgments as to values upon matters presumptively within their knowledge.

Approved in *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 715, 86 Pac. 832, allowing damages for death of practicing physician, though there was no evidence of his earnings.

Where Contract of Employment has been wrongfully terminated, plaintiff should not be allowed both contract price and outlay and cost of performance.

Approved in *Fitzhugh v. Mason*, 2 Cal. App. 223, 83 Pac. 283, refusing to consider earnings or expenses of plaintiff in absence of finding; *Holt v. United Security Life Ins. Co.*, 76 N. J. L. 600, 72

Atl. 307, 21 L. R. A. (n. s.) 691, where profits cannot be recovered for want of definite proof, expenditures fairly incurred may be allowed.

Loss of Profits as Element of Damages for breach of contract. See note, 53 L. R. A. 58, 74.

100 Cal. 100-105, 34 Pac. 627, **HITCHCOCK v. CARUTHERS.**

Vacating Satisfaction of Execution Because Title of purchaser fails. See note, 134 Am. St. Rep. 37.

100 Cal. 105-121, 34 Pac. 492, **PEOPLE ex rel. GERBERDING v. SUPERIOR COURT.**

Title of "Bank Commissioners' Act" sufficiently expresses subject.

Approved in *People v. Bank of San Luis Obispo*, 154 Cal. 202, 97 Pac. 310, upholding bank commission act of 1903 against similar objection; *State v. State Bank & Trust Co.*, 31 Nev. 467, 103 Pac. 409, title of act of 1907 creating bank commission sufficiently expresses subject.

When Title of Statute Embraces only one subject, and what may be included thereunder. See note, 79 Am. St. Rep. 457.

Constitutionality of Code Amendment or revision. See note, 86 Am. St. Rep. 274.

Constitutionality of Statutes Restricting Contracts and business. See note, 21 L. R. A. 790.

100 Cal. 121-140, 34 Pac. 630, **JACOBS v. SAN FRANCISCO.**

The Board of Supervisors has Power to fix water rates.

Approved in *Home Telephone etc. Co. v. Los Angeles*, 155 Fed. 567, holding that city council had power to fix telephone rates.

Establishment and Regulation of Municipal water supply. See note, 61 L. R. A. 100, 104.

Board of Supervisors Acts Judicially when fixing water rates.

Approved in *San Francisco Gas etc. Co. v. City and County of San Francisco*, 164 Fed. 888, *arguendo*.

Mandamus will not Lie to control discretion of officer or tribunal.

Approved in *Van Vleck v. Board of Dental Examiners (Cal.)*, 48 Pac. 225, refusing mandamus to compel board of dental examiners to indorse diploma from dental college as satisfactory.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 869.

Miscellaneous.—Cited in *Chesebrough v. San Francisco*, 153 Cal. 568, 96 Pac. 291, refusing to construe section 3608, Political Code, as exempting corporate stock from taxation.

100 Cal. 140-142, 34 Pac. 630, **PEOPLE v. GREENE.**

Discharge of Jury for Failure to agree will not support plea of once in jeopardy.

Approved in *People v. Ham Tong*, 155 Cal. 581, 132 Am. St. Rep. 110, 102 Pac. 264, 24 L. R. A. (n. s.) 481, where court wrongly decided that information charged robbery and jury convicted defendant thereof, defendant might, on reversal, be tried for larceny; *People v. Disperati*, 11 Cal. App. 474, 105 Pac. 619, court need not hear evidence or make findings on question whether jury could agree.

100 Cal. 142-149, 34 Pac. 637, MILLS v. FLETCHER.

One Holding Under Adverse Location of mining claim cannot urge failure to perform assessment work while he was in adverse possession.

Approved in *Madison v. Octave Oil Co.*, 154 Cal. 773, 99 Pac. 178, reaffirming rule.

Effect of Assessment Work on Mining Claim by one not owner of legal title. See note, 9 L. R. A. (n. s.) 1137.

In Action of Ejectment, cross-complaint to quiet defendant's title is unnecessary.

Approved in *Haight v. Tryon* (Cal.), 34 Pac. 714, where "cross-complaint" is virtually answer, its allegations are not admitted by failure to answer it; *McFarland v. Matthai*, 7 Cal. App. 600, 95 Pac. 180, demurrer properly sustained where land referred to in cross-complaint was not land described in complaint; *Miller & Lux v. Rickey*, 146 Fed. 578, in suit to enjoin diversion of water, cross-bill which merely alleges priority of right and diversion by complainant is demurrable; *Bacon v. Rice*, 14 Idaho, 113, 93 Pac. 512, *arguendo*.

Questioned in *Johnson v. Taylor*, 150 Cal. 208, 119 Am. St. Rep. 181, 88 Pac. 907, 10 L. R. A. (n. s.) 878, objection to cross-complaint in action to quiet title waived by failure to urge it in trial court.

Abandonment and Forfeiture of Mining Claims. See note, 87 Am. St. Rep. 406, 409, 412.

Relocation of Mining Claim as Abandoned or forfeited. See note, 68 L. R. A. 834.

100 Cal. 150-158, 34 Pac. 642, PEOPLE v. DEFOOR.

Conviction of Assault is Bar to Prosecution for mayhem committed during assault.

Approved in *State v. Wondra*, 114 Minn. 459, 131 N. W. 497, reaffirming rule; *People v. Bunkers*, 2 Cal. App. 204, 84 Pac. 368, one who gives bribe is not accomplice of one who receives it; *Floyd v. State*, 80 Ark. 96, 96 S. W. 126, former conviction of petit larceny bars prosecution for robbery based on same facts.

Distinguished in *People v. Ham Tong*, 155 Cal. 584, 132 Am. St. Rep. 110, 102 Pac. 265, 24 L. R. A. (n. s.) 481, where court wrongly decided that information charged robbery and jury so found, defendant might, after reversal, be tried for larceny on same facts.

Identity of Offenses on Plea of former jeopardy. See note, 92 Am. St. Rep. 105, 110, 140, 142.

100 Cal. 158-172, 34 Pac. 667, PHELAN v. SMITH.

Widow Takes Her Interest in community property subject to administration.

Approved in *Estate of Hayes*, 1 Cal. Prob. 553, minor child is entitled to homestead out of community property after widow has died and other children have attained majority.

Property of Intestate Vests in Heirs immediately upon his death.

Approved in *State v. Miller*, 149 Cal. 210, 85 Pac. 610, information for escheat begun less than five years after death of decedent is premature.

Deed of Widow Granting Her Interest in tract of land which was community property is subject to right of probate homestead in herself and minor child.

Approved in *McHarry v. Stewart* (Cal.), 35 Pac. 144, quare, whether deed of widow to probate homestead passed any title during existence of homestead; *Booth Mercantile Co. v. Murphy*, 14 Idaho, 219, 93 Pac. 779, where entire estate has been set apart for use of family, mortgage by widow encumbers only her interest therein.

Clause in Code Requiring Inventory to be filed within three months is directory.

Approved in *Estate of Graber*, 2 Cof. Prob. 345, court will not remove executors for failure to file inventory within precise time required, where failure resulted from negligence of counsel.

Court may Permit Filing of Second or further inventory.

Approved in *Estate of Douglass*, 4 Cof. Prob. 347, copy of inventory filed nunc pro tunc in place of original which was lost.

Homestead from Community Property should be set apart absolutely.

Approved in *Estate of Hessler*, 2 Cof. Prob. 356, 359, granting valuable homestead to widow though she was old and entitled to three-fourths of estate; *Estate of Hayes*, 1 Cof. Prob. 552, setting apart absolutely to minor child homestead from community property after widow had died and other children had attained majority.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 52, 72, 76.

Decree Setting Apart Homestead for the "use of the family" must be construed as referring to the wife and children.

Approved in *Estate of Miller*, 158 Cal. 423, 111 Pac. 257, refusing to set aside entire estate to widow under section 1469, Code of Civil Procedure, where she had abandoned decedent before his death.

What Constitutes a "Family" Under Homestead and exemption laws. See note, 4 L. R. A. (n. s.) 393.

Decree Setting Apart Probate Homestead cannot be collaterally attacked except for errors which render decree absolutely void.

Approved in *Hanley v. Hanley*, 4 Cof. Prob. 480, 483, reaffirming rule.

100 Cal 182-187, 38 Am. St. Rep. 271, 34 Pac. 646, **MONTGOMERY v. SAYRE.**

Duty Owed by Creditor to Surety. See note, 115 Am. St. Rep. 101.

100 Cal. 188-192, 38 Am. St. Rep. 276, 34 Pac. 649, **PEOPLE v. BAKER.**

Filing of Forged Instrument in recorder's office is sufficient uttering.

Reaffirmed in *People v. Driggs*, 12 Cal. App. 242, 108 Pac. 63, 14 Cal. App. 509, 112 Pac. 578.

Uttering of Forged Instrument. See note, 119 Am. St. Rep. 319.

Forgery of Worthless Instruments. See note, 24 L. R. A. 39.

100 Cal. 192-199, 34 Pac. 650, **HOVEY v. WALBANK.**

Where Property was Left to wife with absolute power of disposition and certain legacies were to be paid from money remaining at her death, she could deal with property as she saw fit.

Approved in *Dickey v. Barnstable*, 122 Iowa, 577, 98 N. W. 370, grant of power of sale of fee added to life estate is not inconsistent with remainder created by same deed.

100 Cal. 199-202, 34 Pac. 655, **AUSTIN v. DICK**.

Miscellaneous.—Cited in *Austin v. Dick* (Cal.), 34 Pac. 822, decided on authority of cited case.

100 Cal. 202-213, 38 Am. St. Rep. 279, 34 Pac. 614, **MITCHELL v. DONOHUE**.

In Reading Wills Courts will Supply obviously omitted words.

Approved in *Estate of Goetz*, 13 Cal. App. 295, 109 Pac. 492, holding that words "devise" and "legacy" were used interchangeably; *Pate v. Bushong*, 161 Ind. 550, 100 Am. St. Rep. 287, 69 N. E. 297, 63 L. R. A. 593, correcting error in legal subdivision in description of land.

Word "Leave" Prima Facie Means disposition by will.

Reaffirmed in *Estate of Hale*, 2 Cal. Prob. 205.

Judgment will not be Reversed for errors which could not have changed the result.

Approved in *Greene v. Murdock*, 1 Cal. App. 139, 81 Pac. 994, erroneous instructions not prejudicial to plaintiff where, under pleadings and evidence, he should have been nonsuited.

What Constitutes a Testamentary Writing. See note, 89 Am. St. Rep. 490; 5 Cal. Prob. 13.

Essentials of Holographic Wills. See note, 87 Am. St. Rep. 98.

Holographic Wills. See notes, 104 Am. St. Rep. 26; 1 Cal. Prob. 436.

100 Cal. 214-221, 34 Pac. 654, 849, **BAKER v. BUCHER**.

Action Against Sheriff for False Return is action for breach of official duty.

Approved in *Hooper v. McDade*, 1 Cal. App. 736, 82 Pac. 1117, sheriff not bound to state in his return amount of deficiency on sale of mortgaged premises.

Admissibility of Evidence of Officer's Return. See note, 129 Am. St. Rep. 851.

100 Cal. 227-231, 34 Pac. 718, **PEOPLE v. WELLS**.

Opinion upon Merits Disqualifies Juror.

Approved in *People v. Riggins*, 159 Cal. 118, 112 Pac. 864, challenge based upon belief that defendant was guilty of murder of which he had been acquitted should have been allowed; *People v. Helm*, 152 Cal. 537, 93 Pac. 102, to relieve juror from disqualification, it must affirmatively appear that his opinion is based entirely on public rumor or statements in newspapers.

Distinguished in *People v. Loper*, 159 Cal. 9, 112 Pac. 721, where source of juror's opinion appears to be mere public rumor, it need not be affirmatively shown that persons with whom he spoke were not witnesses.

Where Evidence as to Bias of Juror is conflicting, decision of trial court is conclusive.

Reaffirmed in *People v. Riggins*, 159 Cal. 117, 112 Pac. 864.

100 Cal. 234-236, 34 Pac. 676, **POWELL v. PATISON**.

Absolute Deed of Trust Passes unconditional title to trustee for purposes of trust.

Approved in *Savings etc. Society v. Burnett* (Cal.), 37 Pac. 184, after grantor in trust deed had paid debt secured thereby and had

conveyed to third person, such deed was not security for further advances to him; In re Jersey Island Packing Co., 138 Fed. 626, 71 C. C. A. 75, 2 L. R. A. (n. s.) 560, where corporation executed trust deeds of all its property to secure debts not then due, it retained interest which passed to its trustee in bankruptcy.

Questioned in Brown v. Comonow, 17 N. D. 88, 114 N. W. 729, semble, that instrument in suit was not intended as trust deed.

100 Cal. 236-239, 34 Pac. 677, POWELL v. PATISON.

Mortgage of Homestead by Husband Alone is void, and does not become valid by premises losing their homestead character.

Approved in Loomis v. Loomis, 148 Cal. 154, 82 Pac. 681, 1 L. R. A. (n. s.) 312, deed of homestead by husband to wife in trust conveyed nothing; Bushnell v. Loomis, 234 Mo. 395, 137 S. W. 264, setting aside mortgage of homestead where wife was mentally incapacitated.

Personal Judgment cannot Properly be rendered on promissory note secured by deed of trust until security has been exhausted.

Approved in Herbert Craft Co. v. Bryan (Cal.), 68 Pac. 1021, reaffirming rule; Hibernia Savings etc. Society v. Thornton, 127 Cal. 577, 60 Pac. 37, clause in note to effect that it is secured by mortgage changes nature of obligation.

100 Cal. 240-246, 34 Pac. 666, HOLLAND v. SOUTHERN PACIFIC CO.

Evidence of Single Act of Negligence by locomotive engineer is not proof of negligence in retaining him in employment.

Approved in Wicklund v. Saylor Coal Co., 119 Iowa, 338, 93 N. W. 306, one supposed act of negligence by engineer at mine held insufficient to show negligence in employing him.

Distinguished in Conover v. Neher-Ross Co., 38 Wash. 175, 107 Am. St. Rep. 841, 80 Pac. 282, proof of two negligent acts of stationary engineer held sufficient proof of negligence in retaining him.

Evidence of Specific Instances to Prove Character. See note, 14 L. R. A. (n. s.) 696, 759, 761, 765.

Duty of Master With Respect to Employment of his servants. See note, 48 L. R. A. 384, 385.

Liability of Master for Injuries to servant by incompetency of fellow-servant. See note, 25 L. R. A. 716.

What Servants Deemed to be in Common Employment, apart from statutes, where no questions as to vice-principalship arise. See note, 50 L. R. A. 465.

100 Cal. 256-259, 34 Pac. 677, CLARK v. COLLIER.

Where Installments in Building Contract were payable on completion of building, they cannot be recovered where building was destroyed by fire before completion.

Approved in O'Brien v. Garibaldi, 15 Cal. App. 522, 115 Pac. 251, order directing owner to pay specific sum to subcontractor not binding on owner where original contractor did not earn payments by completing building.

Distinguished in Hogan v. Globe Mut. Bldg. & Loan Assn. (Cal.), 71 Pac. 707, holding words "payable upon completion of the house," in acceptance of order for lumber, simply fixed time of payment and order was binding though house burned before completion.

Right of Building Contractor to Recover for substantial performance of contract. See notes, 134 Am. St. Rep. 690; 24 L. R. A. (n. s.) 346.

100 Cal. 260-264, 34 Pac. 678, **HIGGINS v. COLE.**

Term of Office not Fixed by Constitution or declared by law continues only during pleasure of appointing power.

Approved in *Wright v. Gamble*, 136 Ga. 380, 71 S. E. 797, in such case appointee holds at pleasure of appointing power, though it attempts to fix definite term.

100 Cal. 265-267, 34 Pac. 707, **BOYNE v. RYAN.**

Mandamus will not Lie to control general course of official action.

Approved in *People v. Busse*, 238 Ill. 599, 87 N. E. 842, refusing mandamus against mayor of city to enforce statute imposing fine for selling liquor on Sunday against proprietor of certain saloons.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 870.

100 Cal. 268-276, 34 Pac. 716, **COUNTY OF EL DORADO v. MEISS.**

County cannot Discriminate Against Nonresidents in matter of license tax for carrying on business.

Approved in *Los Angeles v. Lankershim*, 160 Cal. 802, 118 Pac. 216, city license tax upon business of conducting office building containing more than designated number of rooms is invalid.

Miscellaneous.—Cited in *County of Plumas v. Wheeler*, 149 Cal. 766, 87 Pac. 912, ordinance imposing license fee of ten cents for each sheep or lamb is not revenue measure, as matter of law.

100 Cal. 276-282, 38 Am. St. Rep. 287, 34 Pac. 775, **WREN v. WREN.**

Husband and Wife may Agree that earnings of wife shall be her separate property.

Approved in *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 719, 103 Pac. 194, upholding agreement between husband and wife that all community property should be separate property of wife; *Bondy v. American Transfer Co.*, 15 Cal. App. 749, 115 Pac. 966, business held to be separate property of wife under antenuptial agreement; *Larson v. Larson*, 15 Cal. App. 535, 115 Pac. 342, holding money earned by wife from business conducted in her own name without interference of her husband was her separate property.

100 Cal. 282-292, 38 Am. St. Rep. 290, 34 Pac. 720, 852, **ELLEDGE v. NATIONAL CITY ETC. RY. CO.**

Master is Liable for Injury to servant caused by falling of cliff, unsafe condition of which was not obvious to servant but known to master.

Approved in *Bone v. Ophir Silver Min. Co.*, 149 Cal. 294, 86 Pac. 685, master held liable for injury to servant caused by failure to inform him of unexploded charges of powder in mine; *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 683, 84 Pac. 260, master liable for injury to servant from fall of untimbered mine roof, caused by action of percolating water; *Martin v. Des Moines Edison L. Co.*, 131 Iowa, 731, 106 N. W. 361, master liable for death of servant from electric shock while engaged in making alterations in electric

switchboard; *Fisher v. Chesapeake etc. R. R. Co.*, 104 Va. 641, 52 S. E. 375, 2 L. R. A. (n. s.) 954, railroad company must use ordinary care to guard against obstructions caused by landslides or rocks falling from adjoining banks.

Knowledge as Element of Employer's Liability. See note, 41 L. R. A. 117, 134.

Exclamation of Roadmaster at Time of accident to subordinate that he expected it is admissible as part of *res gestae*.

Approved in *Bundy v. Sierra Lumber Co.*, 149 Cal. 778, 87 Pac. 624, admitting request of section foreman that trestle be repaired.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 38, 77, 98.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 607.

Servant's Assumption of Risk from Latent Danger or defect. See note, 17 L. R. A. (n. s.) 81.

Delegability of Master's Duty to Instruct or warn servants. See note, 26 L. R. A. (n. s.) 634.

100 Cal. 293-301, 34 Pac. 777, **ASEVADO v. ORR.**

Plaintiff in Injunction Suit is not liable in damages without proof of malice and want of probable cause.

Reaffirmed in *Doyle v. Sandpoint*, 18 Idaho, 657, 112 Pac. 205, and *Krzeszke v. Kamin*, 163 Mich. 296, 128 N. W. 193.

Fact That Plaintiff Dismissed Action is not admission that he had no probable cause of action.

Approved in *Hurgren v. Mutual Life Ins. Co. (Cal.)*, 69 Pac. 615, denying recovery where civil action was instituted three times, but dismissed without trial; *Cohn v. Saidel*, 71 N. H. 570, 53 Atl. 806, fact that nonsuit was taken will not support finding of want of probable cause in action for malicious prosecution.

Voluntary Dismissal of Action for injunction is equivalent to denial of injunction.

Approved in *Quinn v. Baldwin Star Coal Co.*, 19 Colo. App. 504, 76 Pac. 554, such dismissal does not affect liability for attorneys' fees incurred prior thereto.

Demurrer Lodged Against Complaint generally is properly overruled if any count thereof is good.

Approved in *Bonham Nat. Bank v. Grimes Pass P. M. Co.*, 18 Idaho, 636, 111 Pac. 1080, reaffirming rule.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 470.

Miscellaneous.—Cited in *Dongal v. Eby*, 11 Idaho, 798, 85 Pac. 104, error to enter judgment summarily against sureties on dissolution of injunction.

100 Cal. 302-309, 34 Pac. 961, **SCHMITT v. SAN FRANCISCO.**

Conveyance of Entire Block of Land without reference to *cul-de-sac* constitutes revocation of offer to dedicate latter, in absence of estoppel.

Approved in *Myers v. Oceanside*, 7 Cal. App. 92, 93 Pac. 688, offer of dedication for park purposes revoked by filing of map showing land subdivided into building lots.

Books of Assessor cannot Show acceptance of offer to dedicate.

Approved in *Myers v. Oceanside*, 7 Cal. App. 94, 94 Pac. 689, reaffirming rule.

Leaving Blank in Plat as Dedication. See note, 28 L. R. A. (n. s.) 813.

100 Cal. 310-316, 34 Pac. 714, **CLYNE v. BENICIA WATER CO.**

Conveyance of Land Passes Water rights appurtenant thereto at time of conveyance.

Reaffirmed in *Josslyn v. Daly*, 15 Idaho, 145, 96 Pac. 570.

Whether Water Right Used in Connection with land mortgaged prior to its acquirement passes on foreclosure. See note, 15 L. R. A. (n. s.) 361.

100 Cal. 316-321, 34 Pac. 711, **SOUTHERN CALIFORNIA MOTOR ROAD CO. v. SAN BERNARDINO NAT. BANK.**

Miscellaneous.—Cited in *Southern California etc. Road Co. v. Merrill* (Cal.), 34 Pac. 712.

100 Cal. 322-328, 38 Am. St. Rep. 296, 34 Pac. 722, **KEYES v. CYRUS.**

Probate Homestead Set Apart for widow is exempt from her debts as well as those of her deceased husband.

Approved in *Weaver v. First Nat. Bank of Chicago*, 76 Kan. 542, 123 Am. St. Rep. 155, 94 Pac. 273, 16 L. R. A. (n. s.) 110, homestead character, once attached, may persist for benefit of sole surviving member of family.

Object of Homestead Law is to Protect Family in right to preserve their home.

Approved in *Bell v. Bell*, 2 Cal. App. 340, 83 Pac. 815, widow to whom family allowance has been paid is not liable to children after they have attained their majority; *Estate of Hayes*, 1 Cal. Prob. 553, setting apart homestead to minor child, widow having died and other children having attained majority.

Headings are Portion of Statute, and may be examined to determine legislative intent.

Approved in *Bettencourt v. Sheehy*, 167 Cal. 702, 109 Pac. 91, defining word "retail" in statute by reference to marginal note in Political Code; *In re Wisner*, 36 Mont. 308, 92 Pac. 960, applying rule to portion of Penal Code relating to frauds in corporate management.

100 Cal. 328-334, 34 Pac. 698, **PEOPLE v. MITCHELL.**

Admissibility of Confession or Admissions of third persons in criminal cases. See note, 131 Am. St. Rep. 787.

100 Cal. 336-338, 34 Pac. 775, **BLACKBURN v. NELSON.**

In Attempting to Trace Description on ground, court should follow footsteps of surveyor rather than take reverse course.

Approved in *Birk v. Hodgkins*, 159 Cal. 580, 114 Pac. 824, following calls of description in their order.

Distinguished in *Davies v. Wickstrom*, 56 Wash. 159, 134 Am. St. Rep. 1100, 105 Pac. 456, refusing to apply rule in view of construction of description by parties upon the ground.

100 Cal. 339-343, 34 Pac. 822, McCLURE v. McCLURE.

Compromise of Utterly Unfounded Claim is not valid consideration.

Approved in *Union Collection Co. v. Buckman*, 150 Cal. 163, 164, 119 Am. St. Rep. 164, 88 Pac. 710, 9 L. R. A. (n. s.) 568, compromise of claim on promissory notes given for gambling debt is not sufficient consideration for new notes.

Void, Invalid, or Unfounded Claim as subject of valid compromise. See note, 25 L. R. A. (n. s.) 287, 299, 300.

100 Cal. 344-345, 34 Pac. 830, WILL v. LYTLE CREEK WATER CO.

Showing Held Sufficient to Justify setting aside default.

Approved in *Stretch v. Montezuma Mining Co.*, 29 Nev. 169, 86 Pac. 447, setting aside default against foreign corporation which did not learn of service of summons till ten days after entry of default.

100 Cal. 345-347, 34 Pac. 825, IN RE WERINGER.

Husband is Primarily Liable for wife's funeral expenses.

Approved in *Kenyon v. Brightwell*, 120 Ga. 612, 48 S. E. 126, and *Stonesifer v. Shriver*, 100 Md. 30, 59 Atl. 141, both reaffirming rule; *Butterworth v. Teale*, 54 Wash. 16, 102 Pac. 769, wife is liable for funeral expenses of husband.

Distinguished in *Skillman v. Wilson*, 146 Iowa, 604, 125 N. W. 345, under statute, estate of deceased wife is primarily liable for her funeral expenses.

Liability of Decedent's Estate for funeral expenses. See note, 33 L. R. A. 662.

Liability of Separate Estate of Wife for her funeral expenses. See note, 6 L. R. A. (n. s.) 917.

Cost of Monument and Funeral Expenses may be allowed from estate of decedent.

Approved in *Estate of Hessler*, 2 Cal. Prob. 358, 362, refusing, under circumstances, to allow more than was absolutely necessary properly to mark grave of deceased.

Items and Amounts Allowable as Funeral Expenses against deceased's estate. See note, 28 L. R. A. (n. s.) 573.

100 Cal. 348-352, 34 Pac. 819, ELECTRIC LIGHT & POWER CO. v. SAN BERNARDINO.

Contract for Lighting Streets is not contract for "street work."

Reaffirmed in *Tanner v. Auburn*, 37 Wash. 40, 79 Pac. 494.

100 Cal. 352-359, 34 Pac. 826, PEOPLE v. WIEGER.

Necessity of Claiming Constitutional Protection against self-incrimination. See note, 4 L. R. A. (n. s.) 1145.

Miscellaneous.—Cited in *State v. Jackson*, 128 Iowa, 546, 105 N. W. 53, guilt or innocence of accused is not determined by motives of witnesses for state.

100 Cal. 359-366, 34 Pac. 820, WAGNER v. SUPERIOR COURT.

Writ of Prohibition. See note, 111 Am. St. Rep. 946, 947.

100 Cal. 367-370, 34 Pac. 852, PEOPLE v. KINDELBERGER.

It is Error for Judge to Inform Jury that he is utterly at a loss to know why twelve honest men cannot agree on verdict.

Approved in *People v. Conboy*, 15 Cal. App. 99, 103, 113 Pac. 703, 705, error for court to say "that there is no reason why twelve honest, intelligent, reasonable men should not reach a conclusion in this case"; *Bishop v. State*, 73 Ark. 573, 84 S. W. 709, error for judge to say to jury that, if they could not agree upon punishment, they might leave that to be fixed by him; *State v. Chambers*, 9 Idaho, 685, 75 Pac. 278, error for court to remind jury of great expense of trial to county and to say that case did not involve much difficulty; *State v. Yates*, 99 Minn. 467, 109 N. W. 1072, reversing where charge was argumentative and gave undue prominence to testimony of particular witnesses; *State v. Thield*, 36 Wash. 367, 78 Pac. 920, reversing where judge stated that it seemed a very clear case and that he could not see why jury should hesitate.

Distinguished in *People v. Miles*, 143 Cal. 638, 77 Pac. 667, not error for judge to remind jury of great expense that would be incurred by a retrial.

100 Cal. 370-372, 34 Pac. 853, PEOPLE v. HANDLEY.

In Information for Arson, ownership of house burned is immaterial if it is otherwise sufficiently described.

Approved in *People v. Lavery*, 9 Cal. App. 759, 100 Pac. 901, reaffirming rule; *People v. Hutchings*, 8 Cal. App. 554, 97 Pac. 327, allegation in indictment for grand larceny of steer that it was taken from possession of owner is surplusage.

100 Cal. 372-374, 34 Pac. 861, THELIN v. STEWART.

Cause of Action for Injury to Person is improperly united with separate cause of action for subsequent injury to property.

Approved in *Estate of Goodspeed*, 2 Cal. Prob. 151, charges of fraud and duress, in will contest, should be separately stated.

100 Cal. 376-378, 34 Pac. 867, IN RE BERGIN.

That Part of Code of Civil Procedure entitled "Probate of Foreign Wills" must prevail over all conflicting provisions.

Approved in *State v. Campbell*, 3 Cal. App. 605, 86 Pac. 841, sections of Code of Civil Procedure as to venue must prevail over Political Code as to action to recover official moneys from superintendent of state insane asylum.

100 Cal. 379-391, 34 Pac. 856, PEOPLE v. LANE.

Evidence of Subsequent Shooting by defendant held inadmissible as part of *res gestae* or to show motive or intention.

Approved in *State v. Kelly*, 77 Conn. 273, 58 Atl. 707, rejecting statement of person upon finding dead chickens that they had been poisoned.

Evidence of Distinct Offense is Inadmissible unless there is some logical connection between the two offenses.

Approved in *People v. Glass*, 158 Cal. 679, 112 Pac. 287, in prosecution for bribery to prevent granting of telephone franchise, evidence of efforts by accused to prevent granting of similar franchise in neighboring city is inadmissible; *People v. Cook*, 148 Cal. 341, 83 Pac. 47, evidence of criminal relations between accused and his daughter is admissible in connection with proof that deceased had been paying attentions to daughter; *People v. Edwards*, 13 Cal. App. 553, 110 Pac.

343, in trial for rape of child, evidence of subsequent rape committed by companion of defendant upon same child is inadmissible; *State v. Williams*, 36 Utah, 281, 103 Pac. 253, in trial for rape of child, evidence of defendant's statement that he had committed similar offense with other children is inadmissible.

Distinguished in *People v. Grow*, 16 Cal. App. 149, 116 Pac. 370, evidence that accused was striker and prosecuting witness nonunion man is admissible in trial for assault with intent to murder.

Evidence of Other Crimes in Criminal Cases. See note, 62 L. R. A. 313.

Evidence of Motive may be Admitted to prove intent.

Approved in *Lo Toon v. Territory*, 16 Haw. 356, admitting evidence of illicit relations between accused and wife of prosecuting witness.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 471.

100 Cal. 391-400, 34 Pac. 863, ESTATE OF FLINT.

Evidence of Physician That He Prescribed to decedent for mental trouble is inadmissible.

Approved in *Murphy v. Board of Police etc. Commrs.*, 2 Cal. App. 470, 83 Pac. 577, refusing to permit wife of decedent to introduce evidence of his communications with his physician; *Trull v. Modern Woodmen*, 12 Idaho, 323, 85 Pac. 1082, applicant for life insurance held to have waived privilege by express provision contained in application.

Expert Opinions as to Sanity or Insanity. See note, 39 L. R. A. 321.

Heir cannot Waive Privilege attached to communications from deceased to his physician.

Approved in *Auld v. Cathro*, 20 N. D. 470, 472, 128 N. W. 1028, 1029, 32 L. R. A. (n. s.) 71, privilege is personal and cannot be waived by heirs or personal representatives.

Evidence of Illicit Relations of decedent with his future wife nine years prior to execution of will is not evidence of her undue influence over such execution.

Approved in *Fulton v. Freeland*, 219 Mo. 515, 131 Am. St. Rep. 576, 118 S. W. 18, reaffirming rule.

Undue Influence Invalidating Wills. See note, 2 Cof. Prob. 95.

Insane Delusions. See note, 1 Cof. Prob. 251.

Contest Arising upon Probate of will is civil action within meaning of subdivision 4 of section 1881, Code of Civil Procedure.

Distinguished in *Estate of Harris*, 3 Cof. Prob. 5, will contest is special proceeding and not subject, except as to mode of trial, to provisions of Code of Civil Procedure concerning civil action.

Miscellaneous.—Cited in *Estate of Goodspeed*, 2 Cof. Prob. 151, one charged in pleading with conspiracy is entitled to names of alleged conspirators.

100 Cal. 400-404, 34 Pac. 865, ESTATE OF COUTS.

By Proper Publication of Order to show cause, all persons interested in order of sale are brought within jurisdiction of court.

Approved in *Dane v. Layne*, 10 Cal. App. 370, 101 Pac. 1069, such order cannot be collaterally attacked by heirs and persons claiming interest in land.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 338.

100 Cal. 404-408, 34 Pac. 869, FINNERTY v. PENNIE.

Superior Court Sitting in Probate has jurisdiction to determine every matter necessary or proper in the proceeding.

Approved in *In re Burton*, 5 Cal. Prob. 238, refusing to review probate proceedings before court of another county.

Allowance to Administrator for Interest on disbursements. See note, 5 Cal. Prob. 396.

100 Cal. 408-413, 38 Am. St. Rep. 301, 34 Pac. 959, LOWE v. WOODS. Conditional Sale is Valid.

Approved in *Liver v. Mills*, 155 Cal. 462, 101 Pac. 300, bona fide purchaser from vendee acquires no superior right.

Miscellaneous.—Cited in *Lowe v. Woods* (Cal.), 40 Pac. 1047, same case on subsequent appeal.

100 Cal. 419-425, 38 Am. St. Rep. 305, 35 Pac. 302, PEOPLE v. GLENN COUNTY.

Motives Which Induce Legislative Action are not subject of judicial inquiry.

Approved in *Lukens v. Nye*, 156 Cal. 505, 105 Pac. 596, agreement between governor and beneficiary, under appropriation act, by which beneficiary promised to accept less than full amount, is invalid.

Act Creating New County is not with constitutional prohibition against special legislation.

Approved in *Wheeler v. Herbert*, 152 Cal. 228, 233, 92 Pac. 355, 357, county boundary lines may be changed by special act.

Allegations of Fraud Should Contain Facts sufficient to constitute fraud.

Approved in *Estate of Harris*, 3 Cal. Prob. 14, allegation that will of decedent was absolutely overpowered by lies and misrepresentations of another is insufficient.

100 Cal. 429-434, 34 Pac. 1089, HENKE v. EUREKA ENDOWMENT ASSN.

Complaint Which Sets Up Written Contract need not allege consideration.

Approved in *Younglove v. Cunningham* (Cal.), 43 Pac. 755, holding appeal which disputed rule to be frivolous; *Noyes v. Young*, 32 Mont. 236, 79 Pac. 1065, rule applies to instrument acknowledging indebtedness and promising to pay it.

Matters of Inducement Do not Render complaint ambiguous.

Approved in *Matthews v. Coate*, 17 Idaho, 629, 106 Pac. 991, court need not make findings on matters of inducement.

100 Cal. 437-442, 34 Pac. 1080, PEOPLE v. CHUEY YING GIT.

On Information for Robbery it is unnecessary to specify value of property taken.

Approved in *State v. La Chall*, 28 Utah, 83, 77 Pac. 4, amendment inserting words descriptive of value in indictment for robbery is not prejudicial.

Nature and Elements of Crime of Robbery. See note, 135 Am. St. Rep. 481.

100 Cal. 442-446, 34 Pac. 1082, COUNTY OF SAN LUIS OBISPO v. PETTIT.

County Treasurer Held Estopped by his statement that he had received certain moneys from license tax collector.

Distinguished in County of San Luis Obispo v. Farnum, 108 Cal. 566, 41 Pac. 446, sureties on county auditor's bond are not liable for license tax moneys paid to him, but which should have been paid directly to treasurer; Shelton v. Cooksey, 138 Mo. App. 394, 122 S. W. 333, recital in deed that purchase price has been paid may be contradicted to prejudice of attaching creditor.

100 Cal. 446-454, 34 Pac. 1085, COLLINS v. SCOTT.

Heirs of Mortgagor are not necessary parties to action of foreclosure.

Reaffirmed in McClung v. Cullison, 15 Okl. 408, 82 Pac. 500.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 44.

100 Cal. 454-459, 35 Pac. 75, KENYON v. WESTERN UNION TEL. CO.

Negligence of Telegraph Company Causing Discontinuance of contract terminable at pleasure of other party thereto, as actionable. See note, 29 L. R. A. (n. s.) 892.

Damages for Loss of Appointment as deputy assessor are too speculative to be recovered.

Approved in Pacific-Union Club v. Commercial etc. Assur. Co., 12 Cal. App. 509, 107 Pac. 731, loss by fire, where earthquake cut off water supply, is not loss caused directly or indirectly by earthquake; Western Union Tel. Co. v. Adams Machine Co., 92 Miss. 856, 47 So. 413, denying recovery for nondelivery of telegram resulting in loss of opportunity to make proposed contract.

100 Cal. 459-465, 34 Pac. 1078, PEOPLE v. WELLS.

It is Error for Prosecuting Attorney knowingly to ask defendant questions calling for inadmissible testimony in order to prejudice jury.

Approved in People v. Wong Loung, 159 Cal. 525, 114 Pac. 831, reversing where wife of juror read to him newspaper article accusing defendant of other crimes; People v. Amer, 151 Cal. 309, 90 Pac. 700, misconduct of district attorney cannot be considered on motion for new trial; People v. Pang Sui Lin, 15 Cal. App. 263, 114 Pac. 584, in joint prosecution for robbery, prejudicial error for district attorney to ask questions intimating that one of defendants had been guilty of other crimes, though court admonished jury; People v. McCarthy, 14 Cal. App. 150, 111 Pac. 275, refusing to reverse for voluntary testimony of witness for state, not responsive to district attorney's question and stricken out on his motion; People v. Grider, 13 Cal. App. 712, 714, 110 Pac. 590, 591, reversing where district attorney persistently asked questions which he knew called for inadmissible testimony, and argued facts of case whenever defendant objected; People v. Davenport, 13 Cal. App. 643, 110 Pac. 322, reversing where district attorney intimated that defendant was guilty of another offense; State v. Irwin, 9 Idaho, 40, 71 Pac. 609, 60 L. R. A. 716, reversing where prosecuting attorney asked questions intimating

that accused was guilty of other similar offenses; *State v. Roscum*, 119 Iowa, 333, 93 N. W. 296, repeated efforts of prosecuting attorney to introduce evidence of defendant's guilt of other offenses are ground for reversal; *State v. Rogers*, 31 Mont. 8, 77 Pac. 296, reversing where district attorney asked improper questions tending to degrade witness for defense; *Leo v. State*, 63 Neb. 732, 89 N. W. 306, error for prosecuting attorney repeatedly to ask questions intimating that accused had been previously arrested and convicted of other offenses.

Distinguished in *People v. Bradbury*, 151 Cal. 679, 91 Pac. 498, refusing to reverse where district attorney asked one improper question for which he was severely reprimanded; *People v. Davis*, 1 Cal. App. 12, 81 Pac. 718, reference by prosecuting attorney to presence of defendant's relatives in courtroom held not prejudicial error; *Dimmick v. United States*, 135 Fed. 270, 70 C. C. A. 141, refusing to reverse where alleged improper questions were asked in good faith.

100 Cal. 466-478, 35 Pac. 80, PEOPLE v. GALLAGHER.

Defendant can be Cross-examined only as to those matters about which he was examined in chief, but as to those matters he may be cross-examined as fully as any other witness.

Approved in *People v. Martin*, 13 Cal. App. 107, 108 Pac. 1038, reaffirming rule; *People v. Soeder*, 150 Cal. 20, 87 Pac. 1020, where defendant denied that he was guilty of murder, it was proper cross-examination to ask him where he was at time murder was alleged to have occurred; *People v. Dole (Cal.)*, 51 Pac. 945, where defendant had testified that he had won forged check at cards, it was proper cross-examination to ask him whether he had stated that fact to police officers; *People v. Maughs*, 8 Cal. App. 117, 118, 96 Pac. 412, permitting inquiry into all pertinent circumstances connected with killing; *People v. Oliver*, 7 Cal. App. 604, 95 Pac. 174, defendant may be asked upon cross-examination whether he has ever been convicted of felony; *People v. Schmitz*, 7 Cal. App. 360, 94 Pac. 415, reversing where cross-examination was allowed to extend beyond matters testified to in chief; *People v. Zimmerman*, 3 Cal. App. 90, 84 Pac. 449, defendant who swears to alibi may be cross-examined as to alleged criminal transactions; *Lewis v. Territory*, 7 Ariz. 57, 60 Pac. 696, defendant, who has testified as to circumstances of crime, cannot be compelled to testify as to whether he has been convicted of other felonies.

Embezzlement. See note, 87 Am. St. Rep. 21, 22, 30, 35.

Embezzlement as Affected by Want of Authority to receive money or property in first instance. See note, 17 L. R. A. (n. s.) 534.

100 Cal. 478-484, 35 Pac. 84, PEOPLE v. CROWLEY.

Defendant in Criminal Action may be asked on cross-examination whether he has been convicted of a felony.

Reaffirmed in *People v. Walker*, 15 Cal. App. 405, 114 Pac. 1011.

Distinguished in *Lewis v. Territory*, 7 Ariz. 58, 60 Pac. 696, in absence of special statutory authority, such question cannot be asked

Cross-examination as Proper Mode of Proving conviction of crime for purposes of impeachment. See note, 30 L. R. A. (n. s.) 851.

100 Cal. 484-493, 35 Pac. 144, MULCAHY v. BUCKLEY.

Defendant cannot Deny on Information and belief where he is presumed to have knowledge or the means of knowledge.

Approved in *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 375, 105 Pac. 131, denial of nonpayment on information and belief is insufficient; *Hewel v. Hogin*, 3 Cal. App. 254, 84 Pac. 1004, 1006, denial by treasurer of irrigation district, on information and belief, that coupons were ever signed by secretary, is insufficient; *Mendocino County v. Peters*, 2 Cal. App. 28, 82 Pac. 1123, denial on information and belief of publication in newspaper and of proceedings of board of supervisors is insufficient.

Matter of Public Record cannot be Denied on information and belief.

Approved in *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 433, 114 Pac. 1030, *Peacock v. United States*, 125 Fed. 587, 60 C. C. A. 389, and *Sumpter v. Burnham*, 51 Wash. 600, 99 Pac. 753, all reaffirming rule.

When Denials on Information and Belief are permissible. See note, 133 Am. St. Rep. 107, 109.

Denials upon Information and Belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 780.

Right to Attorneys' Fees is Incidental to judgment establishing mechanic's lien.

Approved in *Hampton v. Christensen* (Cal.), 84 Pac. 204, amount of attorneys' fees is within discretion of trial court; *Armijo v. Mountain Elec. Co.*, 11 N. M. 249, 67 Pac. 730, amount can be fixed by trial court irrespective of amount mentioned in complaint.

100 Cal. 493-496, 35 Pac. 87, LOVEREN v. LOVEREN.

Wife is not Entitled to Allowance for past expenses of divorce action except where payment is necessary to enable wife further to prosecute or defend.

Approved in *Sheppard v. Sheppard*, 15 Cal. App. 618, 115 Pac. 753, reaffirming rule; *Stewart v. Stewart*, 156 Cal. 655, 105 Pac. 957, before expenses of summoning witnesses and taking depositions will be allowed, necessity therefor must be shown; *Bordeaux v. Bordeaux*, 29 Mont. 483, 75 Pac. 361, fact that court reserved right to make allowance after trial does not show necessity therefor; *Leak v. Leak*, 156 Fed. 477, 84 C. C. A. 284, court has no power to allow wife cost of depositions previously taken by her.

100 Cal. 496-500, 35 Pac. 431, DOUGHERTY v. BARTLETT.

Where Executors are Also Trustees of residue of estate, court of equity cannot enforce accounting pending administration.

Approved in *In re Burton*, 5 Cal. Prob. 238, superior court of one county will not review orders in probate of superior court of another county; *Roach's Estate*, 50 Or. 188, 92 Pac. 122, where executor gave no undertaking as trustee and did not secure his discharge as executor, county court still had jurisdiction to compel final accounting.

100 Cal. 500-504, 35 Pac. 146, PORTER v. ARROWHEAD RESERVOIR CO.

Failure to Make Payments upon first of each month for proportion of work completed is substantial breach.

Approved in *Alderson v. Houston*, 154 Cal. 13, 96 Pac. 889, land owner, who contracted to give brokers exclusive right to sell land for

eighteen months, broke contract when he permitted land to become encumbered with bond liens for street work; *Beck v. Schmidt*, 13 Cal. App. 451, 110 Pac. 456, contractors for grading could sue on quantum meruit where defendant failed to make payments required by contract; *Harris Lumber Co. v. Wheeler Lumber Co.*, 88 Ark. 497, 115 S. W. 171, in contract for sale of several carloads of lumber, failure to pay for any one carload is breach of contract.

Distinguished in *Fairchild-Gilmore-Walton Co. v. Southern Refining Co.*, 158 Cal. 274, 110 Pac. 955, one who contracted to sell asphalt on monthly deliveries and payments could not rescind for failure to make timely payments where it had not insisted on same and was itself delinquent.

Right of Contractor to Sue on Quantum Meruit upon breach of construction contract by other party. See note, 13 L. R. A. (n. s.) 448.

Recovering for Services and Expenses under running contract with corporation ended by its insolvency and dissolution. See note, 69 L. R. A. 128.

100 Cal. 505-511, 35 Pac. 73, **PATCHETT v. PACIFIC COAST RY. CO.**

Who may Plead Statute of Limitations. See note, 104 Am. St. Rep. 751.

100 Cal. 511-514, 35 Pac. 88, **MURRAY v. GLEASON.**

Summons must be Served within reasonable time.

Approved in *Castro v. San Francisco (Cal.)*, 35 Pac. 1035, court may dismiss action for inexcusable delay of two years in serving summons; *Luke v. Bennion*, 36 Utah, 67, 106 Pac. 714, action in justice's court does not necessarily terminate from failure to serve summons within year.

100 Cal. 514-523, 35 Pac. 148, 559, **WILSON v. SAMUELS.**

Composition Agreement is Agreement between debtor and his creditors whereby latter, for sake of early payment, promise to accept less than full amount of their claims in complete satisfaction.

Approved in *Reynolds v. Pennsylvania Oil Co.*, 150 Cal. 634, 89 Pac. 612, agreement held not to bar creditors who had signed it from prosecuting their claims or to compel them to accept less than full amount in satisfaction.

Accord and Satisfaction. See note, 100 Am. St. Rep. 394.

100 Cal. 523-525, 35 Pac. 88, **PEOPLE v. KRUGER.**

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 60, 61.

100 Cal. 525-536, 35 Pac. 153, 556, **COUNTY OF LOS ANGELES v. LANKERSHIM.**

Sureties of County Treasurer are not liable for loss from payment of genuine auditor's warrant in due form, without notice of illegality.

Approved in *Town of Buyck v. Buyck*, 112 Minn. 101, 127 N. W. 454, but holding that county treasurer had notice of illegality.

Actions for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 556.

Failure to Present Claim Against Estate of deceased or bankrupt principal, as releasing surety. See note, 25 L. R. A. (n. s.) 139.

100 Cal. 537-542, 38 Am. St. Rep. 310, 35 Pac. 163, **PEOPLE ex rel. FLEMING v. SHORB.**

Absence of Officer from State for more than sixty days, without permission of legislature, ipso facto vacates office.

Approved in McKannay v. Horton, 151 Cal. 717, 121 Am. St. Rep. 146, 91 Pac. 600, 13 L. R. A. (n. s.) 661, office of mayor vacant when judgment convicting him of felony entered, though appeal pending.

Distinguished in Bergerow v. Parker, 4 Cal. App. 174, 87 Pac. 250, rule does not apply when constable was arrested for felony and imprisoned pending trial, but case was subsequently dismissed.

Abandonment of Public Office. See note, 113 Am. St. Rep. 517.

Question Whether Official Bond of relator has been properly approved cannot be raised by defendants in quo warranto.

Approved in People v. Rea, 2 Cal. App. 111, 83 Pac. 165, in action to try right to office, errors in portion of judgment finding one defendant entitled to office cannot be considered on appeal by other defendants.

100 Cal. 543-547, 35 Pac. 156, 563, **STEWART v. SUPERIOR COURT.**

Mandatory Injunction is Stayed by appeal.

Approved in Clute v. Superior Court, 155 Cal. 18, 123 Am. St. Rep. 54, 99 Pac. 364, holding injunction restraining defendant from representing himself as manager of hotel to be mandatory.

Office of Injunction is Preventive and not remedial.

Approved in Hatch v. Raney, 9 Cal. App. 717, 100 Pac. 887, injunction temporarily restraining defendant from interfering with plaintiff's use of ditch was improperly issued where ditch had been destroyed more than a year before.

Distinguished in Dingley v. Buckner, 11 Cal. App. 186, 104 Pac. 480, though defendant is in possession of plaintiff's place of business, injunction will lie to prevent further interference with operation of business.

Miscellaneous.—Cited in Stewart v. Superior Court, 101 Cal. 595, 36 Pac. 100, referring historically to principal case.

100 Cal. 547-554, 35 Pac. 158, **McCANN v. PENNIE.**

Contract of Executory Nature, which personal representative can fully and fairly execute, is enforceable against estate of decedent.

Approved in Barrett v. Towne, 196 Mass. 491, 82 N. E. 700, 13 L. R. A. (n. s.) 643, contract by which testator retained counsel to defend his brother may be enforced against his estate; Mills v. Smith, 193 Mass. 18, 78 N. E. 768, 6 L. R. A. (n. s.) 865, enforcing against estate of decedent contract by which entire charge and disposition of his lands was given to another.

Complaint upon Claim Against Estate of decedent need not allege presentation of claim to administrator.

Approved in Clayton v. Dinwoody, 33 Utah, 263, 93 Pac. 727, service of verified complaint upon executors in action to establish claim is sufficient presentation thereof.

Where Contract is Required to be in writing, it is not necessary to allege in pleading that it was in writing.

Reaffirmed in Levy v. Ryland, 32 Nev. 469, 109 Pac. 908.

100 Cal. 554-571, 35 Pac. 165, **STEVENS v. SAN FRANCISCO & NORTH PAC. R. R. CO.**

Engineer of Ferry-boat is Fellow-servant of fireman and oiler employed by him.

Approved in McDonald v. Hoffman, 10 Cal. App. 518, 102 Pac. 674, foreman in charge of construction of building is fellow-servant of carpenters employed on building in constructing scaffold; Schwind v. Floriston Pulp etc. Co., 5 Cal. App. 202, 89 Pac. 1069, yard foreman is fellow-servant of employee killed by cars while going on errand.

What Servants Deemed to be in Common Employment, apart from statutes, where no questions as to vice-principalship arise. See note, 50 L. R. A. 438.

Liability of Master for Injuries to Servant by incompetency of fellow-servant. See note, 25 L. R. A. 714.

Duty of Master With Respect to Employment of his servants. See note, 48 L. R. A. 378, 390.

Duties of Master and Servant as to Rules promulgated for safe conduct of business. See note, 43 L. R. A. 318.

Knowledge as Element of Employer's Liability. See note, 41 L. R. A. 53.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 759.

100 Cal. 571-575, 35 Pac. 162, **PEOPLE ex rel. CONNOLLY v. CORONADO.**

Act of March 19, 1889, providing for changing of boundaries of cities and exclusion of territory therefrom, is valid.

Approved in People v. Town of Ontario, 148 Cal. 628, 84 Pac. 206, said act is not invalid as delegation of legislative authority.

100 Cal. 576-578, 35 Pac. 158, **SUTTON v. SYMONS.**

No Appeal Lies from Order refusing to vacate appealable order.

Approved in Title Ins. etc. Co. v. California Dev. Co., 159 Cal. 487, 114 Pac. 839, dismissing appeal from order denying motion to vacate order appointing receiver.

Order Striking Statement on Motion for new trial from files is appealable.

Approved in Freeman v. Brown, 4 Cal. App. 109, 87 Pac. 205, order denying defendant's motion to amend his statement on motion for new trial by inserting specifications is appealable.

100 Cal. 578-590, 35 Pac. 317, **WHEELLOCK v. GODFREY.**

Question Whether Witness as to Mental Sanity of another is "intimate acquaintance" is addressed to discretion of trial court.

Approved in Estate of Biedan, 156 Cal. 234, 104 Pac. 443, admitting testimony of nurse who had attended testator for three days prior to his death.

Expert Opinions as to Sanity or Insanity. See note, 39 L. R. A. 309, 318.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 733.

Party Who Introduces Incompetent Evidence cannot have it stricken out when he finds it to be prejudicial.

Approved in *Poindexter etc. Co. v. Oregon Short Line R. R. Co.*, 33 Mont. 341, 83 Pac. 888, where evidence is admitted without objection and witness cross-examined, it cannot be stricken out on motion; *Flannery v. Central Brewing Co.*, 70 N. J. L. 719, 59 Atl. 158, refusing to strike out deposition, admitted without objection, on ground that witness had appeared in court.

Party Objecting to Testimony of Physician as privileged must make his objection seasonably.

Approved in *Pittsburgh etc. Ry. Co. v. O'Connor*, 171 Ind. 690, 85 N. E. 970, privilege waived on second trial by failure to object to physician's testimony on first trial.

When Appellant Does not Specify in what parts of record errors are to be found, they may be regarded as unimportant.

Reaffirmed in *Bell v. Staacke*, 151 Cal. 548, 91 Pac. 324.

Miscellaneous.—Cited in *Whelock v. Godfrey* (Cal.), 35 Pac. 321, on another appeal; *Curtis v. Boquillas Land etc. Co.*, 9 Ariz. 65, 76 Pac. 613, finding of ownership is finding of ultimate fact.

100 Cal. 590-592, 35 Pac. 170, BANK OF UKIAH v. PETALUMA SAV. BANK.

Lien of Unrecorded Mortgage takes precedence over attachment or judgment lien obtained after its execution.

Approved in *Wolfe v. Langford*, 14 Cal. App. 362, 112 Pac. 204, reaffirming rule; *In re McIntosh*, 150 Fed. 549, 80 C. C. A. 250, failure to record mortgages until after bankruptcy of mortgagor does not make same unlawful preference, in absence of fraud.

100 Cal. 592-593, 35 Pac. 308, HOUSE v. MEYER.

In Action to Recover Damages for negligence, general allegation of negligence is sufficient.

Approved in *Rathbun v. White*, 157 Cal. 254, 107 Pac. 311, allegation that defendant negligently kept explosives and that explosives so kept exploded is sufficient; *Pigeon v. Fuller*, 156 Cal. 695, 105 Pac. 977, allegation that defendant negligently failed to inform plaintiff of dangers of work sufficiently avers that defendant knew plaintiff needed warning; *Payne v. Oakland Traction Co.*, 15 Cal. App. 148, 113 Pac. 1082, question for jury whether defendant was negligent in failure to enforce rule requiring warning to be given before moving cars in carhouse; *Mugford v. Atlantic etc. Co.*, 7 Cal. App. 675, 95 Pac. 675, plaintiff held guilty of contributory negligence as matter of law, danger being obvious; *Warren v. Southern Cal. Ry. Co.* (Cal.), 67 Pac. 2, general allegation of negligence in collision between railroad train and wagon held sufficient; *Younie v. Blackfoot Light & Water Co.*, 15 Idaho, 63, 96 Pac. 195, complaint alleging negligence in failure of defendant to use due care in building and operating electric light plant is sufficient; *Crowley v. Croesus Gold etc. Min. Co.*, 12 Idaho, 542, 86 Pac. 540, upholding complaint which alleged negligent construction and operation of machinery and appliances and called attention to particular appliances that were defective.

Sufficiency of General Allegations of negligence. See note, 59 L. R. A. 210, 214.

100 Cal. 593-606, 35 Pac. 341, IN RE LUX.

Order Making Family Allowance creates vested right to all sums which have become due thereunder.

Reaffirmed in *Estate of Welch*, 3 Cal. Prob. 304, 305.

Failure of Executor to Make Affidavit required by section 1449, Code of Civil Procedure, does not invalidate inventory.

Reaffirmed in *Estate of Douglass*, 4 Cal. Prob. 348.

Will of Husband cannot Deprive Wife of right to family allowance.

Reaffirmed in *Estate of Bump*, 152 Cal. 278, 92 Pac. 644.

In Making Allowance from Estate of decedent, financial ability of widow is immaterial.

Approved in *Estate of Bump*, 152 Cal. 276, 92 Pac. 644, reaffirming rule; In *re Welch*, 106 Cal. 432, 39 Pac. 806, special administrator appointed pending proceedings for removal of general administrator must pay family allowance; In *re Estate of Leavitt*, 85 Neb. 526, 124 N. W. 116, heir entitled to specific articles described in statute whether decedent died testate or intestate.

Amount of Family Allowance is within discretion of probate court.

Approved in *In re Averill's Estate* (Cal.), 66 Pac. 15, allowance to guardian for board and lodging of incompetent is within discretion of court, which will not be reviewed, though uncontradicted testimony favors larger amount.

In Fixing Family Allowance court should consider mode of living during lifetime of decedent, condition of estate and value of property set apart for use of family.

Approved in *Estate of Hessler*, 2 Cal. Prob. 357, 360, granting three hundred dollars a month from estate appraised at seventy-six thousand dollars; In *re Pugsley*, 27 Utah, 494, 76 Pac. 562, age, health and social position of applicant, education of children and value of estate should be considered.

100 Cal. 609-617, 35 Pac. 345, 639, MILLER v. LUX.

Rule Providing That upon Appeal from order papers or evidence must be authenticated by bill of exceptions applies only where order is sought to be reversed because of matters appearing in affidavits or evidence.

Distinguished in *Muzzy v. McEwen Lumber Co.*, 154 Cal. 687, 98 Pac. 1062, dismissing appeal from order changing venue, because affidavits not incorporated in bill of exceptions.

Findings of Fact are Unnecessary in proceeding for settlement of administrator's account.

Reaffirmed in *Estate of McPhee*, 156 Cal. 337, 104 Pac. 455.

On Appeal from Order Settling Accounts of executor, accounts and reports, exceptions to accounts, findings of court and order settling accounts constitute judgment-roll.

Approved in *Estate of Pease*, 149 Cal. 172, 85 Pac. 151, following rule; *Estate of Parsons*, 159 Cal. 428, 114 Pac. 571, where record contains no bill of exceptions, only question is whether judgment-roll sustains order; In *re Healy's Estate* (Cal.), 66 Pac. 178, petition, answer and order in proceeding for removal of administrator need not be incorporated in bill of exceptions; In *re Smith's Estate* (Cal.), 38 Pac. 951, where there is no bill of exceptions or statement of evidence, findings must be accepted as true; *Estate of Thayer*, 1 Cal.

App. 105, 81 Pac. 659, other papers can be considered only when incorporated in bill of exceptions; *In re Dougherty's Estate*, 34 Mont. 342, 86 Pac. 40, account, record objections thereto and finding and order held to constitute judgment-roll.

Where Executor Uses Funds of Estate for his own purposes, he is chargeable with legal interest compounded annually.

Approved in *Estate of Pease*, 149 Cal. 171, 85 Pac. 151, charging executor with simple interest on funds used for his own purposes; *Estate of Cousins*, 111 Cal. 446, 44 Pac. 183, guardian chargeable only with legal rate of interest compounded annually, though current rate of interest greater.

Distinguished in *Title Insurance etc. Co. v. Ingersoll*, 158 Cal. 489, 111 Pac. 366, where trustee has mingled trust funds with his own, but is able to show that they have been prudently managed and what profits are, he will not be liable beyond amount of profits.

Liability of Executors or Trustees for compound interest. See note, 29 L. R. A. 623.

Miscellaneous.—Cited in *In re Lux*, 114 Cal. 90, 45 Pac. 1029, and *In re Lux*, 114 Cal. 81, 45 Pac. 1026, both referring historically to principal case.

100 Cal. 617-622, 35 Pac. 328, DOLBEER v. LIVINGSTON.

One Who Induces Another to Act on belief in certain state of facts will be estopped from alleging the contrary.

Approved in *Mills v. Rossiter Eureka etc. Mfg. Co.*, 156 Cal. 170, 103 Pac. 897, where assignee of contract to purchase land leaves assignor in possession "to handle the property," he is bound by transfer made by latter; *Showers v. Zanone* (Cal. App.), 85 Pac. 858, defendant bound by consent and acquiescence to pay share of expense of constructing ditch.

100 Cal. 626-635, 35 Pac. 323, PRIEST v. BROWN.

Finding Based on Conflicting Evidence will not be disturbed, even though evidence consists of depositions.

Approved in *Crisman v. Lanterman*, 149 Cal. 655, 117 Am. St. Rep. 167, 87 Pac. 92, where facts stipulated are not ultimate facts, finding will not be disturbed if facts stipulated will support it by any reasonable inference; *Rounthwaite v. Rounthwaite* (Cal.), 68 Pac. 304, finding based on conflicting evidence will not be disturbed though some of evidence in depositions.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 467.

100 Cal. 635-647, 38 Am. St. Rep. 314, 35 Pac. 433, BROWN v. CAMPBELL.

In Action Against Nonresident for recovery of money, where defendant has not been personally served within state and has not appeared, judgment can affect only property attached in action.

Approved in *First National Bank v. Eastman*, 144 Cal. 491, 103 Am. St. Rep. 95, 77 Pac. 1045, *Merchants' Nat. Union v. Buisseret*, 15 Cal. App. 447, 115 Pac. 59, and *Smith v. Supreme Lodge A. O. U. W.*, 12 Cal. App. 190, 106 Pac. 1103, all reaffirming rule; *Anderson v. Schloesser*, 153 Cal. 223, 94 Pac. 886, but holding that record did not show substituted service; *In re Culp*, 2 Cal. App. 82, 83 Pac. 94, re-

fusing to enforce order of court of another state in divorce suit as to custody of child, where neither mother nor child were within jurisdiction of that court.

Garnishment of Unliquidated Claims. See note, 59 L. R. A. 372.

Foreign Judgments. See note, 94 Am. St. Rep. 553.

Statute Does not Begin to Run against action to subject property fraudulently conveyed to payment of debt until creditor has secured judgment.

Approved in *Ainsworth v. Roubal*, 74 Neb. 731, 105 N. W. 252, 2 L. R. A. (n. s.) 988, and *Ziska v. Ziska*, 20 Okl. 641, 95 Pac. 256, 23 L. R. A. (n. s.) 1, both reaffirming rule; *Miller v. Ash*, 156 Cal. 566, 105 Pac. 609, action by wards against guardian's estate for moneys converted by him not barred by laches or statute of limitations, though more than forty years had elapsed.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

Judgment cannot be Pleaded in bar where time for appeal has not expired.

Reaffirmed in *Estate of Ricks*, 160 Cal. 473, 117 Pac. 541.

Right of Creditor to Buy Property from debtor in satisfaction of debt. See note, 36 L. R. A. 350.

100 Cal. 648-664, 35 Pac. 310, **OULLAHAN v. BALDWIN.**

Commission of Real Estate Broker is earned when he produces purchaser ready, willing and able to buy upon terms stated in contract.

Approved in *Hill v. McCoy*, 1 Cal. App. 163, 81 Pac. 1017, broker entitled to commission though owner negotiated contract himself.

Distinguished in *Bacon v. Davis*, 9 Cal. App. 99, 98 Pac. 77, broker held to have been authorized to bind principal by contract of sale.

When Broker Earns Commission. See note, 139 Am. St. Rep. 243.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 608.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal, and defective title. See note, 43 L. R. A. 605.

Miscellaneous.—Cited in *Oullahan v. Baldwin* (Cal.), 45 Pac. 1032, referring historically to principal case.

100 Cal. 664-672, 38 Am. St. Rep. 323, 35 Pac. 326, 24 L. R. A. 33, **PEOPLE v. MUNROE.**

Void Instrument may be Subject of forgery.

Approved in *People v. Collins*, 9 Cal. App. 623, 99 Pac. 1109, clearing-house certificate may be subject of forgery; *People v. Johnson*, 7 Cal. App. 129, 93 Pac. 1042, receipt may be subject of forgery; *People v. McPherson*, 6 Cal. App. 269, 91 Pac. 1099, true test is intent to defraud; *People v. Harben*, 5 Cal. App. 32, 91 Pac. 399, upholding conviction of forgery for passing bill consisting of two state bank bills pasted together, one of which was neither signed nor dated; *State v. Hazzard*, 168 Ind. 168, 80 N. E. 151, subscription paper used in taking orders for book, may be subject of forgery; *State v. Blodgett*, 143 Iowa, 582, 121 N. W. 687, school order issued without authority may be subject of forgery; *Gordon's Case*, 100 Va. 829, 41 S. E. 748, 57 L. R. A. 744, adding to canceled check words "in full of account to date," held to be forgery.

100 Cal. 672-683, 35 Pac. 623, 22 L. R. A. 790, **SCHMIDT v. BRIEG.**

Words Merely Descriptive of Character, quality or composition cannot be monopolized as trademark.

Approved in *Italian Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 257, 110 Pac. 915, Italian word "tipo," meaning type, as applied to brands of wine, cannot be appropriated as trademark.

No Trader can Adopt Trademark so like that of another that purchasers buying with ordinary caution are likely to be misled.

Approved in *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 24, 88 N. E. 95, name, "The Anderson Cheese Cutter Company," may infringe upon name, "The Computing Cheese Cutter Company of Anderson"; *Atlas Assurance Co., Ltd., v. Atlas Insurance Co.*, 138 Iowa, 232, 128 Am. St. Rep. 189, 112 N. W. 233, 15 L. R. A. (n. s.) 625, name, "Atlas Insurance Company," infringes upon name, "Atlas Assurance Company."

Miscellaneous.—Cited in *Schmidt v. Liberty Soda-Works Co.* (Cal.), 35 Pac. 856, *Schmidt v. Haake* (Cal.), 35 Pac. 856, *Schmidt v. Crystal Soda-Water Co.* (Cal.), 35 Pac. 855, *Schmidt v. Steinke* (Cal.), 35 Pac. 855, *Schmidt v. McEwen* (Cal.), 35 Pac. 855, and *Schmidt v. Welch* (Cal.), 35 Pac. 626, all decided upon authority of cited case.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 101 CALIFORNIA.

101 Cal. 1-9, 35 Pac. 437, DUFF v. DUFF.

If Motion be Made for New Trial of entire action, court may grant it in part and deny it in part, leaving stand its former determination upon portion of issues.

Approved in Robinson v. Muir, 151 Cal. 125, 90 Pac. 524, on appeal from order denying new trial, in action to quiet title to several mining claims, on which issues were entirely separate, and as to which order was properly denied as to some and erroneously to others, order should be reversed only so far as may be necessary to correct error in order.

If Court had Found Only upon Single Issue upon which new trial was granted, conclusion of law to be drawn and judgment to be entered would not depend upon such finding alone, but would find their support in entire record, including findings upon former trial which were not set aside.

Approved in Barrett-Hicks Co. v. Glas, 14 Cal. App. 295, 111 Pac. 763, where former appeal from judgment involving validity of mechanic's lien was disposed of by holding two findings of fact essential to support judgment to be against evidence, and reversal of judgment was general, trial court properly limited new trial to questions involved in such issues, and in effect approved findings not disturbed by former appeal.

Where Other Findings are Repeated at New Trial, objection that they were not supported by any evidence given at last trial is not tenable, where court states that it adopts facts found from testimony introduced at former trial as far as applicable.

Approved in Russell v. Dufresne, 1 Alaska, 577, where new trial is granted because wrong findings of fact and conclusions of law were drawn from testimony, it is not necessary to require evidence to be taken de novo, but court should correct findings and conclusions from evidence already taken, and render judgment thereon.

101 Cal. 10-15, 35 Pac. 348, PAYNE v. ENGLISH.

Where Deed Described Premises as Being on line of street which was practically located after deed was made, such location may be looked to for purpose of determining location of land granted.

Approved in *Andrews v. Wheeler*, 10 Cal. App. 618, 103 Pac. 149, in action to quiet title involving disputed boundary, where map uncertainly locates line, and no field-notes are indicated, court may inquire as to location of such stakes and monuments as were commonly recognized in lieu of lost or destroyed original monuments.

101 Cal. 15-26, 40 Am. St. Rep. 17, 35 Pac. 353, **WULZEN v. SAN FRANCISCO**.

"Due Process of Law" Signifies Such Exercise of governmental powers as settled maxims of law permit and sanction.

Approved in *Ross v. Wright County*, 128 Iowa, 441, 104 N. W. 511, 1 L. R. A. (n. s.) 431, upholding code provision that land owner, on appeal from order of supervisors fixing assessment on land within drainage district, shall not be permitted to show that his land received no benefit.

Proceedings of City Supervisors, under statute of March 6, 1889, in passing resolution to open and extend street, being legislative in character, certiorari will not lie to review them.

Cited in *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 675, 87 Pac. 30, arguendo.

Miscellaneous.—Cited in *Brickell v. San Francisco (Cal.)*, 35 Pac. 357.

Existence of Public Use as question for courts. See note, 88 Am. St. Rep. 934.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 15, 51, 68, 83, 88, 92, 93, 111, 113.

101 Cal. 26-31, 35 Pac. 332, **KENNA v. CENTRAL PACIFIC R. R. CO.**

Where Plaintiff's Negligence Clearly Appears from facts, issue of negligence is question of law for the court.

Approved in *Payne v. Oakland Traction Co.*, 15 Cal. App. 136, 113 Pac. 1078, where motorman ran into car-barn for repair of brake in pit, whither he went to help repairer, at latter's request, and he was injured while ascending from pit by careless removal of apparently dead car, jury warranted in finding against contributory negligence.

One Who is Working in Place where he is exposed to danger must exercise his faculties for his own protection.

Approved in *Brett v. Frank*, 153 Cal. 273, 94 Pac. 1052, where employer maintained open elevator shaft-hole in floor of tannery, existence of which was known to adult servant, whose ordinary duties of wheeling truck to elevator enabled him to clear hole, but stepped into hole, he was contributorily negligent; *Larsen v. Leonhardt*, 8 Cal. App. 228, 96 Pac. 397, when one of issues was whether unsecured condition of plank, from which plaintiff fell, was such that plaintiff could have found out such fact by looking at it, and jury could not say from evidence they could not render general verdict in plaintiff's favor, contrary to instruction that if he did not look out properly for himself he was guilty of contributory negligence; *Mugford v. Atlantic etc. Co.*, 7 Cal. App. 678, 95 Pac. 676, though not instructed by employer, experienced ship carpenter, familiar with operation of pile-driver, whose danger was obvious, though performing unaccustomed duty of loftsmen, who placed hand on top of pile-driver, where it was mashed, was guilty of contributory negligence.

Walking Railroad Track Where Trains are at any time liable to pass, without looking to see whether train is approaching, is negligence per se.

Approved in *Nery v. Northern Pac. Ry. Co.*, 37 Mont. 472, 97 Pac. 947, 19 L. R. A. (n. s.) 446, where freight conductor of experience in certain railroad yard proceeded to check cars of his train while on siding, and walked along main track, on which train was momentarily expected, in same direction as train would come, and did not pay any attention to danger, though track was clear for long distance, he was contributorily negligent as matter of law; *Texas Midland R. R. v. Byrd*, 102 Tex. 268, 115 S. W. 1166, 20 L. R. A. (n. s.) 429, where person, who could have reached his destination by other and safe routes, chose to cross railroad bridge which he knew to be dangerous, he was guilty of negligence, precluding recovery for injuries from attempting to jump from bridge to escape train, though bridge was generally used by pedestrians.

Distinguished in *Atchison etc. Ry. Co. v. Schmidt*, 67 Kan. 12, 72 Pac. 575, where railroad tracks are laid in public street, and there is room to walk in safety outside of tracks, and there is no reason by necessity or convenience for his going upon them, his walking along track is negligence preventing discovery for being struck, notwithstanding negligence of railroad, unless injury is intentionally and wantonly caused.

101 Cal. 32-36, 35 Pac. 429, GOULD v. STAFFORD.

Court has Discretion to Allow Defendant to amend his answer by omitting defense set out in original answer, and substituting different defense therefor.

Approved in *Rose v. Doe*, 4 Cal. App. 685, 89 Pac. 137, upholding allowance of amendment of answer, after denial of motion for nonsuit, setting up special defenses other than those presented in original answer.

Owner of Riparian Land Who has Leased Land to tenants for term of years, giving exclusive possession and control of premises and of flumes, is not responsible for wrongful diversion of greater quantity than they were entitled to divert, in absence of participation therein, or of notification or of request to abate nuisance.

Cited in *Carnes v. Dalton*, 56 Or. 606, 110 Pac. 174, *arguendo*.

101 Cal. 37-41, 35 Pac. 442, PARKE & LACY CO. v. WHITE RIVER LUMBER CO.

Under Conditional Sale, Action of Owners in foreclosing mortgage of realty, given by purchasers to secure purchase price, defeats seller's right to reclaim property because of noncompliance with conditions of instrument in regard to payment.

Approved in *Elsom v. Moore*, 11 Cal. App. 379, 105 Pac. 271, where potatoes were sold upon understanding that title was not to pass until payment therefor, bringing of action against him by vendor for goods sold and delivered, and attachment of goods as purchaser's property, constituted election by vendor to treat sale as absolute; *Bierce v. Hutchins*, 16 Haw. 421, election of remedy, in conditional sale, based upon theory of enforcement of materialmen's lien, which assumes that property is in defendant, estops plaintiff from

pursuing different remedy based upon inconsistent theory of action of replevin which assumes that property is still in plaintiff; *Mark Means etc. Co. v. Mackenzie*, 9 Idaho, 174, 73 Pac. 137, where suit is based on promissory note providing that express conditions of sale for which given are such that title and possession does not pass until payment in full of note, and that payee can declare note due and take possession at any time he may deem himself insecure, unless it can be shown by affidavit that security is beyond his reach, attachment is not maintainable for purchase price; *Madison River Livestock Co. v. Osler*, 39 Mont. 250, 133 Am. St. Rep. 558, 102 Pac. 326, where buyer under conditional sale breaks contract, seller has election of remedies, but having chosen one he will pursue, choice becomes irrevocable; *Poirier Mfg. Co. v. Kitts*, 18 N. D. 560, 120 N. W. 560, vendor, on breach of terms of conditional sale by vendee, may elect to recover possession of property, or waive his title, and sue for value or selling price, but he cannot do both.

Distinguished in *Muncy v. Brain*, 158 Cal. 306, 110 Pac. 946, where contract for automobile, provides three payments as rental, and final payment of large sum on June 25th, and for termination of lease and delivery of possession to lessor on June 30th, with right, if all rental paid, to purchase property for six dollars and twenty-five cents on July 3d, it was duty of lessee to pay such large sum at time stated, and to deliver possession when stated.

Action for Price as Waiver of Right of conditional vendor to recover property. See note, 23 L. R. A. (n. s.) 144.

Agreement by Which Owners of personal property "lease" it to others, under which on prompt payment of rental title would pass, although called lease, is sale.

Approved in *McCullough v. Home Ins. Co.*, 155 Cal. 662, 102 Pac. 815, instrument designated as "lease contract," whereby owner of land acknowledged receipt of specified sum "as a deposit to secure" land, and which stated that deposit was accepted as rent for one week, that payer was to pay further sums as weekly rent for specified number of weeks, and upon payments owner would convey property, and containing forfeiture provision upon default, is contract for sale, and not lease.

What Constitutes a Transaction a Sale. See note, 94 Am. St. Rep. 249.

Rights and Liabilities of Parties to conditional sale on default. See note, 32 L. R. A. 463, 471.

101 Cal. 70-81, 35 Pac. 349, **SAN JOAQUIN LAND ETC. CO. v. BEECHER.**

When Promoters of Corporation Meet and organize under name, for objects and with capital stock and shares as specified in agreement for formation, and name parties to agreement, with shares subscribed by each, it is acceptance by corporation of such parties as shareholders, who are thereby bound as such.

Approved in *Turner v. Markham*, 155 Cal. 573, 102 Pac. 276, where corporation agreed to issue its stock to certain named subscribers in consideration of their deeding to it certain mining claims, when stock was given up and property received, corporation could not repudiate merely because of inadvertence in not having it entered formally upon its minutes; *Turner v. Fidelity Loan Concern*, 2 Cal.

App. 131, 83 Pac. 66, on adoption of incorporators' agreement by corporation, no objection can be urged to resolution adopting it because of interest of directors, who, though trustees, were sole beneficiaries.

It is not Necessary to Validity of Corporation or to subscribers who agreed to its formation, becoming stockholders, that they should all sign articles of incorporation.

Approved in *Horseshoe Pier etc. Co. v. Sibley*, 157 Cal. 446, 108 Pac. 309, where subscription of fifteen hundred dollars toward stock was made, and eight hundred dollars was paid in first payment, for which stock was tendered in action to recover residue by corporation, subscriber's ownership of stock in proposed corporation was wholly foreign to latter's right to recover on express contract to pay subscription made for its benefit; *Planters' etc. Independent Packet Co. v. Webb*, 144 Ala. 673, 39 So. 564, agreement by which person shows intention to become stockholder in corporation is sufficient as contract of subscription, as against both him and corporation.

To Constitute Subscribers to Agreement for formation of corporation stockholders of such, it is not necessary that certificates of stock should have issued to them.

Approved in *San Francisco Com. Agency v. Miller*, 4 Cal. App. 293, 87 Pac. 631, averment that certain number of shares were issued is not equivalent of stating that only that number of shares were subscribed, and amounts to no more than statement of stock certificates issued.

Where Directors of Corporation have Been Nominally elected, organized as board of directors, and acted as such, their acts as de facto officers in levying assessment upon subscribed stock were valid.

Approved in *Sherwood v. Wallin*, 154 Cal. 741, 99 Pac. 193, persons actually holding office as directors for nearly two years, with corporation's consent, and under color of election had exercised all functions of such officers, are de facto directors, and may legally call special meeting of stockholders to increase capital stock.

Liability to Corporations of Subscribers to Stock. See note, 93 Am. St. Rep. 359, 360.

Miscellaneous.—Cited in *San Joaquin Land etc. Co. v. Belding* (Cal.), 35 Pac. 353, *San Joaquin Land etc. Co. v. Hewlett* (Cal.), 35 Pac. 353, and *San Joaquin Land etc. Co. v. Hitchcock* (Cal.), 35 Pac. 353.

101 Cal. 89-90, 35 Pac. 431, **COOK v. FOWLER.**

Failure of Partnership, Doing Business under designation not showing names of persons interested, to file certificate as required by sections 2466 and 2468 of Civil Code, is matter of defense to be set up by defendants.

Approved in *Nicholson v. Auburn Gold Min. etc. Co.*, 6 Cal. App. 548, 92 Pac. 651, statutory provision that persons doing business as partners contrary thereto shall not maintain action is satisfied where certificate of partnership showing names of partners was filed, and publication thereof completed, before filing of plea in abatement, though publication was not complete at commencement of action; *Wilson v. Yegen Bros.*, 38 Mont. 509, 100 Pac. 615, where fact that

plaintiffs were copartners did not appear on face of complaint, and question of their legal capacity to sue for failure to comply with statutory provisions requiring partnership doing business under fictitious name to file certificate of names of members was not raised by answer, defendants are deemed to have waived objection.

101 Cal. 90-105, 35 Pac. 444, **BURBANK v. DENNIS**.

Promoter of Corporation Who Brings about its organization and aids in procuring subscriptions thereto occupies fiduciary relationship toward corporation and its stockholders.

Reaffirmed in *Hitchcock v. Hustace*, 14 Haw. 241.

Promoter may Sell Property to Corporation, but must, as person occupying fiduciary relation, make full and fair disclosure of his interest in property.

Approved in *Hitchcock v. Hustace*, 14 Haw. 244, where promoters organize corporation for purpose of selling property and options they own, and make agreement with selves as promoters to buy same at profit, and fail to disclose to other shareholders terms of agreement, agreement is void, and profit of promoters may be recovered; *Old Dominion Copper etc. Co. v. Bigelow*, 203 Mass. 184, 89 N. E. 204, where promoters or organized corporation sold property worth only two millions to it for three and one-quarter millions, and sold stock for half million to complete capitalization, purchasers being ignorant as to facts, and purchase of property was ratified when promoters held all stock issued, promoters are liable to corporation for profits.

Transactions in Which Corporation Promoters suppress or misrepresent material facts, or otherwise deceive corporation, or corruptly control its actions, are fraudulent, and company may elect either to set aside transaction or to recover promoters' secret profits.

Approved in *Lomita Land & Water Co. v. Robinson*, 154 Cal. 45, 97 Pac. 13, 18 L. R. A. (n. s.) 1106, where promoters of corporation organized for express purpose of purchasing particular piece of property fail to disclose personal interest they have in purchase, corporation may set aside transaction, or recover compensation for loss suffered, if there was any misrepresentation of facts or suppression in relation to such personal interest; *Mason v. Carrothers*, 105 Me. 401, 74 Atl. 1034, where promoters transferred to corporation through themselves certain patent rights for greater amount of stock than owners asked, subsequent purchasers of preferred stock from treasury, paying full cash value therefor, and without knowledge of promoters' transaction, could maintain bill in equity for surrender and cancellation of certificates of common stock which promoters received as profit; *Wesley v. Diamond*, 26 Okl. 176, 109 Pac. 526, where party has been induced by fraud and deceit to part with title to real property, he may affirm contract and sue for damages, or he may rescind.

Where Fraud is Practiced upon Stockholders by promoters, knowledge of it by directors not being knowledge of stockholders, such fraud cannot be ratified or waived by directors.

Approved in *Lomita Land & Water Co. v. Robinson*, 154 Cal. 51, 97 Pac. 16, 18 L. R. A. (n. s.) 1106, where one associates himself with others in undertaking for purchase of property for common benefit, he will be precluded from making any secret profit out of contemplated purchase at their expense, and fact that some, but not

all, of associates knew or supposed he was making profit, will not relieve him from liability.

Promoter is One Who Brings About incorporation and organization of corporation.

Reaffirmed in *Cox v. National Coal & Oil Invest. Co.*, 61 W. Va. 305, 56 S. E. 500.

Duties and Liabilities of Promoters to corporation and its members. See note, 25 L. R. A. 90, 91, 102.

Stenographer's Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 365, 366.

101 Cal. 105-107, 35 Pac. 432, 873, **EGENER v. JUCH.**

Residence Referred to by Attachment Law is actual, as contradistinguished from constructive, or legal residence or domicile.

Reaffirmed in *Stickney v. Chapman*, 115 Ga. 761, 42 S. E. 70.

101 Cal. 107-112, 35 Pac. 432, **WATTERSON v. SALDUNBEHERE.**

Where There has Been Actual Appropriation and use of water, right to it is acquired regardless of compliance with provisions of Civil Code for acquisition of water rights.

Approved in *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 211, 110 Pac. 930, following rule; *Lower Tule River Ditch Co. v. Angiola Water Co.*, 149 Cal. 499, 86 Pac. 1082, one may by prior actual and complete appropriation and use, without proceeding under code, acquire right to water beneficially used, which will be superior and paramount to title of one making subsequent appropriation in manner provided for sections 1415 and 1421 of Civil Code; *Bean v. Morris*, 159 Fed. 653, 86 C. C. A. 519, complainants, by prior appropriation in Wyoming of waters of non-navigable stream rising in Montana, acquired right to continue diversion as against junior appropriator in Montana, rights of appropriation not being affected by interstate character of stream; *Morris v. Bean*, 146 Fed. 428, where complainant, citizen of Wyoming, sues to enjoin defendant, citizen of Montana, from diverting water from stream having its source in latter state, defendant could not justify under laws of Montana authorizing its citizens to appropriate water within state, but general doctrine of priority governs regardless of state lines; *Neilson v. Parker*, 19 Idaho, 731, 115 Pac. 489, state engineer cannot grant permit for appropriation of water of stream, where same has already been diverted and applied to beneficial use, although done without permit or license of state engineer; *Sand Point etc. Co. v. Panhandle Development Co.*, 11 Idaho, 413, 83 Pac. 349, arguendo.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 669.

101 Cal. 115-117, 35 Pac. 443, **HOWELL v. HOWELL.**

Where Appeal has Been Taken from Order of superior court, lack of bill exceptions is ground for affirmance, if there is nothing in record upon which action of superior court can be reviewed.

Approved in *Estate of Young*, 149 Cal. 177, 85 Pac. 146, in absence of service of bill of exceptions to order refusing and dismissing petitions for partial distribution by children not provided for in will on all "adverse parties," including devisees, within time required by law, bill of exceptions cannot be considered upon appeal from order.

101 Cal. 118-122, 35 Pac. 572, LEE v. SOUTHERN PAC. R. R. CO.

In Actions for Negligence, Law does not attempt to fix any precise rules for ascertaining what is just compensation, but leaves assessment of damages to good sense and judgment of jury.

Approved in *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 467, 88 Pac. 590, it was proper to instruct jury that, if plaintiff was entitled to recover, they should award such sum as in their best judgment would fairly compensate him for any injuries received by reason of alleged carelessness of defendant, and also for all damages suffered up to time of trial, and which it was reasonably probable he would sustain in future, not exceeding sum claimed in complaint.

Verdict will not be Disturbed Merely upon ground that damages are excessive, nor because opinion of court differs from that of jury, unless it appears that excess was given under influence of passion or prejudice.

Approved in *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 277, 104 Pac. 314, holding verdict of six thousand four hundred dollars was not excessive; *Hale v. San Bernardino Traction Co.*, 156 Cal. 715, 106 Pac. 84, upholding verdict for twelve thousand dollars in favor of widow and infant child of man killed at age of twenty-six, who was then earning seventy-five dollars a month; *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 147, 104 Pac. 329, upholding verdict for seven thousand five hundred dollars in action for permanent injury to hand and arm of boy of twelve, who was improperly placed upon raised platform to operate dangerous machine in defendant's foundry; *James v. Oakland Traction Co.*, 10 Cal. App. 800, 103 Pac. 1089, upholding verdict for fifteen thousand dollars for injuries to child thrown from speeding car; *Lanigan v. Neely*, 4 Cal. App. 772, 89 Pac. 446, upholding verdict for eight thousand dollars in action for breach of promise of marriage, where plaintiff shows seduction; *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 446, 82 Pac. 642, in action against railroad for deprivation of access over street to premises, measure of damages is amount which will compensate him for all detriment proximately caused by such use; *Maloney v. Winston Bros. Co.*, 18 Idaho, 766, 111 Pac. 1089, where miner, twenty-nine years old, whose wages were from three dollars to five dollars a day, was injured through master's negligence and his earning capacity thereby reduced about fifty per cent, injury causing eversion of his foot, fifteen thousand dollars was excessive, and should be reduced to ten thousand dollars.

In Order to Constitute Assumption of Risk of defective machinery by employee, such as to bar recovery for personal injuries received therefrom, employee must not only know of defects, but danger arising from defects must also be known or reasonably apprehended by him.

Approved in *Tuckett v. Steam & Hand Laundry*, 30 Utah, 287, 116 Am. St. Rep. 832, 84 Pac. 505, 6 L. R. A. (n. s.) 410, laundry employee, who merely knows that ironing machine being operated by her is running in jerky and unsteady manner does not, as matter of law, assume risk of injury arising from machine suddenly starting forward caused by its defective condition.

101 Cal. 125-131, 40 Am. St. Rep. 46, 35 Pac. 567, WEIR v. MEAD.

Where Executor's Bond is Joint Obligation of principal and sureties, and several obligation only of sureties, sureties signing it are not

bound, if it is not executed by principal, in absence of evidence that sureties intended to be bound without requiring principal's signature.

Distinguished in *Stimson Mill Co. v. Riley* (Cal.), 42 Pac. 1075, where bond is in form joint and several, failure of all parties named in instrument as obligors to sign bond does not render it void; *Deer Lodge Co. v. United States F. & G. Co.*, 42 Mont. 323, 112 Pac. 1062, where official bond is joint and several, so that had principal signed it, action could have been brought thereon against surety without joining principal, and failure of principal to sign did not change surety's liability, he is not released by failure of principal to sign bond.

When Official Bond Binds Sureties and what irregularities fail to relieve them from liability. See note, 90 Am. St. Rep. 194.

Effect of Delivery of Bond Unsigned by principal obligor. See note, 12 L. R. A. (n. s.) 1107, 1108, 1112, 1118.

101 Cal. 131-135, 35 Pac. 562, **BRANDENSTEIN v. HOKE**.

Section 21 of Act of March 25, 1868, relating to creation of levee district, is void.

Cited in *People v. Levee Dist. No. 6* (Cal.), 63 Pac. 342, levee district, though void as to method of organization, under act of March 25, 1868, was validated by act of March 30, 1872, recognizing existence of such district.

Distinguished in *People v. Ontario*, 148 Cal. 632, 84 Pac. 208, fixing of boundaries of territory to be annexed is, in absence of constitutional prohibition, matter of policy for legislature to determine whether it shall be conferred only on some legislative body or upon electors of locality to be affected.

Commissioners of Levee District are not Estopped from disputing validity of its bonds by retaining benefit from sale thereof, and by interest payment thereon for several years.

Approved in *Wichmann v. Placerville*, 147 Cal. 165, 81 Pac. 538, ultra vires acts of municipal corporation are absolutely void, and cannot be subject of ratification or estoppel in pais.

Holder of Bonds of Levee District organized under unconstitutional act is not entitled to mandamus requiring board of fund commissioners to levy tax to pay principal and interest of bonds.

Approved in *State v. Candland*, 36 Utah, 418, 104 Pac. 290, under law for expenditure of two hundred and fifty thousand dollars for university building, and providing that loan should be debt of university and not of state, loan was debt of state notwithstanding, and in violation of constitutional provision against state's contracting any debt in excess of two hundred thousand dollars except to repel invaders, etc., and officer may attack statute directing him to act as unconstitutional, and justify his refusal in mandamus proceeding on that ground; *Payne v. Staunton*, 55 W. Va. 207, 46 S. E. 929, mandamus does not lie to compel ministerial officer to perform any duty imposed by invalid statute.

Unconstitutionality of Statute as Defense against mandamus to compel enforcement. See note, 47 L. R. A. 515.

What Constitutes a Corporation de Facto. See note, 118 Am. St. Rep. 255.

101 Cal. 135-151, 35 Pac. 549, STATE INVESTMENT & INS. CO. v. SAN FRANCISCO.

Section 400 of Civil Code Applies to All Cases of dissolution, whether voluntary or involuntary.

Approved in *Crossman v. Vivienda Water Co.*, 150 Cal. 580, 89 Pac. 337, following rule.

Jurisdiction of Superior Court to Dissolve Corporation is limited by provisions of statute, both as to conditions under which it may be invoked and extent of judgment which it may make in exercise of this jurisdiction.

Approved in *In re Balfour & Garretti*, 14 Cal. App. 271, 111 Pac. 620, court cannot grant voluntary dissolution without affirmative proof that all claims and demands against corporation have been satisfied and discharged; *People v. District Court*, 33 Colo. 303, 80 Pac. 911, action to dissolve corporation because managers had diverted it from its true object, and are guilty of ultra vires acts, does not come within code section allowing courts to dissolve corporation and appoint receiver in such cases as are in accord with practices of courts of equity.

Effect of Appeal from Judgment when proceedings are stayed is to preserve rights of parties to controversy in same condition as they were prior to entry of judgment.

Approved in *McAneny v. Superior Court*, 150 Cal. 8, 87 Pac. 1021, stay of proceedings upon appeal from alimony order operates as super-sedeas, and deprives superior court of all power to enforce order appealed from, either by execution or by proceedings for contempt, or through appointment of receiver; *Primm v. Superior Court*, 3 Cal. App. 211, 84 Pac. 787, sections 553 and 946 of Code of Civil Procedure, construed together, permit of attachment being continued in force, pending appeal by plaintiff from judgment for defendant, upon plaintiff's perfecting appeal and filing undertaking as required by concluding clause of section 946.

Upon Application of Corporation, writ of prohibition must be granted to prevent superior court from proceeding upon judgment and orders appointing receiver with reference to any of corporation's property, and from interfering with corporation's possession or control as to its property, pending its appeal from judgment of dissolution.

Distinguished in *McAneny v. Superior Court*, 150 Cal. 10, 87 Pac. 1022, prohibition will not lie to prevent enforcement of order appealed from pending stay of proceedings upon appeal of action to appoint receiver in action for divorce for purpose of enforcing payment of alimony.

Writ of Prohibition. See note, 111 Am. St. Rep. 947.

Superintending Control and Supervisory Jurisdiction of superior over inferior or subordinate tribunal. See note, 51 L. R. A. 108.

When and at Whose Instance Receiver of corporation may be appointed. See note, 118 Am. St. Rep. 199.

Acts and Proceedings of Dissolved Corporation. See note, 134 Am. St. Rep. 313.

101 Cal. 152-154, 35 Pac. 555, HARRISON v. HEBBARD.

Where at Commencement of Dissolution Proceedings of corporation court, which enjoined corporation and its agents from carrying on any litigation or interfering with assets, is without jurisdiction, at

torney who prosecuted petition in involuntary insolvency against corporation is entitled to writ of prohibition to prevent judge from hearing order to show cause why he was not guilty of contempt.

Approved in *Golden v. District Court*, 31 Nev. 266, 101 Pac. 1027, where court, in appointing receiver of bank had no jurisdiction of proceeding because necessary parties had not been served with notice, prohibition is proper to restrain court and receivers appointed from proceeding under order appointing receiver and other orders based thereon.

Writ of Prohibition. See note, 111 Am. St. Rep. 949.

When and at Whose Instance Receiver of corporation may be appointed. See note, 118 Am. St. Rep. 199.

101 Cal. 154-160, 35 Pac. 635, **DOUGALL v. SCHULENBERG.**

Where Note Sued upon was in Express Terms payable out of state, and both of payers were nonresidents when cause of action accrued, statute only commences to run in their favor when they come into this state, and if they afterward left state, time absent would not be part of time in which suit must be commenced.

Approved in *McKee v. Dodd*, 152 Cal. 639, 125 Am. St. Rep. 82, 93 Pac. 855, 14 L. R. A. (n. s.) 780, where note was executed and made payable in New York, and maker was nonresident therein when it became due, and afterward came to this state, staying, however, less than two years, and later died in Honolulu, leaving property in this state, where ancillary administration was had, claim on note may be enforced in such ancillary administration.

Applicability to Nonresidents of Provision suspending limitations until "return" of absent defendant. See note, 25 L. R. A. (n. s.) 25.

Sufficiency and Effect of "Return" to State by defendant to start limitations running. See note, 23 L. R. A. (n. s.) 552.

101 Cal. 160-164, 35 Pac. 633, **HART v. CARNALL-HOPKINS CO.**

Where Superior Court has Original Jurisdiction of subject matter of suit, fact that case gained ingress to court by appeal from justice's court rendered upon merits of case cannot affect original jurisdiction of superior court to hear and determine cause.

Approved in *Groom v. Bangs*, 153 Cal. 459, 96 Pac. 505, where original complaint was by husband and wife for injury from negligent and unskillful treatment by defendant, and amended complaint stated new cause of action in husband alone, and defendant demurred to new action, irregularity in procedure could not be urged for first time on appeal; *Riverside Heights etc. Co. v. Trust Co.*, 148 Cal. 469, 83 Pac. 1008, where appellant answered cross-complaint and stipulated to submit for decision a particular question arising upon cross-complaint and answer, it cannot be objected upon appeal for first time that cross-complaint was improperly filed; *Lane v. Superior Court*, 5 Cal. App. 765, 91 Pac. 406, upon attempted appeal from justice's court, where sureties fail to justify, cause remains in that court until new undertaking is filed, and if latter was filed more than thirty days after judgment, appeal is ineffectual, and prohibition will lie to prevent superior court from trying case; *Johnson v. Erickson*, 14 N. D. 417, 105 N. W. 1105, when question of title to or boundary of real property arises, justice court does not lose complete jurisdiction, but his duty is to certify case to district court for trial, and where he

dismisses it instead, and plaintiff appeals generally from judgment, district court has jurisdiction.

101 Cal. 164-174, 35 Pac. 627, BURNHAM v. STONE.

Where Defendant Raised Issue of Fact in pleading, and plaintiff did not object to evidence proving such, plaintiff is estopped from objecting to pleading for first time upon appeal.

Approved in *Milwaukee etc. Ins. Co. v. Warren*, 150 Cal. 353, 89 Pac. 96, where, in action by insurance company on its agents' bonds, where books were mutilated, and case was referred and referee made report, which was treated as prima facie showing of indebtedness, and defendant examined referee, and case was tried on theory that referee's report was properly before court, defendants cannot raise objection for first time on appeal which could have been obviated in lower court.

Writ Describing Land by Reference to "dwelling-house, honey-house and chicken-house thereon," covers land on which they are situated, notwithstanding erroneous description by government subdivisions.

Approved in *Hall v. Bartlett*, 158 Cal. 644, 112 Pac. 178, where deed described land as two-story frame house on corner of two designated streets, on lot 10 of block "V," and evidence showed that lot was sixty feet from corner referred to, and was only lot in vicinity with house thereon, recital that house on corner would be rejected is false call.

If Owner of Land Wrongfully Held by another enters and expels occupant, using no more force than is reasonably necessary, he is not liable for trespass, though he was compelled, in order to effect removal, to use such force as would render him subject to indictment for breach of peace or for forcible entry.

Approved in *Walker v. Chanslor*, 153 Cal. 129, 126 Am. St. Rep. 61, 94 Pac. 610, 17 L. R. A. (n. s.) 455, trespasser cannot maintain action for personal injuries, while trying to prevent entry of owner thereon, provided no more force is used by owner than is reasonably necessary to make entry effective; *Cory v. Santa Ynez Land etc. Co.*, 151 Cal. 783, 91 Pac. 649, mortgagor who is forcibly ejected by mortgagee, who is rightly entitled to possession, cannot maintain trespass to recover damages from mortgagee.

Judgment will be Reversed Where Erroneous instruction cuts off substantial defense on merits, though verdict is right on evidence.

Approved in *Walker v. Chanslor*, 153 Cal. 134, 126 Am. St. Rep. 61, 94 Pac. 612, 17 L. R. A. (n. s.) 455, reversing for exclusion of evidence.

101 Cal. 175-178, 35 Pac. 686, JAFFE v. LILIENTHAL.

Unless Right of Parties to be Present at trial is waived by voluntary or negligent absence, dismissal because of plaintiff's absence, which involves destruction of his rights, should not be imposed, unless justice clearly requires it.

Approved in *Sheldon v. Landwehr*, 159 Cal. 781, 116 Pac. 45, circumstance that witness unable to attend is also one of parties strengthens showing in favor of continuance, but does not necessarily compel court to grant it; *Storer v. Heitfeld*, 17 Idaho, 126, 105 Pac. 60, where motion for continuance showed that one of defendants consented to setting for trial and notified other, who was then absent

from state at brother's funeral, and thus unable to be present, and his testimony was pertinent to good defense, and he could be present at next term, it was error to overrule motion; *McMahon v. Norick*, 12 Okl. 128, 69 Pac. 1048, where physician's certificate showed that plaintiff was unable to attend, and she was material witness in her own behalf, and motion for continuance was made in good faith, it was abuse of discretion to deny application for continuance, which would require reversal of cause.

101 Cal. 178-187, 35 Pac. 569, 23 L. R. A. 388, LEVEE DISTRICT NO. 9 v. FARMER.

Public Use Ceases upon Vacation of highway, and injury to abutting owner consequent upon such ending of use is damnum absque injuria.

Approved in *Swift v. Santa Barbara*, 16 Cal. App. 76, 77, 116 Pac. 318, 319, upon discontinuance of public lane connecting two public highways, rights of abutting owner are unaffected by order, but such owner cannot insist that public maintain road for his private convenience and use; *Marietta Chair Co. v. Henderson*, 121 Ga. 404, 104 Am. St. Rep. 156, 49 S. E. 315, public streets cannot be vacated for benefit of private individual, but only for benefit of public; *Long v. Wilson*, 119 Iowa, 271, 97 Am. St. Rep. 315, 93 N. W. 283, owner of property abutting upon public street has interest in street distinct from his interest as citizen of municipality, and is not bound by decree in suit against city to change and fix boundaries of such street to which he was not individually made party; *Pence v. Bryant*, 54 W. Va. 270, 46 S. E. 278, statute giving town council power to vacate street does not empower it to close street merely for benefit of private person or to free his land from public easement.

Right of Property Owner Whose Access from one direction is shut off or interfered with by closing of street. See note, 2 L. R. A. (n. s.) 269.

As to All Facts Tending to Show whether power of supervisors ought or ought not to be exercised in laying out new road and vacating part of old, board exercises judicial functions, and its judgments cannot be attacked collaterally.

Approved in *County of Sacramento v. Glann*, 14 Cal. App. 786, 113 Pac. 362, where private property is required for highways, it is province of supervisors to determine conclusively, as against collateral attack, necessity for use, its public character, route and terminus, land necessary therefor, its apparent ownership, and matters of fact passed upon in approving report of viewers.

What Constitutes "Damage" to Property within provision that property shall be taken or damaged for public use without compensation. See note, 109 Am. St. Rep. 913.

101 Cal. 187-196, 35 Pac. 630, PALMER v. ATCHISON ETC. R. R. CO.

Where Railroad Accepts Freight for Place beyond its route, in absence of stipulation that such company shall be liable beyond its own terminus, its liability as common carrier ceases upon making delivery to connecting carrier at end of its own line.

Approved in *Schwartz v. Panama R. R. Co.*, 155 Cal. 747, 103 Pac. 198, following rule; *Fairfield v. Pacific Coast Steamship Co.*, 3 Cal. App. 108, 84 Pac. 439, steamship company accepting merchandise to be forwarded beyond certain port, under bill of lading by which it contracts to carry to such place and there deliver to consignee or to some connecting carrier to be carried to him, absolves itself from further liability by making delivery to connecting carrier at such intermediate port; *Colfax etc. Fruit Co. v. Southern Pac. Co. (Cal.)*, 46 Pac. 670, under Civil Code, section 2201, provision in freight contract that carrier's responsibility shall cease at connecting point is not rendered ineffective by further stipulation for through passenger train service.

Railroad Receiving Freight for Transportation over its own and connecting lines, which, by reason of some fact known to it and unknown to shipper, is liable to detention beyond usual time occupied in transit, should inform shipper of such fact.

Approved in *Daoust v. Chicago, R. I. etc. Ry. Co.*, 149 Iowa, 655, 128 N. W. 1108, where common carrier took its freight crews for purpose of handling extraordinary passenger traffic, it was bound to notify shippers of freight of crippled condition of its freight traffic, in order to excuse delay in transportation from such cause.

Law of Place Where Contract of Carriage was made governs in determining liability of carrier, unless parties at time of making it had some other law in view.

Approved in *Missouri etc. Ry. Co. v. Hutchings etc. Co.*, 78 Kan. 771, 99 Pac. 234, in action against carrier based upon bills of lading involving no question with respect to carrier's right to limit its common-law liability, rights and obligations of parties are to be determined by law of place where contract was made.

Conflict of Laws as to Carrier's Contracts. See note, 63 L. R. A. 530.

Where Contract for Transportation by Railroad was made in another state, law of which was not put in evidence, it must be presumed that law of that state is same as law of this state.

Approved in *Schwartz v. Panama R. R. Co.*, 155 Cal. 747, 103 Pac. 198, following rule; *Wilhite v. Skelton*, 5 Ind. Ter. 630, 82 S. W. 935, court of territory in which suit is brought for specific performance of contract there made relative to land in another territory will, in absence of allegation as to statute of frauds of that territory, assume that it is same as its own.

How Case Determined When Proper Foreign Law not proved. See note, 67 L. R. A. 43.

Snowstorm as Act of God Relieving Carrier from liability. See note, 24 L. R. A. (n. s.) 1209.

101 Cal. 197-198, 35 Pac. 556, **EX PARTE AH CUE.**

Miscellaneous.—Cited in *Ex parte Lippman (Cal.)*, 35 Pac. 557.

101 Cal. 198-200, 35 Pac. 642, **GRANGERS' BANK OF CALIFORNIA v. SUPERIOR COURT.**

Constitution and Rule Making Judgment rendered in supreme court final unless rehearing is granted within thirty days do not make any distinction between cases of original and of appellate jurisdiction.

Approved in *Noll v. Smith*, 2 Cal. App. 162, 83 Pac. 169, where superior judge was directed by writ of mandate from appellate court to

procure another judge to try cause, or show cause, such alternative writ operated as stay of proceedings without any order therefor.

101 Cal. 206-216, 35 Pac. 643, 646, McDONALD v. SOUTHERN CALIFORNIA RY. CO.

Admission or Averment of Fact in verified answer, in separate defense, is not evidence against defendant upon issues tendered in other defenses contained in same answer, consisting of denials only.

Approved in *Light v. Stevens*, 8 Cal. App. 79, 103 Pac. 362, defendant may apply evidence applicable to plea of payment in favor of such plea, notwithstanding inconsistent plea of counterclaim to which it is not applicable; *The Snipsic Co. v. Smith*, 7 Cal. App. 151, 93 Pac. 1035; in action for goods sold and delivered, where defenses are separately pleaded, answer may deny every allegation of complaint, including nonpayment and assignment to plaintiff, and separate defense that he was fraudulently induced to sign writing cannot qualify or affect specific denials of answer.

Right to Plead Inconsistent Defenses. See note, 48 L. R. A. 194, 195, 204.

Miscellaneous.—Cited in *McDonald v. Southern Cal. Ry. Co. (Cal.)*, 41 Pac. 812, discussing history of litigation.

101 Cal. 216-221, 35 Pac. 651, SAN DIEGO WATER CO. v. PACIFIC COAST S. S. CO.

Where There is No Appearance at Time when order to show cause was returnable, and motion for injunction was not completed or kept alive in any mode, restraining order falls, and ends naturally with motion.

Approved in *Knight v. Cohen*, 5 Cal. App. 301, 90 Pac. 147, upon hearing of order to show cause why preliminary injunction should not be granted, restraining order falls with denial of injunction, and is merged in it if granted; *Ex parte Grimes*, 20 Okl. 453, 1 Okl. Cr. 109, 94 Pac. 671, where restraining order fixes day certain on which to show cause, and at that time neither party nor court takes any action, order thereby spends its force, and judgment holding party guilty of contempt for violation of its terms is void, and he is entitled to release on habeas corpus.

Statute Discriminates Between Restraining Order and injunction.

Approved in *Ex parte Grimes*, 20 Okl. 457, 459, 1 Okl. Cr. 113, 114, 94 Pac. 672, 673, fact that bond is required by court and given by party applying for restraining order at time of its issuance, and also that words, "until the further orders of this court," were contained in order in conjunction with a day set for hearing to show cause, does not have effect of charging order into temporary injunction.

Where No Efforts were Made to Dissolve preliminary injunction except that case was tried on its merits, and dissolution of injunction was made by final judgment, and attorneys were simply employed to try case, and were paid for that purpose and no other, counsel fees cannot be recovered, as damages upon injunction bond.

Approved in *Spooner v. Cady (Cal.)*, 44 Pac. 1020, where only evidence of money properly expended in pursuit of personal property wrongly converted is that plaintiff made note for gross sum to attorney, in full payment of all expenses of proposed suit, and it did not appear what expenses were incurred, except that plaintiff had judg-

ment for her costs, money paid to attorney cannot be taken into account, in estimating damages; Chicago, Anamosa etc. Ry. Co. v. Whitney, 143 Iowa, 514, 121 N. W. 1046, where suit brought to enjoin collection of railroad aid tax and preliminary injunction was dissolved upon final hearing, whereupon railroad brought mandamus against trustees to compel issuance of tax certificate, and on appeal from injunction decree supreme court enjoined collection of taxes and proceedings in mandamus case, on its dissolution, attorneys could not recover for attorneys' fees on main appeal, or on attempt to set aside injunction.

Recovery on Injunction Bond of Attorneys' Fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 66, 72.

101 Cal. 223-224, 35 Pac. 770, SYMONS v. BUNNELL.

No Appeal Lies from Order Refusing to vacate appealable order.

Approved in Freeman v. Brown, 4 Cal. App. 109, 87 Pac. 205, order denying motion under section 473 of Code of Civil Procedure for leave to amend statement on motion for new trial by inserting specifications excusably omitted therefrom, being appealable, motion to dismiss appeal therefrom must be denied.

101 Cal. 224-229, 35 Pac. 761, GODFREY v. MONROE.

Conveyance by Deed of Trust With Power to Sell, and involving payment of indebtedness out of receipts of sale of lands and reconveyance of residue to grantor, constitutes mortgage with power of sale.

Approved in Avetin v. Krohn, 4 Cal. App. 136, 87 Pac. 245, rule that action does not ordinarily lie in favor of trustee to foreclose trust deed does not apply where granting clause of instrument shows that conveyance was made as security only for existing indebtedness to plaintiffs, and action by beneficiaries involves accounting; Brown v. Comonow, 17 N. D. 88, 114 N. W. 729, arguendo.

Subsequent Sale Under Attachment of mortgagor's interest in land under judgment recovered against grantor relates back to time of levy of attachment.

Approved in Martinovich v. Marsicano, 150 Cal. 600, 119 Am. St. Rep. 254, 89 Pac. 333, sheriff's deed executed in pursuance of execution sale under judgment in attachment suit relates back to and takes effect from levy of attachment, if sufficient to create a lien.

Miscellaneous.—Cited in Gould v. Monroe (Cal.), 35 Pac. 763.

101 Cal. 229-233, 35 Pac. 860, PEOPLE v. LYNCH.

Instruction That Bare Fear of Defendant that prosecuting witness was going to inflict bodily injury upon him would not justify him in trying to kill witness, but there must have been acts such as would induce ordinarily prudent man to believe that he was in great and immediate danger of death or great bodily harm, is correct.

Approved in State v. Fleming, 17 Idaho, 485, 106 Pac. 310, following rule; Hoard v. State, 80 Ark. 92, 95 S. W. 1004, in instruction that defendant had right to defend himself if it seemed to him, "acting as a reasonable person," without fault on his part, that he was in danger of losing his life or receiving great bodily harm, insertion of quoted words is not error, where there is no contention that defendant is not person of ordinary reason, meaning of instruction not being changed thereby.

Standpoint of Determination as to Danger and necessity to kill in self-defense. See note, 3 L. R. A. (n. s.) 543.

"Retreat to the Wall" in Homicide. See note, 2 L. R. A. (n. s.) 57.

101 Cal. 235-238, 35 Pac. 859, **ANTHONY v. GRAND.**

Under Section 1025 of Code of Civil Procedure, neither party can recover costs.

Approved in *Frese v. Mutual Life Ins. Co. of N. Y.*, 11 Cal. App. 399, 105 Pac. 270, upon plaintiff's recovery of small residue of cash value of policy, left after payment of loan, being less than three hundred dollars, no costs are allowable to either party.

101 Cal. 242-246, 35 Pac. 770, **GALLAGHER v. MONTECITO ETC. WATER CO.**

Where Defendant and His Predecessors have diverted water to extent of boxes and pipes used, and used same for beneficial purposes continuously and adversely to plaintiff and all others for more than five years, he has good prescriptive title thereto.

Approved in *Arroyo Ditch etc. Co. v. Baldwin*, 155 Cal. 285, 100 Pac. 876, corporation organized to distribute to its stockholders waters of certain stream, to which they each either had riparian rights or had acquired right by prescription, may maintain action against upper riparian proprietor to establish such rights; *Hubbs etc. Ditch Co. v. Pioneer Water Co.*, 148 Cal. 417, 83 Pac. 257, in action to determine rights of parties to waters of stream, where decree awarded defendant prior right to only fifteen cubic feet per second, but findings established his title to twenty-five feet superior to any right in plaintiff to any water, decree must be modified accordingly.

Change of Use or Channel of Water Appropriated. See note, 30 L. R. A. 386.

101 Cal. 254-260, 35 Pac. 767, **FREEMAN v. KIEFFER.**

Delay by Purchaser of Land, Under Contract of sale to rescind contract occurring under circumstances which do not render delay unreasonable, will not deprive him of right to rescind.

Approved in *Owen v. Pomona Land etc. Co. (Cal.)*, 61 Pac. 474, where grantor's title was derived from one of two conflicting congressional grants, other of which had been held paramount by court, fact that grantee waited from January, 1894, to August, 1896, before rescinding sale for failure of title, in reliance on grantor's repeated promises to obtain act of Congress to cure defect, was not such unreasonable delay as to amount to laches.

101 Cal. 260-265, 35 Pac. 873, **EAMES v. CROSIER.**

Upon Proof, by Defendant, of Fraud or illegality in inception of note, burden is cast upon indorsee to show that he is innocent holder.

Approved in *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 769, 118 Pac. 95, where plaintiff upon direct examination testified that he gave valuable consideration for assignment of note, it is not error for trial court to refuse to permit him to be cross-examined with reference to nature and amount of such consideration.

When Indorsee Shows That He was Innocent Holder, in due course, unless evidence shows that note was taken by him under circumstances creating presumption that he knew facts impeaching its validity,

burden is cast upon defendant to show that plaintiff took with notice of defendant's equities.

Approved in *Meyer v. Lovdal*, 6 Cal. App. 376, 377, 92 Pac. 325, where note was given for money lost at gambling, or was fraudulently obtained, burden is on indorsees to show purchase for value before maturity, in usual course, but when this is shown, burden is on maker to show that indorsees took with notice of his equities.

Fraud in Obtaining Execution of Note as defense against bona fide holder. See note, 36 L. R. A. 441.

One Taking Overdue Note from prior holder, who took for value before maturity, without any notice of any infirmity in it, acquires as good a title as that of prior holder.

Approved in *Union Collection Co. v. Buckman*, 150 Cal. 166, 119 Am. St. Rep. 164, 88 Pac. 711, 9 L. R. A. (n. s.) 568, neither payee nor subsequent holder can recover on gambling consideration.

Distinguished in *Reese v. Bell* (Cal.), 71 Pac. 89, where note was not duly indorsed to plaintiff before its apparent maturity, within provisions of Civil Code, section 3123, but payee made mere equitable assignment thereof, and after maturity indorsed same, in action by plaintiff maker might set up any equitable defense.

101 Cal. 265-271, 40 Am. St. Rep. 53, 35 Pac. 863, **McCONOUGHIEY v. JACKSON.**

Petition for Mandamus to Compel Drawing of warrant, which states that trustees ordered bill paid, and ordered warrant drawn in his favor for amount, which president and clerk refused to draw and countersign, and that there was money in treasury to pay it, states facts giving right to writ.

Approved in *Goldtree v. San Diego*, 8 Cal. App. 510, 97 Pac. 218, where judgment is not sought against city, but only against fund in its treasury, court has jurisdiction to render suitable judgment in cause to which city is party.

Where City Board of Trustees has Jurisdiction to hear and determine claim, its determination is judicial act, concluding fact of indebtedness.

Approved in *Clapp v. Titus*, 138 Mich. 43, 100 N. W. 1006, under statute providing that village councils shall have authority to provide for custody of public property, where village president has suspended marshal, and council, through committee on fire and water, employed suspended marshal, and allowed his claim for services in attending to fire apparatus, mandamus lies to compel president to sign orders for amount allowed by council.

Municipal Legislative Department may, at Any Time before rights of third persons have vested, rescind previous votes and orders, so far as consistent with laws of its creation and its rules of action.

Approved in *State v. Ross*, 82 Neb. 424, 118 N. W. 89, where county board established ditch and ordered construction thereof, where no rights have accrued in consequence of such order, and no proceedings taken except employment of engineer and portion of preliminary work of surveying being done by him, board may reconsider its former action, and revoke order establishing ditch.

Right of Municipal Authorities to Reconsider Action as to allowance of claim. See note, 21 L. R. A. (n. s.) 291.

Denial of Indebtedness Without Denying facts in regard to expenses incurred by petitioner is denial of conclusion of law.

Approved in *Fox v. Monahan*, 8 Cal. App. 710, 97 Pac. 766, complaint merely alleging that "defendants became indebted" in certain sum, money had and received at special instance and request of defendants, without stating any facts showing directly or inferentially that money was had or received for their use or benefit, states no cause of action.

When Denials on Information and Belief are permissible. See note, 133 Am. St. Rep. 122.

Denials upon Information and Belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge. See note, 30 L. R. A. (n. s.) 779.

101 Cal. 275-280, 35 Pac. 865, **SANFORD v. EAST RIVERSIDE IRR. DISTRICT.**

Though Profit upon Sinking of Artesian Wells cannot be determined with mathematical certainty, yet damages are fairly ascertainable in their character and origin within meaning of section 3301 of Civil Code.

Approved in *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 604, 110 Pac. 462, in action by one to whom exclusive agency was contracted for to sell defendant's motor cars within specified territory, where defendant solicited orders therein, measure of damages is profits plaintiff would have made on such sales had defendant refused to invade territory, and have referred inquiries of purchasers to plaintiff as agreed upon.

101 Cal. 281-285, 35 Pac. 862, **PEOPLE v. WALLACE.**

Where Defendant, Accused of Assault with deadly weapon with intent to commit murder, is convicted only of assault with deadly weapon, any error in instruction which could have no bearing upon lower offense of which he was convicted is harmless.

Distinguished in *People v. Mendenhall* (Cal.), 63 Pac. 676, on prosecution for assault with intent to murder, instruction that malice necessary to make killing murder might be either express or implied was erroneous.

Only Ground of Challenge to Panel of jury summoned by special venire is "bias of the officer who summoned them," as provided in section 1064 of Penal Code.

Cited in *State v. Ju Nun*, 53 Or. 5, 97 Pac. 98, under statute abolishing challenge to panel, litigant cannot object to jurors summoned in manner prescribed by law and accepted by court, on ground that law is unconstitutional.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 442.

101 Cal. 286-292, 35 Pac. 876, **ST. LOUIS NAT. BANK v. GAY.**

Maker of Non-negotiable Notes which have been assigned by payee to third party may set off against them note of payee which he has purchased before notice of assignment of notes executed by him.

Approved in *Davis v. Rawhide Gold Min. Co.*, 15 Cal. App. 118, 113 Pac. 903, in action against mining company on mining labor checks assigned by drawee, and offset pleaded in answer against plaintiff's

assignor was unknown to plaintiff before answer, he is not precluded from proving, in avoidance of such offset, countervailing debt of defendant to his assignor; *Randol v. Rowe* (Cal.), 44 Pac. 1068, equitable estoppel to plead setoff of note in action on account against defendant, which has been assigned to plaintiff by maker, did not arise out of assignor's direction to defendant, after assignment, to pay amount of account to plaintiff, and defendant's silence as to his possession of note, it not appearing that plaintiff had knowledge of such request.

Section 1459 of Civil Code and Section 368 of Code of Civil Procedure are to be construed as though they had been passed at same time and were parts of same statute.

Approved in *Jensen v. Dorr*, 159 Cal. 745, 116 Pac. 554, section 3060 of Civil Code and section 813 of Code of Civil Procedure are to be considered together.

101 Cal. 292-295, 35 Pac. 868, FLETCHER v. DENNISON.

Where Note Gives Holder Option either to claim compound interest or to claim whole amount of principal and interest as immediately due and payable, without notice, holder of note has reasonable time after default of interest in which to make his election.

Approved in *Patten v. Pepper Hotel Co.*, 153 Cal. 468, 96 Pac. 300, where both complaint of plaintiff and cross-complaint of defendant bank as holder, each avers that because of default they had both elected to exercise option, and had declared whole of note due, and such averments were admitted by failure to deny them specifically, no finding was required to be made upon matter so admitted; *Trinity County Bank v. Haas*, 151 Cal. 556, 91 Pac. 386, if, after default, but before exercise of option, maker pays or offers to pay overdue interest, right to exercise option is lost; *Kinsel v. Ballou*, 151 Cal. 758, 91 Pac. 622, delay of fifteen days after default in payment of monthly installment of interest is not unreasonable.

Distinguished in dissenting opinion in *Patto v. Pepper Hotel Co.*, 153 Cal. 472, 96 Pac. 303, majority holding, where both plaintiff's complaint and cross-complaint of defendant bank as holder aver that because of default they had both elected to exercise option and had declared whole of note due, and such averments were admitted by failure to deny them specifically, no finding was required to be made on matters so admitted.

101 Cal. 295-303, 35 Pac. 995, BROWN v. KLING.

Statute Does not Render Contracts in restraint of trade wholly void, though not in accordance with code.

Approved in *Shafer v. Sloan*, 3 Cal. App. 337, 85 Pac. 163, contract not to engage in occupation of second-hand dealer, so long as purchaser continues in such business, without restricting it to "similar business" as provided in section 1671 of Civil Code, is void only to extent to which it attempted to enlarge purchaser's rights beyond statute.

Where Contract in Restraint of Trade is valid, and complaint states breach of it, plaintiff is entitled to injunction to prevent its violation, even if only nominal damages can be proven.

Approved in *Hickey v. Brinkley*, 88 Neb. 358, 129 N. W. 554, where defendants sold livery and feed business, and executed at same time agreement with penalty of five hundred dollars, conditioned

that they would not engage in business in that vicinity for ten years, upon violation of such agreement, plaintiffs had election to sue for damages upon bond or apply for injunction to restrain breach of negative contract.

Validity of Agreement in Restraint of Trade, ancillary to sale of business or profession, as affected by territorial scope. See note, 24 L. R. A. (n. s.) 929.

Injunction Against Breach of Contract. See note, 90 Am. St. Rep. 637, 638.

101 Cal. 303-307, 35 Pac. 869, **SPEARS v. COUNTY OF MODOC**.

Where Superior Court Imposed Fine for violation of municipal ordinance, and pending appeal from judgment ordinance was repealed, notwithstanding affirmance of judgment its enforcement will be restrained.

Cited in *People v. Bank of San Luis Obispo*, 159 Cal. 76, 112 Pac. 870, where judgment rendered under banking act of 1903 had been affirmed on direct appeal therefrom, and thus become final, subsequent repeal of such statute, pending appeal from order refusing new trial, without supersedeas or stay bond, does not have effect to destroy judgment.

Effect of Repeal, upon Prior Conviction under penal statute or ordinance. See note, 23 L. R. A. (n. s.) 245, 246.

101 Cal. 307-312, 35 Pac. 899, **FIRST NAT. BANK OF SAN LUIS OBISPO v. HENDERSON**.

Repeal of Statute Pending Appeal deprives appellate court of power to render judgment by which statutory penalty may be enforced.

Approved in *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 194, 81 Pac. 1031, upon death of appellant, power of court to enforce judgment by execution against him terminated, and respondent is remitted for its collection to probate court having charge of appellant's estate.

If Case is Appealed, and, Pending Appeal, law is changed, appellate court must dispose of case under law in force when its decision is rendered.

Approved in *People v. Bank of San Luis Obispo*, 159 Cal. 77, 112 Pac. 871, where judgment rendered under banking act of 1903 had been affirmed on direct appeal, and has become final, subsequent repeal of such statute, pending appeal from order refusing new trial, without supersedeas or stay bond, does not destroy judgment.

Provision of Act of April 1, 1876, was in nature of penalty, which legislature could remit at any time.

Approved in *Riverdale Mining Co. v. Wicks*, 14 Cal. App. 531, 112 Pac. 898, in action by corporation affecting title to land, its failure to file its articles of incorporation in county is merely matter in abatement of action, constituting special defense, which is waived unless affirmatively pleaded.

101 Cal. 312-317, 40 Am. St. Rep. 57, 35 Pac. 872, **HOLLENBACH v. SOHNABEL**.

Courts will Take Judicial Notice of their records and officers.

Approved in *Buhman v. Nickels & Brown Bros.*, 7 Cal. App. 595, 95 Pac. 178, in unlawful detainer, where plaintiff claimed under

executor's sale, and defendant under prior lease of executors, and only defense was plea in abatement that lessee appealed from decree confirming plaintiff's title, and that appeal was pending when action was commenced, but was determined before answer was filed, but character of determination did not appear, fact that decree of confirmation of sale was affirmed will be judicially noticed; *Haaren v. Mould*, 144 Iowa, 301, 122 N. W. 923, in proceedings for violation of liquor injunction, court will take judicial notice of decree alleged to have been violated; *Caldwell Banking etc. Co. v. Porter*, 52 Or. 324, 95 Pac. 3, *arguendo*.

Judicial Notice. See note, 83 Am. St. Rep. 773.

101 Cal. 317-322, 35 Pac. 897, **FRANDZEN v. SAN DIEGO COUNTY.**

Where Statute Contains Specific Provisions relating to particular subject, they must govern in respect to that subject, as against general provisions in other parts of statute, although latter, standing alone, would be broad enough to include subject to which more particular provisions relate.

Approved in *King v. Armstrong*, 9 Cal. App. 371, 99 Pac. 528, action, in this state, by receiver of insolvent national bank in Kansas, to enforce assessment levied upon stockholders in pursuance of laws of United States, against stockholder resident in this state, is barred, under section 359 of Code of Civil Procedure, by lapse of three years after liability was created.

101 Cal. 322-326, 35 Pac. 896, **REDONDO BEACH CO. v. BREWER.**

Garnishment of Unliquidated Claims. See note, 59 L. R. A. 354, 384.

101 Cal. 326-330, 35 Pac. 871, **WEBSTER v. SAN PEDRO LUMBER CO.**

Party's Books of Account as Evidence in own favor. See note, 52 L. R. A. 574, 609.

What Provable by Books of Account. See note, 52 L. R. A. 723.

101 Cal. 333-337, 35 Pac. 993, **SAN PEDRO v. SOUTHERN PACIFIC R. R. CO.**

Right to Erect Wharves. See note, 40 L. R. A. 645.

101 Cal. 338-349, 35 Pac. 856, 36 Pac. 813, **MARCEAU v. TRAVELERS' INS. CO.**

Upon Question of Insanity, Statements of witnesses as to peculiar conduct and conversation of person charged with insanity as observed by witnesses are competent evidence, although they are not intimate acquaintances within meaning of section 1870, subdivision 10, of Code of Civil Procedure.

Approved in *State v. Penna*, 35 Mont. 541, 90 Pac. 789, two newspaper reporters, whose only acquaintance with defendant consisted of their conversation with him for half hour shortly after homicide, were not "intimate acquaintances," within code provision authorizing persons of intimate acquaintance to testify to their opinion on issue of insanity of accused.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 727.

Expert Opinions as to Sanity or Insanity. See note, 39 L. R. A. 324.

Presumption and Burden of Proof as to sanity. See note, 36 L. R. A. 721.

Res Judicata in Criminal Proceedings. See note, 103 Am. St. Rep. 20.

Judgment in Criminal Action as res judicata in civil action. See note, 11 L. R. A. (n. s.) 660.

101 Cal. 349-358, 35 Pac. 991, 36 Pac. 98, 508, **ESTATE OF THOMPSON.**

Petition Filed in Superior Court After Final distribution of decedent's estate, asking for accounting and removal of trustees, on account of mismanagement of estate, will be regarded as bill in equity addressed to equitable power of superior court.

Distinguished in *King v. Chase*, 159 Cal. 422, 115 Pac. 208, action in equity does not lie to compel executor of deceased executor to settle account of his testator with estate in which decedent had been acting.

Fact That Bill in Equity was Entitled "in the matter of the estate" of decedent, and that trustees were brought in by citation from probate division of superior court, is waived by their appearance and answer without objection to form of petition.

Distinguished in *King v. Chase*, 159 Cal. 425, 115 Pac. 209, reversing judgment for accounting, rendered against executor of deceased executor in action in equity brought after enactment of section 1659 of Code of Civil Procedure, when such executor, at time he accounted in such action, objected to jurisdiction of court to compel him to account therein.

101 Cal. 358-367, 35 Pac. 997, **WILHELM v. SILVESTER.**

What Cross or Intersecting Lodes are included in mineral patents, and rights therein. See note, 83 Am. St. Rep. 42, 44.

Veins Intersecting, Crossing, or Uniting. See note, 50 L. R. A. 209.

101 Cal. 367-372, 35 Pac. 1000, **TALMADGE v. ARROWHEAD RESERVOIR CO.**

No Action Lies to Enforce Performance of contract, or to recover damages for its breach, unless it be complete and certain as to price, as well as to subject matter and parties.

Approved in *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 669, 117 Pac. 937, following rule.

101 Cal. 387-390, 35 Pac. 1004, **SOLARI v. SNOW.**

Where Deed Purporting to be from Plaintiff to defendant was signed by one of grantors as assumed attorney in fact for plaintiff, he having no authority to so execute it, deed is of itself sufficient to charge defendant with notice of extent and character of plaintiff's interest, and of such pretended relation of agency.

Approved in *Davis v. Trachsler*, 3 Cal. App. 559, 86 Pac. 612, where contract of sale is made by one holding himself out as agent of seller, and signed by him as agent, it is incumbent upon purchaser, who has actual notice of agency, to ascertain scope of agent's authority, and contract in excess of agent's authority, without concurrence or fault of principal, renders professed agent alone liable.

Evidence to Show Credibility or Bias of Witness. See note, 82 Am. St. Rep. 48.

101 Cal. 390-395, 35 Pac. 1005, AMES v. CITY OF SAN DIEGO.

Findings are to be Liberally Construed in support of judgment.

Approved in *Haight v. Haight*, 151 Cal. 92, 90 Pac. 198, following rule; *Bruce v. Bruce*, 16 Cal. App. 357, 116 Pac. 996, where findings were expressly waived by both parties, general recital in judgment that all material allegations of complaint are true is to be understood to be general recital as to facts constituting cause of action, and not statement as to character of homestead as being on community property, where judgment expressly recites that it was declared on separate property of husband; *Brenneke v. Smallman*, 2 Cal. App. 308, 83 Pac. 303, in action to foreclose chattel mortgage, findings as to secured note and mortgage in accordance with allegations of complaint that to secure note defendant executed mortgage of personal property described in paragraph 3 of complaint, followed by finding of its record, referring to volume and page thereof, sufficiently show execution of mortgage described in complaint, though not in terms referring thereto.

Land Acquired by City from United States, held in trust for general public for specific public use, cannot be alienated, and title of city cannot be lost by possession adverse to city.

Approved in *Tulare Irr. Dist. v. Collins*, 154 Cal. 443, 97 Pac. 1125, 1126, irrigation district organized under Wright Act and Bridgeford Act holds its land in trust for uses specified in acts, and trustees cannot sell lands which have become unnecessary to and are not used in its irrigation scheme, nor can such lands be sold on execution at instance of judgment creditor of district; *People v. Kerber*, 152 Cal. 734, 125 Am. St. Rep. 93, 93 Pac. 879, when tide lands are situated in navigable bay, and constitute part of waterfront thereof, they constitute property devoted to public use, of which persons cannot obtain title by prescription; *Kern Island etc. Co. v. Bakersfield*, 151 Cal. 407, 90 Pac. 1053, user for eleven years of ditch unlawfully constructed and maintained in public highway, without objection from public authorities, creates no prescriptive right in owner's favor to maintain same as ditch along highway; *Koshland v. Cherry*, 13 Cal. App. 443, 110 Pac. 144, where plaintiff constructed store on public alley, which formed cul-de-sac, and closed it by gate, and used property in that way for about twenty-three years, before city authorities ordered such gate to be removed and alley opened, such long occupation creates no prescriptive right against city.

Pueblo Lands, Legal Title of Which is Vested in city, and which may be alienated by it, may be lost by adverse possession for statutory period.

Approved in *Orack v. Powelson*, 3 Cal. App. 285, 85 Pac. 130, in action to quiet title to lands within Van Ness ordinance of San Francisco, which plaintiff claimed by adverse possession, fact that city held land under trust to convey to persons who might be entitled thereto will not prevent plaintiff acquiring title by adverse possession.

101 Cal. 396-404, 35 Pac. 1008, BALDWIN v. TEMPLE.

Payment of Taxes by Record Owner adds nothing to his title, but it excludes any presumption that it was assessed to, or paid by, adverse owner.

Approved in *Glowner v. de Alvarez*, 10 Cal App. 196, 101 Pac. 433, validity of taxes assessed against property does not in any manner depend upon name in which they were assessed; *Spotswood v. Spotswood*, 4 Cal. App. 716, 89 Pac. 363, defendant was properly allowed to introduce assessment-rolls in evidence to prove that land was assessed, in order that court might determine whether plaintiff had paid all taxes, as required by statute, to obtain title by prescription; *Rio Grande etc. Ry. Co. v. Salt Lake Inves. Co.*, 35 Utah, 538, 101 Pac. 500, where part of lot assessed to railroad was not owned by company and was not part of right of way, and was assessed generally to owners thereof by local assessor for whole period for which it was assessed to company by board of equalization, railroad did not pay taxes thereon so as to entitle it to claim lot by adverse possession, under statute requiring claimant to have paid all taxes assessed for statutory period of seven years, to claim by adverse possession; *Swank v. Sweetwater etc. Co.*, 15 Idaho, 360, 98 Pac. 299, *arguendo*.

Where Owner of Land Accepts Lease from another it does not destroy his title to land.

Approved in *Strong v. Baldwin*, 154 Cal. 161, 129 Am. St. Rep. 149, 97 Pac. 183, owner of right originally acquired by prescription to use of water ditch across land of another, and who remains in continuous exercise and possession of such use, is not estopped, by mere fact that he has accepted lease of ditch from owner of land, from asserting his prescriptive title to use of ditch against owner of land.

Adverse Possession by Donee Under Parol Gift. See note, 35 L. R. A. 835.

Miscellaneous.—Cited in *McLean v. Baldwin*, 136 Cal. 566, 570, 69 Pac. 259, reciting history of litigation.

101 Cal. 405-411, 40 Am. St. Rep. 65, 35 Pac. 1019, BLAISDELL v. LEACH.

Where One of Two Innocent Persons must suffer by act of third, he by whose negligence it happened must be sufferer.

Approved in *Raymond v. Glover* (Cal.), 37 Pac. 775, where vendee signs purchase money mortgage, payable to vendor's agent, under belief that it is payable to vendor, after having ample opportunity to examine it, he cannot contest its validity as against innocent purchaser.

101 Cal. 411-414, 35 Pac. 1024, DOMICO v. CASASSA.

If Verdict or Finding is Made upon Conflict of evidence, trial court may review sufficiency of evidence, and if in its opinion verdict is against weight of evidence, it is its duty to set it aside.

Approved in *Hughes Bros. v. Rawhide Gold Min. Co.*, 16 Cal. App. 297, 116 Pac. 971, and *Eidinger v. Sigwart*, 13 Cal. App. 676, 110 Pac. 525, both following rule; *Newton v. United Electric etc. Co.*, 3 Cal. App. 705, 86 Pac. 903, in case involving negligence of electric power company, order granting new trial after verdict for plaintiff on ground of insufficiency of evidence will be affirmed, where no error or abuse

of discretion appears in record; *Castor v. Bernstein*, 2 Cal. App. 708, 84 Pac. 246, where verdict based upon comparison between assignment and release and there is conflict between them as to genuineness of release, court, if of opinion that verdict was not justified by evidence, should set it aside and grant new trial; *Scrivani v. Dondero* (Cal.), 44 Pac. 1066, rule that appellate court will not disturb verdict where there is evidence to support it does not apply with equal force to trial judge, who saw and heard witnesses.

If There is No Evidence upon Issue which is essential to judgment, verdict of finding upon such issue is error of law which may be reviewed by appellate court.

Approved in *Winchester v. Becker*, 8 Cal. App. 366, 97 Pac. 75, in action to rescind contract to sell real estate, for fraud in its procurement, from one who seeks to enforce contract by cross-complaint, in answer to which fraud is set forth, plaintiff was entitled to finding upon that issue, and where judgment was for defendant, and court granted new trial to plaintiff for errors of law, failure to find upon issue of fraud will support order.

Miscellaneous.—Cited in *Warner v. Thomas Parisian etc. Cleaning Works* (Cal.), 37 Pac. 153, after statement of case has been settled for appeal, court can allow additions to be made thereto, though omissions arose from negligence of attorney.

101 Cal. 415-424, 35 Pac. 1027, LONDON ETC. BANK v. SMITH.

Persons are Necessary Parties where defendants already before court have such interest in having them made parties as to authorize those defendants to object to proceeding without such parties.

Approved in *Cochrane v. McDonald*, 4 Cof. Prob. 541, denying motion for change of venue to county where real estate affected by action is situated, because true basis of action was fraud and collusion rather than determination of interest in realty, and because motion was opposed by necessary party.

101 Cal. 425-429, 35 Pac. 1021, GROOME v. ALMSTEAD.

Judgment Which is Right upon Merits should not be reversed by reason of fact that court gave wrong reason for its rendition.

Approved in *Hodgins v. Hodgins*, 23 Okl. 629, 103 Pac. 712, dissolution of temporary injunction granted upon allegations set forth in answer and cross-petition sworn to, but otherwise unsupported, based upon such grounds, will not be reversed on appeal.

Plaintiffs Out of Possession cannot Sue for crops severed from freehold by defendant in possession of premises, holding possession in good faith under adverse claim of right.

Approved in *Snyder v. Harding*, 38 Wash. 674, 80 Pac. 792, where lessee took possession under invalid three year lease, and remained in possession for year, settling with owners for year, and also more than sixty days of second year, without notice to quit, planting second crop, he became lessee for such second year, and entitled to crop planted in such year.

Distinguished in *Myer v. Roberts*, 50 Or. 83, 126 Am. St. Rep. 733, 89 Pac. 1052, 12 L. R. A. (n. s.) 194, rule that owner out of possession is not entitled to annual crops grown and severed by occupant cannot be invoked by assignee of tenant, who secures and maintains

possession by injunction wrongfully issued after lessor had lawfully re-entered for condition broken in making assignment.

Replevin by or Against One in Adverse Possession of land for things severed. See note, 69 L. R. A. 735.

101 Cal. 429-431, 35 Pac. 990, **CONNOR v. SOUTHERN CALIFORNIA MOTOR ROAD CO.**

If Statute Absolutely Fixes Time within which act must be done, act cannot be done at any other time unless, during existence of prescribed time, it has been extended by order made for that purpose under authority of law.

Cited in *Hoehnan v. New York Drygoods Co.*, 8 Idaho, 73, 67 Pac. 798, if objections are made to settlement of statement on ground that time for settlement has expired, and such fact appears from record, trial court is without jurisdiction to settle same.

Miscellaneous.—Cited in *McIntyre v. Southern California Motor Road Co.* (Cal.), 35 Pac. 991.

101 Cal. 432-438, 35 Pac. 1032, **CLEMENS v. LUCE.**

Mortgagor Being Guilty of Breach of Contract by defaulting in interest, no demand for payment is necessary for commencement of action.

Approved in *Trinity County Bank v. Haas*, 151 Cal. 556, 91 Pac. 386, if, after default, and before exercise of option, maker of note pays or offers to pay overdue interest, right to exercise option is lost.

Where Mortgage Provided for Maturity of whole mortgage debt upon default in payment of interest, fact that note provided for interest not paid to be added to principal does not preclude foreclosure of mortgage, upon nonpayment of interest, at option of mortgage.

Approved in *Copper Belle Mining Co. v. Costello*, 12 Ariz. 325, 100 Pac. 810, mortgage containing power to sell as prescribed by law in case of default in interest, though principal be not yet due, may be foreclosed on such default by action.

Where Mortgage Merely Provides Security for payment of principal and interest specified in note, and does not provide for securing payment of any attorneys' fees, such fee cannot be made lien upon land or be provided for in decree of foreclosure.

Approved in *Barnett v. Mulkins* (Cal.), 40 Pac. 115, *Cooper v. McCarthy* (Cal.), 36 Pac. 2, and *San Diego Sav. Bank v. Lowenstein* (Cal.), 36 Pac. 388, all following rule; *Rafferty v. High* (Cal.), 41 Pac. 489, mortgage expressly providing that it is given "as security for the payment of" principal sum of note, "with interest thereon according to the terms of the note," does not secure counsel fees provided by note in case of suit being brought against maker of note; *Sainsevain v. Luce* (Cal.), 35 Pac. 1034, where mortgage secures in terms only principal and interest of note, lien cannot be had for attorneys' fees, though note provides for them; *Lee v. McCarthy* (Cal.), 35 Pac. 1034, lien for attorneys' fees cannot be obtained in suit to foreclose mortgage containing provision that should suit be commenced, mortgagors agree to pay additional sum of ten per cent on principal and accrued interest as attorneys' fees, since mortgage does not purport to secure such fees.

Miscellaneous.—Cited in *Chase v. High* (Cal.), 35 Pac. 1035.

101 Cal. 438-441, 35 Pac. 1016, WOODWARD v. McADAM.

Real Property Held for Partnership Purposes will be regarded by courts as personal property, so far as may be necessary to settle equities between firm and its creditors, or between partners themselves.

Approved in *Tutt v. Davis*, 13 Cal. App. 719, 110 Pac. 692, where defendant, as vendor, dealt with partnership dealing in real estate, one of whom witnessed signature to contract, agency of one of partners is sufficient authority to execute assignment of contract in firm name.

On Validity of Deed to Partnership as Grantee. See note, 1 L. R. A. (n. s.) 158.

101 Cal. 442-445, 35 Pac. 1013, RIEHL v. SAN JOSE.

Where Municipal Contract was Fair and Reasonable, and no fraud appeared, contract cannot be disturbed.

Cited in *Bunker v. Hutchinson*, 74 Kan. 658, 87 Pac. 887, ordinance requiring competitive bidding will not prevent the council of city of second class from contracting in good faith for pavement in which patented articles or processes are used; *Riker v. Oakland Circuit Judge*, 138 Mich. 183, 101 N. W. 230, where complainant claimed to have valid contract with city for lighting its streets at time when city repudiated same and accepted bid of another, complainant could not restrain city by injunction from entering into new contract, but had adequate remedy at law.

Right of Lower Bidder on Public Contract. See note, 26 L. R. A. 707.

Miscellaneous.—Cited in *Riehl v. San Jose (Cal.)*, 35 Pac. 1014,

101 Cal. 445-455, 35 Pac. 1035, HABER v. BROWN.

Presentment must be Shown to have been made at promisor's last known place of residence or business.

Approved in *Wills v. Booth*, 6 Cal. App. 203, 91 Pac. 761, complaint against indorsers of promissory note, alleging maker left state five months after indorsement was made, and shows no attempt at presentment during such time, and alleging presentment more than two years after indorsement, at place of date of note, without any allegation of presentment within time allowed by law at last known place of business or residence of maker, does not state cause of action.

As Between Pledgor and Pledgee, general property in pledge remains in pledgor, notwithstanding apparent transfer of legal title to pledgee.

Approved in *Sparks v. Caldwell*, 157 Cal. 403, 404, 108 Pac. 277, where note is executed by makers, who as payees of note of third person transferred same to holder as collateral security for their note to him, title of such collateral is not transferred any further than to enable pledgee to collect amount remaining due upon principal debt; *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 301, 111 Pac. 765, assignment of moneys to become due under contract by contractor to surety, by way of indemnity of surety against loss, does not place surety in shoes of contractor.

101 Cal. 455-458, 35 Pac. 1023, SHEA v. JOHNSON.

Where Claim of Prior Attaching Creditor is for bona fide debt, without tinge of fraud, objection to attachment proceedings on

ground of impropriety of affidavit for attachment can be made only by defendant in attachment suit.

Approved in *Hillman v. Griffin* (Cal.), 59 Pac. 195, evidence to impeach affidavit of attachment is not admissible in collateral proceedings by stranger to attachment suit to recover possession of property.

Right of Creditors to Question Validity of attachment. See note, 35 L. R. A. 772.

Proceedings to Dissolve Attachments. See note, 123 Am. St. Rep. 1045.

101 Cal. 459-462, 36 Pac. 8, **McKENZIE v. BARLING.**

Where Affidavits Used upon Motion to change place of trial go mostly to merits of action, and all the statements therein are controverted by conflicting affidavits, ruling of court in denying motion will not be reversed upon appeal.

Approved in *O'Brien v. O'Brien*, 16 Cal. App. 197, 116 Pac. 698, following rule; *Henderson v. Katz*, 10 Cal. App. 585, 102 Pac. 828, where affidavits are conflicting as to nonresidence of third defendant, decision of trial court that he is resident of county of venue inconclusive.

Where Any of Defendants Reside in county in which suit is brought, motion to change place of trial to county in which others of defendants reside will not be granted, unless all of defendants join in motion, or unless good reason is shown why they have not so joined.

Approved in *Hannon v. Nuevo Land Co.*, 14 Cal. App. 704, 705, 112 Pac. 1105, where complaint shows on its face that both defendants resident and nonresident are unnecessary parties, rights of resident defendant determines place of trial; *Pittsman v. Carstenbrook*, 11 Cal. App. 227, 104 Pac. 701, where transitory action is brought in county outside residence of personal defendants, fact that foreign corporation did not unite in demand for change to county of their residence cannot affect their right to such change, in absence of any showing that original venue was county in which foreign corporation has its principal place of business in this state; *Henderson v. Cohen*, 10 Cal. App. 582, 102 Pac. 826, upon motion by two of three defendants to change venue, when notice includes only that they are nonresidents and residents of same county, and does not specify that third defendant is only nominal party, and was fraudulently misjoined to prevent change of place of trial, such specification was essential to present that question for proof, and not raised as ground for motion; *Sullivan v. Lusk*, 7 Cal. App. 189, 94 Pac. 92, upon appeal from order refusing to change venue to residence of defendant claiming whole sum allowed to trustee, complaint in interpleader, if stating cause of action against one defendant, also states action against other, and court properly refused to change venue, where other defendant did not join in motion; *Mahler v. Drummer Boy Gold Min. Co.*, 7 Cal. App. 192, 93 Pac. 1065, under section 395 of Code of Civil Procedure, where plaintiff's affidavit fails to show reasonable diligence in seeking in good faith to make discovery of defendants' residence, defendants are entitled of right to have venue changed to their place of residence upon proper demand therefor; *Cochrane v.*

McDonald, 4 Cof. Prob. 542, motion to change venue to county where real estate affected by action is situated is denied where true basis of action is fraud and collusion rather than recovery or determination of any interest in realty, where necessary party opposes.

Where It Appears from Face of Complaint that defendant residing in county where suit is begun is not proper and necessary party to action, other defendants may have trial changed to county where they reside, without consent of resident defendant.

Approved in Bartley v. Fraser, 16 Cal. App. 564, 117 Pac. 684, where plaintiff contracts to buy from personal defendant half interest in mine and water rights in county where defendant resides, and contract and title papers are deposited in escrow with bank in another county, which is made codefendant in action to rescind for alleged fraud, but with no cause of action against bank, presence of latter as codefendant cannot affect right of personal defendant to change venue to county of his residence; Eddy v. Houghton, 6 Cal. App. 88, 91 Pac. 398, where action was improperly brought in principal place of business of defendant mining company, although neither of corporations were entitled to have action removed, where personal defendant applied for change of venue to his place of residence, and savings bank, only other proper party defendant, consented to his application, it was properly granted; Cochrane v. McDonald, 4 Cof. Prob. 537, 538, 539, motion to change venue to county where real estate affected by action is situated because true basis of action is fraud and collusion rather than determination of any interest in realty, and because necessary party opposes motion.

101 Cal. 462-471, 35 Pac. 1040, QUIGLEY v. GILLET.

In Action to Determine Adverse Claim to mineral land, court cannot determine regularity or sufficiency of proceedings in land office.

Approved in Bernard v. Parmelee, 6 Cal. App. 541, 92 Pac. 660, jurisdiction of state courts in action to determine adverse claim to mineral lands must be determined by laws of this state which regulate mode of procedure therein, and such procedure cannot be regulated by laws of federal government; Nome-Sinook Co. v. Simpson, 1 Alaska, 587, 590, municipal corporation, though not adverse claimant in land office proceeding, may intervene in suit against adverse claimant by applicant for mining patent, and protect its public property lying within limits of mining location, by showing that neither has complied with law; Lily Min. Co. v. Kellogg, 27 Utah, 121, 74 Pac. 521, in action to determine right of possession to lode claim, arising out of proceedings had in United States land office, state statutes regulating generally actions for recovery of real property, or questioning title thereto, have no application, in view of provisions of section 2326, United States Revised Statutes.

Claim cannot be Relocated Until Prior Locators have lost, abandoned, or forfeited their rights to it.

Approved in Lockhart v. Farrell, 31 Utah, 160, 86 Pac. 1078, following rule; Zerres v. Vanina, 150 Fed. 565, 80 C. C. A. 366, relocater cannot maintain ejectment against original locator or his grantees on ground that first location was void for failure to comply with law as to location notice or recording same.

Relocation of Mining Claims Abandoned or forfeited. See note, 68 L. R. A. 847.

One Claiming Under Relocation for Failure to do annual work has burden of establishing forfeiture upon clear and convincing proof.

Approved in *Gear v. Ford*, 4 Cal. App. 561, 88 Pac. 602, *Zerres v. Vanina*, 134 Fed. 614, and *Swanson v. Kettler*, 17 Idaho, 327, 105 Pac. 1061, all following rule.

Distinguished in *Goldberg v. Bruschi*, 146 Cal. 712, 81 Pac. 24, in action to quiet title to mining claim, plaintiff makes prima facie case by showing his citizenship, discovery and location in conformity with law, and burden is on defendant to show location prior in time and superior to such, and upon his showing such plaintiff may then show, in rebuttal, failure to do annual work, without any averment to that effect in his complaint.

Abandonment and Forfeiture of Mining Claims. See note, 87 Am. St. Rep. 414.

101 Cal. 471-477, 35 Pac. 1043, **PEOPLE v. CHRISTIAN.**

Where Complaint Charged Assault upon one George Magin, and information charged assault upon one George Massino, variance is fatal.

Cited in *Republic of Hawaii v. Nenchiro*, 12 Haw. 197, 198, indictment charging killing "with deliberate premeditated malice aforethought," and also with "extreme atrocity and cruelty," merely charges in different way offense of murder in first degree charged in commitment.

Assault With Intent to Commit Felony and attempt to commit same felony are closely related.

Approved in *People v. Collins*, 5 Cal. App. 655, 91 Pac. 159, where information charged assault with intent to commit rape upon female child of six years, stating acts constituting offense in such manner that person of common understanding could know what was intended, it is sufficient, and need not allege that assault was attempt to commit violent injury upon person of child as defined in section 240 of Penal Code.

Whenever Defendant is Informed Against for offense different from that charged in complaint upon which he was examined, he is entitled to have information set aside, upon ground that he was not legally committed.

Disapproved in *State v. McGreevey*, 17 Idaho, 461, 105 Pac. 1049, prosecutor cannot file information against accused until he has been committed by magistrate, and he can file his information for offense only for which accused was committed by magistrate.

101 Cal. 478-482, 36 Pac. 197, **LOS ANGELES NAT. BANK v. WALLACE.**

Statement by Indorser to Holder that party primarily liable cannot pay, as waiver of presentment to latter. See note, 27 L. R. A. (n. s.) 517.

101 Cal. 483-495, 35 Pac. 1048, **ANAHEIM UNION WATER CO. v. PARKER.**

Where Bond Given by Secretary of Corporation is not retrospective in its terms, it does not cover past delinquencies, and sureties are not liable for money converted prior to its execution.

Cited in *Bartlett v. Wheeler*, 195 Ill. 451, 63 N. E. 172, in action on bond conditioned for performance of contract by grain buyer, who

had agreed to deliver on demand amount and kind of grain in his hands according to his daily reports, surety was not liable for breach committed prior to execution of contract and bond; *Brillion Lumber Co. v. Barnard*, 131 Wis. 301, 302, 111 N. W. 489, 490, in action by lumber company for breach of employer's bond, conditioned on his paying over money received from sales, where inventory was made month and half before bond was given, proof of money being on hand some time before could not extend to period of month and half, and salesbook and unverified invoices would not be evidence against surety for period before date of contract.

Application of Payments. See note, 96 Am. St. Rep. 74.

Use of Person's Books of Account as evidence upon issues between other parties. See note, 53 L. R. A. 552.

101 Cal. 495-500, 40 Am. St. Rep. 69, 35 Pac. 1039, KENNEDY v. CALIFORNIA SAV. BANK.

Defense of Ultra Vires is Looked upon by courts with disfavor.

Approved in *Bankers' Mut. Casualty Co. v. National Bank of Council Bluffs*, 131 Iowa, 467, 108 N. W. 1050, where insurance company has adopted articles of incorporation assuming to write burglary insurance, and has secured permission to do such business, in action on premium note insured cannot defend on ground that writing of burglary insurance was ultra vires.

National Bank is Estopped from Setting Up defense of ultra vires of act of becoming stockholder in another corporation where it has received and still retains benefit of transaction.

Disapproved in *Hunt v. Hauser Malting Co.*, 90 Minn. 283, 96 N. W. 86, application of federal decisions as to powers of national banks to state bank, in case brought in state courts, is to be determined by state decisions.

101 Cal. 513-519, 36 Pac. 16, PEOPLE v. LANE.

Evidence Tending to Show Material Fact or motive, although it also tends to prove commission of another offense by defendant, is relevant and admissible in criminal action.

Approved in *People v. Cook*, 148 Cal. 341, 83 Pac. 46, in homicide, evidence of criminal relations between defendant and his daughter were admissible, when connected with proof that defendant was extremely jealous of attentions paid by anyone to his daughter, and that deceased had been paying such attentions; *People v. Tomalty*, 14 Cal. App. 234, 111 Pac. 517, on trial for falsifying entry in ledger in office of treasurer of city of San Francisco so as to increase amount apparently paid by treasurer out of fund, evidence of shortage in treasurer's office is admissible to show motive for falsification; *People v. Botkin*, 9 Cal. App. 253, 98 Pac. 865, upon trial for murder by poisoned candy mailed to deceased, evidence was admissible, upon question of motive, to show that deceased's husband had lived with defendant in illicit intercourse, and then left, expecting to go back to his wife, and that, after death, defendant used expressions indicating she hoped that she and he might yet come together and be married; *People v. Davis*, 1 Cal. App. 15, 88 Pac. 1102, upon prosecution for burglary of inmate of house of ill-repute, evidence was admissible to show defendant's frequent visits there, and his knowledge of manner in which she kept her valuables, and also to show acquaintance of eye-

witness to burglary with defendant; *Territory v. McGinnis*, 10 N. M. 276, 61 Pac. 211, in trial for murder, where evidence left it in doubt whether shot was fired by defendant or others with him, evidence showing that at time of homicide, they were all resisting arrest, from which homicide in question resulted, and also that, prior to that time, they had held up train, such latter evidence was admissible as proving motive.

Evidence of Other Crimes in Criminal Cases. See note, 62 L. R. A. 300.

Large Discretion must be Given Trial Court in permitting witnesses to give their opinion as to mental condition of defendant on trial on criminal charge, where it was shown that witnesses were well acquainted with him.

Reaffirmed in *People v. Overacker*, 15 Cal. App. 630, 115 Pac. 759, and *State v. Penna*, 35 Mont. 541, 90 Pac. 790.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 733.

Where Information was Dismissed on ground that defendant had not been legally committed by magistrate, and only irregularity was failure to make proper indorsement of commitment upon complaint, trial court could order papers sent back to magistrate for proper indorsement, and that upon return of same district attorney should file another information.

Approved in *Ex parte Fowler*, 5 Cal. App. 556, 557, 90 Pac. 961, where magistrate clearly intended to hold defendant to answer for assault with deadly weapon with intent to commit murder, and attempt was merely ineffectual for want of technical words "with malice aforethought," necessary to complete description of crime, omission was only irregularity, which superior court could order magistrate to correct.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 643.

101 Cal. 520-522, 36 Pac. 6, **FAIRBANKS v. LAMPKIN.**

Fact That Applicant's Affidavit does not state true condition of one legal subdivision of land is no ground for denying his application to purchase another subdivision of land included in same application, in respect to which statement is true.

Approved in *Pardee v. Schanzlin*, 3 Cal. App. 600, 86 Pac. 813, where application stated citizenship, though applicant had only declared his intention to become such, entry otherwise valid should not be forfeited on that account ten years after purchaser had paid in full for land, and was entitled to have patent issued during all of that time.

101 Cal. 522-532, 40 Am. St. Rep. 73, 36 Pac. 18, **GORDON v. SAN DIEGO.**

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 487.

101 Cal. 532-541, 40 Am. St. Rep. 81, 35 Pac. 1054, **LE MESNAGER v. HAMILTON.**

Certificate of Acknowledgment may be impeached by parol evidence that person named therein never in fact appeared before officers certifying to acknowledgment.

Approved in *People's Gas Co. v. Fletcher*, 81 Kan. 82, 105 Pac. 36, where parties deny execution of instrument and claim neither to have signed nor acknowledged it, their testimony is admissible to impeach certificate, and will be entitled to as much weight as that of any other interested witness.

Word "Execute," When Applied to Written Instrument, unless context indicates that it was used in narrower sense, imports delivery of instrument.

Approved in *Solt v. Anderson*, 67 Neb. 110, 93 N. W. 207, although admission in answer that contract for sale of land was "executed," in absence of anything to restrict term, admits that it was duly acknowledged, where such acknowledgment was necessary, yet meaning to be given term "executed" may be restricted by context, and will then cover such acts as pleader obviously intended to refer to; *Fenby v. Hunt*, 53 Wash. 130, 101 Pac. 494, under statute requiring chattel mortgages to be filed within ten days from their execution, filing mortgage within ten days of its delivery, though more than ten days from its date, was sufficient, term "execution" including delivery and acceptance.

101 Cal. 542, 36 Pac. 6, AUZERAIS v. SUPREME COURT.

Proceeding in Supreme Court upon Writ of review to annul order and finding of superior court on ground of lack of jurisdiction because cause was still pending on appeal will be dismissed, as petitioner has plain, speedy and adequate remedy at law.

Approved in *Jerrue v. Superior Court*, 7 Cal. App. 720, 95 Pac. 907, upon sale of property of deceased, where bidder, whose bid seemed to have been continuous until part payment and confirmation of his bid, thereafter gave notice of its revocation, writ of review to annul second order confirming bid will not lie.

101 Cal. 543-545, 36 Pac. 7, PEOPLE v. EDWARDS.

Where Jury has Been Partially Impaneled while another jury was engaged in deliberating upon its verdict, which is discharged before impanelment of new jury is complete, clerk should restore their names to jury-box.

Approved in *State v. Houghton*, 45 Or. 113, 75 Pac. 888, where jurors had been impaneled to try another case at time defendant's case was begun, and names of jurors remaining in box were insufficient to complete jury for defendant's case, it was proper for court to order names of jurors excused from previous case restored to box and drawn to complete jury.

101 Cal. 545-549, 36 Pac. 106, SUTTON v. STEPHAN.

Motion to Strike Out Parts of Pleading and order denying same constitute no part of judgment-roll.

Approved in *South Yuba Water Co. v. Auburn*, 16 Cal. App. 780, 108 Pac. 102, orders refusing to strike out are not included under amendment of 1907 to Code of Civil Procedure, section 670, but are governed by preceding law.

Miscellaneous.—Cited in *Idaho Placer Min. Co., Ltd., v. Green*, 14 Idaho, 254, 93 Pac. 956, to point that in action for claim and delivery, under general denial defendant may prove his right to possession.

101 Cal. 553-563, 40 Am. St. Rep. 89, 36 Pac. 107, LITTLE v. CALDWELL.

Upon Death of One Member of Firm of attorneys, client may intrust survivor with further management of litigation in which firm was employed and survivor is bound to complete unfinished contract for benefit of partnership, without compensation, unless otherwise agreed between parties.

Approved in *Felt v. Mitchell*, 44 Ind. App. 99, 88 N. E. 724, contract for employment of firm of attorneys is not terminated by dissolution of firm, so as to start statute of limitations against claim for services before judgment in action in which retained; *Roth v. Boies*, 139 Iowa, 264, 115 N. W. 933, in absence of agreement to contrary, each member of firm is required to give common enterprise all his time and ability so far as is necessary, and one partner cannot claim extra compensation from mere fact that he does more work or that his labor is more valuable than other.

Contract for Contingent Fee in Action which client of firm permits surviving partner to complete must be viewed in equity as asset of partnership.

Approved in *Clifton v. Clark*, 83 Miss. 467, 102 Am. St. Rep. 458, 36 So. 254, 66 L. R. A. 821, where client has contracted for employment of firm of attorneys, and one member dies, client cannot re-employ survivor, and thereby defeat claim of estate of deceased partner for services rendered by such partner; *Clifton v. Clark*, 83 Miss. 466, 102 Am. St. Rep. 458, 36 So. 253, 66 L. R. A. 821, *arguendo*.

Right of Partner to Compensation for Services to partnership. See notes, 112 Am. St. Rep. 846; 17 L. R. A. (n. s.) 393, 402, 405. .

101 Cal. 563-567, 36 Pac. 103, GWYNN v. DIERSEN.

Deed of Bargain and Sale to Married Woman, executed prior to amendment of 1889 to section 164 of Civil Code, must be presumed to have been paid for from community funds, and to have vested title in marital community.

Approved in *Nilson v. Sarment*, 153 Cal. 527, 126 Am. St. Rep. 91, 96 Pac. 316, in order to constitute property taken in wife's name her separate property, before amendment of 1889 to section 164 of Civil Code, it must be shown that it was purchased with her separate funds, or that it was given to her by her husband; *Mitchell v. Moses*, 16 Cal. App. 598, 117 Pac. 687, where wife sued tenant of husband in ejectment, and husband intervened with cross-complaint to quiet his title, as against wife, and judgment was given for wife in ejectment and against husband on cross-complaint, it was reversible error to refuse to allow husband, after proving that he paid purchase price, to give testimony tending to show why property was taken in name of wife, and that it was not intended between them that it should be her separate property.

What is Community Property. See notes, 126 Am. St. Rep. 103; 4 Cof. Prob. 45.

Amendment of 1889 to Section 164 of Civil Code is not retroactive in its effect.

Approved in *Booker v. Castillo*, 154 Cal. 676, 98 Pac. 1068, and *Nilson v. Sarment*, 153 Cal. 528, 126 Am. St. Rep. 91, 96 Pac. 316, both following rule.

Provisions of Statutes upon Subject of taxation for assessment of property are in invitum, and must be strictly followed to divest title.

Approved in *Guptill v. Kelsey*, 6 Cal. App. 43, 91 Pac. 412, complaint to cancel tax deed, which alleges that tax laws, making it duty of purchaser to serve upon owner or occupant, thirty days prior to redemption of property, notice giving date of sale and amount of property sold, were not complied with, sufficiently shows, as against general demurrer, cause of action to cancel deed; *Lantz v. Fishburn*, 3 Cal. App. 665, 91 Pac. 817, where validity of deeds acquired under street improvement bond act of 1892 is in question, burden is upon party claiming under deeds to prove affirmatively strict compliance with statutory provisions.

Where Assessment Named Person as Owner, no liability is created against anybody else, and none against person named, unless such person is owner of property.

Cited in *Commercial Nat. Bank v. Schlitz*, 6 Cal. App. 179, 182, 91 Pac. 752, 753, *arguendo*.

101 Cal. 567-571, 36 Pac. 1, ABBOTT v. SEVENTY-SIX LAND & WATER CO.

Where Possession was Taken Under Written Lease containing no option to purchase, there is no inference of part performance of verbal agreement to sell land to be drawn from possession of lessee and his improvements on land, which are referable to his rights as tenant.

Approved in *Muir v. Chandler*, 16 N. D. 554, 113 N. W. 1039, where plaintiff claimed to have purchased farm from defendant, who remained in actual possession, by oral contract only, trade not being made on farm, and plaintiff not going thereon, plaintiff claiming part performance by reason of oral contract, after sale, to lease premises back to defendant for less than year, there was no actual change of possession, to take case out of statute.

Place of Payment as Affecting Jurisdiction to garnish debt. See note, 3 L. R. A. (n. s.) 610.

101 Cal. 571-576, 36 Pac. 9, PEOPLE v. THOMAS.

Judgment is Void upon Its Face only when that fact is made apparent by inspection of judgment-roll.

Approved in *Estate of Davis*, 151 Cal. 324, 121 Am. St. Rep. 105, 86 Pac. 185, collateral attack upon will upon distribution on ground of fraud and forgery in its procurement cannot be sustained if probate thereof is not void upon its face for want of jurisdiction.

Who may Proceed to Set Aside Judgments against other parties. See note, 54 L. R. A. 767.

101 Cal. 576-581, 36 Pac. 196, SHAFFER v. McCLOSKEY.

One Who is Forced to Pay Debt of Another in order to protect his own interest, and who is not mere volunteer, is entitled to be subrogated to debt.

Approved in *Murray v. O'Brien*, 56 Wash. 374, 105 Pac. 844, owner of half interest in mortgaged property, whose interest was acquired after suit to foreclose, and whose tender of amount due was refused by plaintiff, may intervene, and satisfaction of amount due by plaintiff would not destroy his right to subrogation.

Distinguished in *Carstenbrook v. Wedderien*, 7 Cal. App. 469, 94 Pac. 373, where respondents attached property secured by chattel mortgage, and were compelled to pay mortgage debt, and mortgagee thereupon released mortgage, they were not entitled to subrogation to cancel release and foreclose mortgage; *Wemple v. Yosemite Gold Min. Co.*, 4 Cal. App. 87, 87 Pac. 284, where, on foreclosure of junior mortgage, redemptioners from prior mortgage, made defendants, do not show that they became successors in interest, for purpose of such redemption, of share included in junior mortgage, and court found that interest was included in junior mortgage and was discharged from lien of prior mortgage by payment of debt; subrogation cannot be invoked.

Right of Subrogation. See note, 99 Am. St. Rep. 512, 532.

Right of Assignee of Equity of Redemption procuring discharge of mortgage to subrogation or revival as against junior lien. See note, 16 L. R. A. (n. s.) 472.

Right of Cotenant Paying Mortgage to Subrogation. See note, 8 L. R. A. (n. s.) 561.

101 Cal. 582, 36 Pac. 96, **RICHTER v. FRESNO CANAL ETC. CO.**

Where Material Findings in Case Appealed are attacked on ground of insufficiency of evidence to support them, and respondent has filed no brief, court will assume that point urged by appellant is well taken.

Approved in *Buttler v. McSpadden*, 25 Okl. 466, 468, 107 Pac. 171, where defendant fails to file brief, or to excuse its absence, in answer to plaintiff's contention that judgment is not supported by evidence, court may reverse judgment, where brief filed seems reasonably to sustain assignments of error; *Nettograph Machine Co. v. Brown*, 19 Okl. 79, 91 Pac. 850, where plaintiff files brief, and defendant neither files brief nor excuses such failure, alleged errors will be taken as confessed, and judgment may be reversed without examination of record.

101 Cal. 583-584, 36 Pac. 95, **FLAGG v. PUTERBAUGH.**

On Appeal from Order Dissolving Attachment it cannot be objected that lien was not preserved because appeal was not perfected within five days, and undertaking was not for double amount claimed.

Approved in *Primm v. Superior Court*, 3 Cal. App. 212, 84 Pac. 788, sections 553 and 946 of Code of Civil Procedure, construed together, permit of attachment being continued in force, pending appeal by plaintiff, upon his perfecting his appeal and filing undertaking as required by concluding clause of section 946.

101 Cal. 585-594, 36 Pac. 125, **HEALY v. VISALIA & TULARE R. CO.**

In Action for Injuries from Overturning of hand-car, testimony as to whether it was possible for ordinary person, sitting in plaintiff's position, to stand force of jar and still retain his seat, was not opinion.

Approved in *People v. Wilson*, 14 Cal. App. 521, 112 Pac. 581, where, to support theory that poison letter was written by defendant, prosecution produced several envelopes from his possession of apparently same sort, but which bore, apparently, canceled postage

stamps from various postoffices outside of state, court properly admitted evidence of United States inspector that stamps on six of such did not bear genuine postmark and cancellation of postoffice; dissenting opinion in Nickles v. State, 48 Fla. 52, 37 So. 314, majority holding witness who testified to having heard gunshot, and that he had seen another witness, ten or fifteen minutes before shooting, going away from scene of shooting after water to well about three-eighths of mile away, will not be allowed to state whether latter had time to get back to scene of affray.

Opinion Evidence as to Appearance of plaintiff immediately after accident may be given by witnesses who observed facts.

Approved in Owen v. State, 52 Tex. Cr. 69, 105 S. W. 515, in prosecution for homicide, evidence that at times when accused was talking about his wife, deceased, he appeared to be mad and angry, was admissible.

Physician Who Testifies as Expert may State not only his opinion, but grounds of his opinion, although in some degree founded on books, as part of his general knowledge.

Approved in Copeland v. State, 58 Fla. 32, 50 So. 624, physician, though stating that he had never had any experience with strychnine poisoning, may testify to symptoms produced by strychnine poisoning, and that conditions found might have been caused therefrom.

Right of Married Woman to Recover for loss of time, services, wages, or impaired capacity to labor. See note, 20 L. R. A. (n. s.) 218.

101 Cal. 594-597, 36 Pac. 100, STEWART v. SUPERIOR COURT.

Court Rule 26 is Applicable to petitions for writ of review.

Approved in Stoner v. Los Angeles, 8 Cal. App. 612, 97 Pac. 694, where only demurrer is filed to petition, and judgment dismissing petition is improperly rendered thereon, demurrer must be considered as adopting allegations of petition as return, and it will be reviewed upon appeal, as return, and as part of judgment-roll.

101 Cal. 600-606, 36 Pac. 11, IN RE EICHHOFF.

Domestic Judgment of Superior Court, both parties being residents of state, must be presumed to have been rendered with jurisdiction over defendant's person, although judgment is silent thereon.

Approved in Estate of Davis, 151 Cal. 324, 121 Am. St. Rep. 105, 86 Pac. 185, collateral attack on will upon distribution on ground of fraud and forgery in its procurement cannot be sustained if probate thereof is not void upon its face for want of jurisdiction; Dungan v. Superior Court, 149 Cal. 103, 84 Pac. 769, existence of jurisdictional fact of superior court of county in which letters were first applied for under petition alleging decedent's estate to be in that county cannot be inquired into collaterally by respondent to petition for prohibition against subsequent proceedings under subsequent application in another county; Segerstrom v. Scott, 16 Cal. App. 261, 116 Pac. 692, where it appears that sufficient averments in amended answer as to defendant's qualifications were set forth in her affidavit of purchase, findings establishing such and her right to make purchase fully establish such right as against appeal by plaintiff upon judgment-roll alone, with bill of exceptions; Seaboard National Bank v. Ackerman, 16 Cal. App. 59, 116 Pac. 93, in action on judgment,

where record of original action was destroyed by fire, before commencement of action, original judgment, not void on its face, is immune from collateral attack; *Western Lumber etc. Co. v. Merchants' Amusement Co.*, 13 Cal. App. 8, 108 Pac. 893, in consolidated action to foreclose mechanic's lien, when no issue was joined upon complaint in second action, and it was stipulated at trial that evidence should inure to benefit of all parties, and plaintiff in second action proved lien without objection, fact that judgment was rendered against owner appealing in favor of plaintiff in second action implies that court ascertained that it had jurisdiction before so doing; *Brown v. Caldwell*, 13 Cal. App. 31, 108 Pac. 875, where nothing appears in record upon appeal in contradiction of recital in judgment that defendant appeared by his attorneys, it must be presumed that evidence warranted such finding of jurisdiction of defendant's person, and no formal entry of his default was necessary; *Ex parte Haase*, 5 Cal. App. 544, 90 Pac. 947, upon petition for habeas corpus, attack upon judgment of conviction in superior court upon plea of guilty of burglary in first degree is collateral, and where record does not show contrary, it must be presumed that court determined degree upon sufficient evidence, notwithstanding plea.

Decree Annuling Marriage is Judicial Determination that marriage was void from beginning.

Distinguished in *Coats v. Coats*, 160 Cal. 676, 118 Pac. 443, on annulment of marriage for physical incapacity of woman, she, having entered into marriage in good faith, is entitled to such division of property accumulated by efforts of both parties during marriage as she would have been entitled to in community property, had marriage not been subject to annulment; *Jordan v. Missouri Kansas Tel. Co.*, 136 Mo. App. 200, 116 S. W. 434, decree annulling voidable marriage does not relate back to time of marriage so as to validate second marriage contracted before final decree.

101 Cal. 609-614, 36 Pac. 118, IN RE HICKMAN.

Public Administrator, as Such, cannot Contest proof of will.

Approved in *Estate of Edelman*, 148 Cal. 236, 113 Am. St. Rep. 231, 82 Pac. 963, in contest of probate of will, court may require contestant to first establish his interest, and upon his failure so to do may dismiss contest.

Who may Contest a Will. See note, 130 Am. St. Rep. 204.

Mere Nomination of Executor, Without Making any disposition of one's estate or giving any other directions whatever, will constitute will and render necessary its establishment in probate court.

Approved in *Mulholland v. Gillan*, 25 R. I. 91, 54 Atl. 929, instrument making no disposition of property, further than providing for payment of debts, but which appoints executor, may be will.

Distinguished in *Clearspring Township v. Blough*, 173 Ind. 24, 88 N. E. 514, under statute permitting objections both to probate proper and to validity of provisions of will, question may be raised as to validity of attempted creation of charitable use.

Executor Named in Will, Which Only Names executor and makes no disposition of property, is entitled to letters testamentary as against public administrator.

Distinguished in *Ward v. Brown*, 53 W. Va. 237, 44 S. E. 492, executor of will may propound it for admission to probate, and prose-

cute appeal from decree, declaring it void, in suit brought to impeach it.

101 Cal. 614-623, 36 Pac. 123, MITCHELL v. FINNELL.

Where Maker of Note Procured by Threat of criminal prosecution is compelled to pay same to bona fide purchaser for value, before maturity, without notice, payee who indorsed same to such purchaser must reimburse maker.

Distinguished in *Murray Showcase etc. Co. v. Sullivan*, 15 Cal. App. 478, 115 Pac. 260, where promissory notes were executed by corporation manager, who was under bond, to cover shortage, consideration was not rendered void or illegal by mere threat of corporation that if shortage were not settled, it must be recovered on his bond, unaccompanied by any threat of arrest or of prosecution for embezzlement.

101 Cal. 624-626, 36 Pac. 101, IN RE BURRIS.

Attorney Who Induces Administratrix to Deliver to him money of estate, which he appropriated to his own use, may be disbarred therefor.

Approved in *Matter of Danford*, 157 Cal. 429, 108 Pac. 324, where attorney, claiming to be entitled to practice in federal court, induced client to pay over large sum on representation and promise to cause action against her to be discontinued, without power to do so, sufficient ground for disbarment is shown.

Disbarment or Suspension of Attorney for withholding client's money or property. See note, 19 L. R. A. (n. s.) 414.

Disbarment of Attorney for Criminal Acts prior to conviction therefor. See note, 114 Am. St. Rep. 840..

101 Cal. 627-643, 40 Am. St. Rep. 96, 36 Pac. 113, GRIFFITH v. NEW YORK LIFE INS. CO.

Express Provision in Insurance Policy that company shall not be liable unless premium is actually paid is waived by giving credit for premium, and company is liable for loss occurring during period of credit.

Approved in *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 224, 107 Pac. 296, provision in policy that company shall not be liable until premium is actually paid is waived by unconditional delivery of policy to assured as executed contract, under agreement that credit shall be given for premium, and company is liable for loss occurring during period of credit; *Palmer v. Continental Ins. Co.* (Cal.), 61 Pac. 785, Civil Code, section 2598, applies only to policy containing stipulation that it shall not be binding until premium is actually paid; *German Ins. Co. v. Shader*, 68 Neb. 12, 93 N. W. 976, 60 L. R. A. 918, receiving premium after destruction of all insured property, so that nothing remains to which insurance might attach, waives provision that insurer shall not be liable for loss occurring before payment of premium.

Distinguished in *Stringham v. Mutual Ins. Co.*, 44 Or. 461, 75 Pac. 826, where policy was issued, but not actually delivered, before death of applicant, rights of parties were not altered by payment of premium by third person after applicant's death.

Statute Providing That No Life Insurance Company can declare forfeited any policy except upon certain conditions is intended to prohibit forfeitures of policies, except as therein provided.

Approved in *Washington Life Ins. Co. v. Berwald*, 97 Tex. 116, 76 S. W. 444, taking out second policy in another company with intention of abandoning former policy was not abandonment thereof, if time had not expired.

Delivery and Acceptance of Policies of Insurance. See note, 138 Am. St. Rep. 61.

Waiver of Provisions of Nonwaiver or written waiver of conditions and forfeitures in policies. See note, 107 Am. St. Rep. 137.

101 Cal. 645-648, 36 Pac. 129, **PEOPLE v. ABBOTT.**

Mere Possession of Stolen Property unexplained by defendant, though not sufficient to justify conviction, is circumstance tending to show guilt.

Approved in *People v. Gibson*, 16 Cal. App. 350, 116 Pac. 989, *People v. King*, 8 Cal. App. 332, 333, 96 Pac. 918, *People v. Horton*, 7 Cal. App. 36, 93 Pac. 382, and *People v. Hallam*, 6 Cal. App. 332, 92 Pac. 191, all following rule.

Possession of Stolen Property as evidence of guilt. See note, 101 Am. St. Rep. 499, 502.

Objection to Remarks Made by Judge in presence of jury, touching conduct of appellant's attorney in regard to bribery of witness, will not be considered upon appeal where no exception was noted to course pursued by court.

Approved in *People v. Walker*, 15 Cal. App. 404, 114 Pac. 1010, where defendant at first answered without objection that he had been convicted of felony, and upon objection later, based upon section 1205 of Penal Code, judge, before ruling thereon, made remarks, which called for reply from district attorney, showing prior conviction in another case in same court, this cannot be considered as misconduct upon appeal, in absence of objection to same at trial; *People v. Osborn*, 12 Cal. App. 150, 106 Pac. 891, in absence of specific objection and exception taken to alleged misconduct of trial judge in criminal case, amounting to irregularity in proceedings, appellate court is not authorized to pass upon merits of controversy.

101 Cal. 651-655, 36 Pac. 130, **HICKS v. MASTEN.**

Failure to Object on Account of Notice at time when court fixed date for settlement of bill of exceptions, and attorney's statement that he would "be on hand," is waiver of any other or different notice.

Approved in *Bollinger v. Bollinger*, 153 Cal. 193, 94 Pac. 771, where, after notice of settlement of bill of exceptions, counsel for moving party, through inadvertence, failed to be present at time appointed, and was informed that judge had suggested that parties settle bill between themselves, to which opposing counsel made no objection, objection urged at meeting for such purpose that bill was not presented in time came too late, and was waived; *Coast Lumber Co. v. Wood*, 18 Idaho, 40, 106 Pac. 342, where proposed amendments and statements were not delivered to clerk within ten days after service of such upon moving party, presumption is that such amendments have been adopted and will be so treated, and court may settle them within reasonable time.

Distinguished in *Ford & Sanborn Co. v. Braslan etc. Co.*, 10 Cal. App. 768, 103 Pac. 949, where judgment was joint against appellant and two codefendants, and appellant claimed that codefendants only were liable, such codefendants were adverse parties, who must be served with notice of intention to move for new trial, and with notice of bill of exceptions to be used thereon.

101 Cal. 655-661, 36 Pac. 119, PEOPLE v. UNION HIGH SCHOOL OF SOLANO CO.

Statute Providing That, upon Election for school district, if majority of votes are in favor of high school, superintendent shall proceed to determine its location, does not mean majority of votes in district, but majority of all votes cast.

Approved in *Sharp v. George*, 5 Ariz. 68, 46 Pac. 213, in election for union high school, majority referred to in statute means majority of those voting, and has no reference to number of qualified electors residing in district.

101 Cal. 661-670, 36 Pac. 110, CURTIS v. UNDERWOOD.

Where Notice has Been Given by Publication to absent and unknown heirs, this substituted service gives to superior court jurisdiction over their person as fully as is given by service of summons in ordinary civil action.

Cited in *Rice v. Tilton*, 14 Wyo. 111, 82 Pac. 578, order of district court appointing administrator, reciting that proof of notice was made, but in fact without mailing of notice required by statute, is merely voidable, and, until set aside, is valid.

Miscellaneous.—Cited in *Curtis v. Underwood* (Cal.), 36 Pac. 397.

101 Cal. 673-677, 40 Am. St. Rep. 106, 36 Pac. 387, SECULOVICH v. MORTON.

Notwithstanding Fact That Defendant Left State, plaintiff had remedy to invoke aid of court, and, upon service of protest in statutory manner, could have procured appointment of commissioner to convey property to him.

Approved in *Clem v. Givens*, 106 Va. 149, 55 S. E. 568, in action for specific performance of contract of sale of real estate brought against nonresident executor, and widow and children of vendor, it was proper to proceed against executor by publication; *Silver Camp Min. Co. v. Dickert*, 31 Mont. 500, 78 Pac. 971, 67 L. R. A. 940, *arguendo*.

Where Injured Party has Been Guilty of great laches in prosecution of his remedy for concealed fraud in express trust, he will be barred in equity, on account of paramount importance of having titles settled.

Approved in *Casserly v. County of Alameda*, 153 Cal. 173, 94 Pac. 766, commencement of action to quiet title to fractional interest in public squares after lapse of time of twenty-two years is presentation of stale demand, irrespective of statute of limitations; *Miller v. Ash*, 156 Cal. 566, 105 Pac. 609, discussing question of laches in action for conversion of property of ward.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 102 CALIFORNIA.

102 Cal. 6-11, 41 Am. St. Rep. 135, 36 Pac. 360, **BUCKLEY v. SUPERIOR COURT.**

Probate Court has No Power to Determine disputes between heirs or devisees and strangers as to title to property.

Approved in Caron v. Old Reliable etc. Min. Co., 12 N. M. 222, 223, 78 Pac. 65, 66, following rule; Estate of Heeney, 3 Cal. App. 552, 86 Pac. 844, holding respective rights of heir and stranger under mortgage could not be determined in proceeding for settling account of administrator.

Section 1676, Code of Civil Procedure, in regard to notice of distribution of estate, construed.

Cited in Bell v. Wilson, 159 Cal. 62, 112 Pac. 1102, holding case did not apply.

Distribution of Community as Part of wife's estate. See note, 82 Am. St. Rep. 365.

Writ of Prohibition. See note, 111 Am. St. Rep. 946.

Miscellaneous.—Cited in Bacon v. Bacon, 150 Cal. 481, 89 Pac. 319, to point that decree of distribution is subject to review in equity on showing it was procured by fraud or mistake.

102 Cal. 12-19, 36 Pac. 404, **PEOPLE v. SANDS.**

Office of Justice of Peace is Creation of Constitution, and cannot be created by city charter, and such officer is elected and qualifies under general law of state.

Approved in Graham v. Fresno, 151 Cal. 469, 471, 472, 91 Pac. 148, 149, upholding act providing for election of one justice of peace in cities of fourth class, under section 8½ of article XI, Constitution; Graham v. Fresno, 151 Cal. 472, 473, 91 Pac. 149, 150, holding legislature could not direct payment of justice of peace of city of fourth class from city funds.

102 Cal. 19-26, 36 Pac. 506, **PEOPLE v. TOMLINSON.**

Where One Obtains Possession of Property fraudulently with intent to convert it to his own use, and owner does not part with title, offense is larceny.

Approved in State v. Ryan, 47 Or. 347, 82 Pac. 706, 1 L. R. A. (n. s.) 862, holding where one was induced by fraud to give money

to stockholder on bet, who intended to convert it to his own use, it was larceny.

Larceny. See note, 88 Am. St. Rep. 569, 572.

102 Cal. 26-38, 36 Pac. 417, HUFFMAN v. HALL.

Dedication is Never to be Presumed without evidence of unequivocal intention on part of owner.

✓ Reaffirmed in *Cordano v. Wright*, 159 Cal. 620, 115 Pac. 231.

Fact That Land is Inclosed by Fence is evidence to show use of it by public is permissive.

Approved in *De La Guerra v. Striedel*, 159 Cal. 89, 112 Pac. 858, following rule; *Hill v. McGinnis*, 64 Neb. 190, 89 N. W. 785, holding prescriptive right to roadway not acquired when it was through inclosed land of owner, who changed route from time to time to suit his convenience.

Section 2619, Political Code, Providing All Roads used as such for five years are highways, was repealed by amendment of March 30, 1874.

Approved in *Sutton v. Nicolaisen* (Cal.), 44 Pac. 806, holding occasional travel on road over public land not laid out, recorded or worked, as road did not make it highway.

Injunctive Relief as to Fences or Gates. See note, 7 L. R. A. (n. s.) 63.

102 Cal. 38-46, 36 Pac. 362, SPIEKER v. LASH.

Words Merely Descriptive of Thing Manufactured are not proper subjects of trademark.

Approved in *Italian Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 257, 110 Pac. 915, holding word "tipo," applying to wine, could not be appropriated as trademark.

Sale of Trademark. See note, 1 L. R. A. (n. s.) 715, 722.

102 Cal. 47-50, 36 Pac. 395, TREZEVANT v. STRONG CO.

Principal Place of Business of Corporation is its residence.

Approved in *Krogh v. Pacific Gateway etc. Co.*, 11 Cal. App. 233, 104 Pac. 698, *Waechter v. Atchison etc. Ry. Co.*, 10 Cal. App. 73, 101 Pac. 42, and *San Joaquin etc. Irr. Co. v. Merced Co.*, 2 Cal. App. 595, 84 Pac. 286, all following rule.

Under Section 16, Article XII, Constitution, plaintiff may sue corporation in any county therein provided for, and defendant cannot have venue changed to county of residence without showing other reasons therefor.

Approved in *Cook v. Ray Mfg. Co.*, 159 Cal. 697, 115 Pac. 319, refusing change of venue to residence of corporation of suit on breach of contract occurring in another county; *Haas v. Mutual Relief Assn.* (Cal.), 42 Pac. 237, refusing change of venue of action against corporation from county where complaint alleged it was to be performed; *Krogh v. Pacific Gateway etc. Co.*, 11 Cal. App. 240, 104 Pac. 698, holding provision of Constitution did not apply where complaint failed to show breach sued on occurred in county where action was commenced; *Eddy v. Houghton*, 6 Cal. App. 87, 91 Pac. 398, holding corporation defendants not entitled to change of venue to counties of residence.

Miscellaneous.—Cited in *Burness v. Strong Co.* (Cal.), 36 Pac. 396, companion case.

102 Cal. 50-55, 36 Pac. 364, GREGORY v. GREGORY.

Order Denying Motion to Set Aside Judgment is not appealable, and appeal will be dismissed.

Approved in *Deere & Weber Co. v. Hinckley*, 20 S. D. 362, 106 N. W. 139, holding on trial of subsequent action regarding same matter, appeal from order dismissing action on plaintiff's motion was properly disregarded.

Finding is not Required on Issue raised by defense on which no evidence is offered.

Reaffirmed in *Miller v. Bay Cities Water Co.*, 157 Cal. 272, 107 Pac. 122.

Judgment will not be Reversed for want of finding upon issue where omission in no way prejudices appellant.

Approved in *Miller v. Bay Cities Water Co.*, 157 Cal. 274, 107 Pac. 123, following rule; *Later v. Haywood*, 14 Idaho, 55, 93 Pac. 377, holding where findings made were not conclusive against plaintiff's right to recover, findings on other issues necessary to support judgment must be made.

Findings are not Required upon Facts agreed upon.

Approved in *Crisman v. Lanterman*, 149 Cal. 654, 117 Am. St. Rep. 167, 87 Pac. 92, *Miller & Lux v. Batz* (Cal.), 61 Pac. 936, *Continental Bldg. etc. Assn. v. Woolf*, 12 Cal. App. 729, 108 Pac. 730, *Earle v. Bryant*, 12 Cal. App. 557, 107 Pac. 1019, *Knight v. Cohen*, 7 Cal. App. 44, 93 Pac. 397, and *Harniska v. Dolph*, 133 Fed. 160, 66 C. C. A. 224, all following rule; *Pratt v. Welcome*, 6 Cal. App. 478, 92 Pac. 501, holding findings unnecessary where allegations of complaint were insufficiently controverted in answer; *Grunsky v. Field*, 1 Cal. App. 626, 82 Pac. 980, holding appellant could not predicate error on record to which he consented; *Lambert v. Lambert*, 1 Cal. App. 115, 81 Pac. 715, holding findings of probative facts inconsistent with facts admitted by pleadings must be disregarded.

Limitations will Run Against Cotenants in favor of tenants in possession who hold in open hostility to such cotenants.

Approved in *Casserly v. County of Alameda*, 153 Cal. 173, 94 Pac. 766, following rule.

Creation of Prescriptive Title by Adverse Possession of one cotenant. See note, 109 Am. St. Rep. 612.

102 Cal. 55-70, 41 Am. St. Rep. 151, 36 Pac. 368, MARTIN v. DEETY.

Corporation De Jure is Artificial Body created by operation of law upon compliance with provisions of general laws for its formation.

Approved in *Alaska Gold Mining Co. v. Ebner*, 2 Alaska, 613, 616, holding Oregon laws as to formation of corporations applied in Alaska.

Corporation De Facto Defined.

Approved in *Barnes v. Colusa County*, 13 Cal. App. 766, 110 Pac. 823, holding protection district was de facto corporation; *Reclamation District v. McPhee*, 13 Cal. App. 387, 388, 109 Pac. 1108, holding reclamation district was de facto corporation.

Averment of Existence of De Facto Corporation is as issuable as averment of existence of corporations de jure.

Approved in *Reclamation District v. McPhee*, 13 Cal. App. 386, 109 Pac. 1108, following rule; *Milwaukee Gold etc. Co. v. Gordon*, 37 Mont. 216, 95 Pac. 997, holding in action by corporation necessary averment in complaint that plaintiff was corporation could be put in issue by denial in answer.

Remote Results Produced by Intermediate Sequences of causes are beyond reach of any just and practicable rule of damages.

Approved in *Hunt Bros. Co. v. San Lorenzo Water Co.*, 150 Cal. 55, 87 Pac. 1095, 7 L. R. A. (n. s.) 913, holding owner of contingent future estate in land not entitled to damages for rock actually removed from quarry thereon; *McConnell v. Corona City Water Co.*, 149 Cal. 65, 85 Pac. 931, 8 L. R. A. (n. s.) 1171, giving damages for loss of prospective profits from breach of contract to construct tunnel.

Damages for Tort as Affected by Loss of Profits. See note, 52 L. R. A. 35, 51.

102 Cal. 70-83, 41 Am. St. Rep. 163, 36 Pac. 407, **IN RE WILLIAMS.**

Adoption Papers are not Void because it does not appear on face that adopting parents and judge are residents of same county.

Approved in *Coleman v. Coleman*, 81 Ark. 12, 98 S. W. 734, holding order of adoption not subject to attack because it did not recite that it was shown by two witnesses that residence of father was unknown.

Consent of Father is not Required to Adoption of child when he is divorced for adultery and custody of child awarded to mother.

Reaffirmed in *Cubitt v. Cubitt*, 74 Kan. 359, 86 Pac. 477.

Constitutionality of Statute Permitting Adoption of child without consent of parents. See note, 18 L. R. A. (n. s.) 927.

Validity of Adoption Without Consent of Parents. See note, 30 L. R. A. (n. s.) 152.

Right of Adopted Children to Inherit. See notes, 118 Am. St. Rep. 685; 3 Cof. Prob. 535.

Miscellaneous.—Cited in *Matter of MacRae*, 189 N. Y. 144, 81 N. E. 956, to point that state may authorize courts to conduct proceedings for adoption of minor children without notice by publication or otherwise to child, parents, or relatives.

102 Cal. 93-107, 41 Am. St. Rep. 172, 36 Pac. 374, 24 L. R. A. 197, **WITTENBROCK v. PARKER.**

Notice to Attorney, to be Notice to His Client, must be while acting as attorney for such client.

Approved in *Viotor v. Spalding*, 199 Mass. 54, 127 Am. St. Rep. 472, 84 N. E. 1017, following rule.

102 Cal. 107-113, 36 Pac. 385, **SACRAMENTO v. DILLMAN.**

Where Charter Provides Ordinances shall be published for ten days, but not that they shall not take effect until so published, order regulating liquor license takes effect from passage.

Approved in *Gay v. Engebretson*, 158 Cal. 26, 139 Am. St. Rep. 67, 109 Pac. 878, holding resolution ordering street work could be made basis of notice calling for bids though not yet published.

License Tax Sought to be Recovered is not penalty, but in nature of debt, which can be enforced as if defendant had promised to pay such sum to city.

Reaffirmed in *State v. Wall*, 18 Idaho, 305, 109 Pac. 726.

102 Cal. 113-132, 36 Pac. 424, 25 L. R. A. 312, **LIVERMORE v. WAITE**.

In Submitting Propositions for Constitutional Amendments, legislature is not acting in legislative power, but under limited power conferred on it by people.

Approved in *Chicago v. Reeves*, 220 Ill. 288, 77 N. E. 240, following rule; *McBee v. Brady*, 15 Idaho, 772, 776, 100 Pac. 101, 102, holding constitutional amendment was not regularly adopted; dissenting opinion in *People v. Sours*, 31 Colo. 429, 102 Am. St. Rep. 34, 74 Pac. 186, majority upholding constitutional amendment for consolidation of city and county governments of Denver and Arapahoe county.

Enforcement of Invalid Act Proposing Amendment to state Constitution to change capital enjoined at suit of taxpayer.

Approved in *Wheeler v. Herbert*, 152 Cal. 228, 92 Pac. 355, holding suit for injunction lay on behalf of one specially interested to prevent execution of void statute; *McConaughy v. Secretary of State*, 106 Minn. 405, 119 N. W. 413, and *Kadderly v. Portland*, 44 Or. 134, 136, 74 Pac. 716, both holding whether amendment to Constitution has been regularly proposed, adapted, and ratified is question for courts.

Term "Constitution" Implies Instrument of permanent and abiding nature.

Approved in *State v. Roach*, 230 Mo. 433, 139 Am. St. Rep. 639, 130 S. W. 694, petition under initiative considered and held to be for temporary legislative enactment and not for constitutional amendment.

Miscellaneous.—Cited in *People v. Waite* (Cal.), 36 Pac. 431, companion case.

102 Cal. 132-134, 36 Pac. 406, **EVANS v. PAIGE**.

Upon Appeal from Order Denying New Trial, questions relating to sufficiency of complaint cannot be reviewed or considered by appellate court.

Reaffirmed in *Melvin v. Stone Co.*, 7 Cal. App. 327, 94 Pac. 390.

102 Cal. 134-143, 34 Pac. 702, 36 Pac. 388, **WILLIAMS v. MOUNTAINEER GOLD MIN. CO.**

Claim of Lien for Materials Furnished for construction of structures on mining claim should be against mining claim and not specific structures.

Approved in *Park City Meat Co. v. Comstock Min. Co.*, 36 Utah, 163, 103 Pac. 261, following rule; *Berentz v. Belmont Oil Min. Co.*, 148 Cal. 580, 581, 113 Am. St. Rep. 308, 84 Pac. 48, holding work done on oil well on eighty acre oil mining claim created lien extending to whole of eighty acres; *Salt Lake Hardware Co. v. Chainman's Min. etc. Co.*, 137 Fed. 642, holding contractor who installed machinery in mill not entitled to lien on power plant for same situated some miles distant; *Thompson v. Wise Boy etc. Co.*, 9 Idaho, 367, 74 Pac.

960, holding laborer in quartz-mill located on and belonging to mine was entitled to lien on mine for wages.

Distinguished in *Berentz v. Kern King Oil & Dev. Co.* (Cal. App.), 84 Pac. 46, holding claim of lien for drilling oil well extended only to land necessary for use of well.

Mechanics' Liens upon Buildings distinct from land. See note, 62 L. R. A. 370.

Extent of Land to Which Mechanic's Lien will attach. See note, 26 L. R. A. (n. s.) 835.

102 Cal. 143-151, 34 Pac. 618, 36 Pac. 407, STEPHENSON v. SOUTHERN PAC. CO.

Negligence may be Averred in General Terms, specifying, however, particular act alleged to have been negligently done.

Approved in *Pigeon v. Fuller*, 156 Cal. 695, 105 Pac. 977, *Foley v. Northern California Power Co.*, 14 Cal. App. 410, 112 Pac. 470, and *McGehee v. Schiffman*, 4 Cal. App. 53, 87 Pac. 291, all following rule; *Cary v. Los Angeles Ry. Co.*, 157 Cal. 603, 108 Pac. 684, holding particular act of negligence could not be availed of unless specially pleaded; *Rathbun v. White*, 157 Cal. 254, 107 Pac. 311, holding negligence in storing powder by reason of which it exploded was properly averred; *Fisher v. Western Fuse etc. Co.*, 12 Cal. App. 741, 108 Pac. 660, holding particular acts of negligence sufficiently alleged; *Nilson v. Oakland Traction Co.*, 10 Cal. App. 107, 101 Pac. 415, *Warren v. Southern California Ry. Co.* (Cal.), 67 Pac. 2, and *Crowley v. Croesus Gold etc. Min. Co.*, 12 Idaho, 542, 543, 86 Pac. 540, 541, all holding negligence sufficiently alleged.

Sufficiency of General Allegations of Negligence. See note, 59 L. R. A. 210, 211, 214, 226.

Where Facts are Admitted, Question of negligence is one of law for court.

Approved in *McGraw v. Friend etc. Lumber Co.*, 120 Cal. 580, 52 Pac. 1006, following rule.

Instructions are Sufficient if, Taken all together, they are not confusing nor inconsistent, and give jury fair notion of law on point discussed.

Approved in *Hayden v. Consolidated Min. etc. Co.*, 3 Cal. App. 139, 84 Pac. 423, *De Witt v. Floriston Pulp etc. Co.*, 7 Cal. App. 781, 96 Pac. 400, *Spear v. United Railroads*, 16 Cal. App. 665, 117 Pac. 969, and *Henderson v. Los Angeles Traction Co.*, 150 Cal. 699, 89 Pac. 980, both holding instructions, considered together, were sufficient.

Distinguished in *Parkin v. Grayson-Owen Co.*, 157 Cal. 49, 106 Pac. 214, holding error in one instruction not cured by another inconsistent instruction.

102 Cal. 151-158, 36 Pac. 431, MODOC LAND & LIVESTOCK CO. v. BOOTH.

Riparian Owner cannot Enjoin Diversion of water above him by nonriparian owner when amount diverted would not be used by him.

Approved in *San Joaquin etc. Irr. Co. v. Fresno Flume & Irr. Co.*, 158 Cal. 629, 112 Pac. 183, refusing to enjoin maintenance of dam at headwaters of natural stream where its effect did not diminish flow; *Crawford Co. v. Hathaway*, 67 Neb. 374, 108 Am. St. Rep. 647, 93 N. W. 797, 60 L. R. A. 889, holding riparian owner could not

enjoin diversion of flood waters, so as to prevent their application to beneficial use.

Distinguished in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 333, 88 Pac. 981, 11 L. R. A. (n. s.) 1062, holding lower owner had right to have enjoined diversion of stream by upper nonriparian proprietor which was legal injury to his rights, without showing present actual damage; *Miller & Lux v. Madera Canal etc. Co.*, 155 Cal. 62, 99 Pac. 511, 22 L. R. A. (n. s.) 391, holding record did not present same problem.

Right of Riparian Owner to Prevent Diversion of flood water. See note, 22 L. R. A. (n. s.) 391.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 725.

102 Cal. 159-169, 36 Pac. 399, **MERCED COUNTY v. HELM.**

License Tax Imposing Same Tax on all persons engaging in certain business regardless of extent of business upheld.

Approved in *Los Angeles v. Los Angeles etc. Gas Co.*, 152 Cal. 768, 93 Pac. 1007, following rule.

Police Power is Exercised in Enforcement of penalty prescribed for noncompliance with law, or for doing some prohibited act.

Approved in *In re Ackerman*, 6 Cal. App. 16, 91 Pac. 434, holding ordinance imposing license tax on dogs was valid exercise of police power; *Flanigan v. County of Sierra*, 196 U. S. 559, 25 Sup. Ct. 314, 49 L. Ed. 597, holding license tax on sheep business could not be declared a debt to county and collected as such.

Under Power to License Business not prohibited by law, prohibition cannot be effected.

Distinguished in *Ex parte Murphy*, 8 Cal. App. 443, 97 Pac. 200, upholding ordinance prohibiting public poolrooms.

Ordinance Levying High License Tax for sale of liquor is not exercise of police power but revenue measure.

Distinguished in *Town of Selma v. Brewer*, 9 Cal. App. 74, 98 Pac. 62, holding ordinance designed to prohibit liquor business was valid exercise of police power.

Limit of Amount of License Fees. See note, 30 L. R. A. 439.

Power to Impose License Tax on business does not authorize tax upon individual acts connected with such business.

Approved in *In re Pierce*, 12 Cal. App. 321, 325, 107 Pac. 587, 589, holding ordinance imposing license tax on business of selling liquor did not impose it on individual sale; *Colusa County v. Seube (Cal.)*, 53 Pac. 655, holding ordinance requiring license of everyone who sold intoxicants in quantities of less than one quart imposed license for simple act of selling and was void; *Commonwealth v. Schwartz*, 197 Mass. 111, 83 N. E. 328, holding occupation of pawnbroking was shown by evidence, and not isolated act.

Distinguished in *In re Bond*, 12 Cal. App. 258, 107 Pac. 145, holding one sale could violate clause of ordinance relating to sale or gift of liquor; *Ex parte Fedderwitz (Cal.)*, 62 Pac. 940, upholding ordinance making single act of selling intoxicants a misdemeanor.

Proceeding to Take Property for Tax is in invitum and statutory authority must be strictly complied with.

Approved in *Guptill v. Kelsey*, 6 Cal. App. 43, 91 Pac. 412, holding tax deed void; *Lantz v. Fishburn*, 3 Cal. App. 665, 91 Pac. 817, hold-

ing burden was upon party, claiming under deed acquired under bond act of 1892, to prove strict compliance with statutory provisions.

Action cannot be Maintained to Recover License Tax except from persons engaged in carrying on licensed business.

Approved in *Territory v. Kenney*, 11 Ariz. 358, 95 Pac. 94, holding license fee could not be collected from one engaged in liquor business who had no license.

102 Cal. 174-176, 36 Pac. 367, PEOPLE v. CREWS.

Statement Reaffirmed When Under Sense of impending death is admissible as dying declaration.

Approved in *State v. Peacock*, 58 Wash. 45, 107 Pac. 1023, holding reaffirmed statements offered as dying declarations were not sufficiently identified.

Reaffirmation Under Sense of Impending Death as rendering previous statement admissible as dying declaration. See note, 27 L. R. A. (n. s.) 703.

Admissibility of Dying Declarations. See notes, 86 Am. St. Rep. 647; 56 L. R. A. 387, 414.

102 Cal. 184-188, 36 Pac. 396, PEOPLE v. CARUTHERS SCHOOL DISTRICT.

Bond Proposition to Purchase Lot and build schoolhouse covers but one subject.

Approved in *State v. Gordon*, 223 Mo. 26, 122 S. W. 1015, holding bond proposition for building one school and repairing another was single.

What Objects or Purposes may be Combined in single question submitted to voters. See note, 26 L. R. A. (n. s.) 671.

Necessity of Notice or Proclamation of Election. See note, 126 Am. St. Rep. 796.

102 Cal. 188-198, 36 Pac. 519, CHUNG KEE v. DAVIDSON.

Where One has in His Possession money of another which he ought to pay over, he is liable to action for money had and received.

Approved in *Smith v. Farmers & Merchants' Bank*, 2 Cal. App. 381, 84 Pac. 349, holding complaint stated cause of action for money had and received.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 1063.

102 Cal. 199-201, 36 Pac. 579, ESHLEMAN v. HENRIETTA VINEYARD CO.

Delivery of Deed to Third Person, or record, or delivery for record, by grantor. See note, 54 L. R. A. 869.

102 Cal. 208-218, 36 Pac. 509, BEHLOW v. FISCHER.

Where Corporation is but Agent for partnership, it is to be man- aged in accordance with agreement for its organization so long as original parties are only ones interested in its affairs.

Approved in *Turner v. Fidelity Loan Concern*, 2 Cal. App. 131, 83 Pac. 66, upholding adoption by corporation of incorporators' agreement in regard to issuance of stock, though directors were sole beneficiaries under agreement.

Miscellaneous.—Cited in *Baldwin v. Miller & Lux*, 152 Cal. 457, 92 Pac. 1034, to point that corporation may be formed for purpose of holding property conveyed to it as trustee for stockholders.

102 Cal. 218-220, 36 Pac. 410, **STEWART v. HELVETIA SWISS FIRE INS. CO.**

Where Local Agent has No Authority to contract, his proposal to renew fire policy, which is not communicated to company before loss, does not bind company.

Distinguished in *Carter v. Manhattan Life Ins. Co.*, 11 Haw. 79, holding life insurance company liable for negligence of its agent in failing to forward application for insurance within reasonable time.

102 Cal. 220-224, 36 Pac. 411, 27 L. R. A. 590, **COLGROVE v. SMITH.**

Contractor for Public Improvement cannot relieve himself of responsibility for damage done in performing work by contracting with another to do work.

Approved in *Anderson v. Feutsch*, 31 Nev. 505, 103 Pac. 1014, following rule; *Kirk v. Santa Barbara Ice Co.*, 157 Cal. 593, 108 Pac. 510, holding corporation laying main in streets was liable for injury to pedestrian caused by hole in sidewalk, though it had authorized another to repair it; *Luce v. Holloway*, 156 Cal. 164, 103 Pac. 887, holding street contractor liable for negligence of subcontractor; *Stockton Automobile Co. v. Confer*, 154 Cal. 405, 97 Pac. 883, holding one who erects unlawful obstruction in highway is insurer against injury thereby to one properly traveling highway.

Distinguished in *Hoff v. Shockley*, 122 Iowa, 728, 101 Am. St. Rep. 289, 98 N. W. 576, 64 L. R. A. 538, holding owner not liable for injury caused by building contractor's neglect to barricade and put lights on sand pile in front of building being constructed.

Liability for Acts of Independent Contractor where injury is direct result of work contracted for. See note, 65 L. R. A. 748.

Liability for Injuries Caused by Performance of work by independent contractor which is dangerous unless certain precautions are observed. See note, 65 L. R. A. 841, 847.

Liability for Acts of Independent Contractor where injuries result from nonperformance of absolute duties of employer. See note, 66 L. R. A. 124, 135.

102 Cal. 224-226, 36 Pac. 417, **WEYGANT v. BARTLETT.**

Effect of Destruction or Cancellation, or redelivery to grantor for that purpose, of delivered but unrecorded deed. See note, 18 L. R. A. (n. s.) 1169.

102 Cal. 229-234, 36 Pac. 511, **PEOPLE v. MONAGHAN.**

Where Plea of Not Guilty is Withdrawn and demurrer interposed to indictment, which is overruled, trial and conviction without new plea cannot be sustained.

Approved in *State v. Chambers*, 9 Idaho, 678, 75 Pac. 276, holding failure to read indictment and state plea to jury was reversible error; *State v. De Wolfe*, 29 Mont. 419, 74 Pac. 1085, reversing judgment of conviction when no plea was entered at trial; *State v. Walton*, 50 Or. 155, 91 Pac. 495, 13 L. R. A. (n. s.) 811, holding

it essential to conviction for felony that accused be arraigned and plead or refuse to plead; *Lanphere v. State*, 114 Wis. 199, 89 N. W. 130, holding where plea of not guilty was withdrawn, to enter special plea which was overruled, court could order re-entry of plea of not guilty.

Where Record Fails to Show Accused plead to indictment or declined to plead, trial and judgment thereafter are invalid.

Distinguished in *People v. O'Brien*, 4 Cal. App. 729, 89 Pac. 441, holding imperfect record of plea of guilty could be corrected after judgment.

102 Cal. 239-245, 36 Pac. 436, PEOPLE v. PATTERSON.

Where Incest or Adultery is Charged, prior acts of intercourse may be proven.

Approved in *Iowa v. More*, 115 Iowa, 181, 88 N. W. 323, and *Sykes v. State*, 112 Tenn. 577, 105 Am. St. Rep. 972, 82 S. W. 186, both following rule; dissenting opinion in *Skidmore v. State*, 57 Tex. Cr. 503, 123 S. W. 1132, majority holding evidence of other acts of incest was inadmissible.

Crime of Incest. See note, 111 Am. St. Rep. 27, 29.

Evidence of Other Crimes in Criminal Cases. See note, 62 L. R. A. 330.

102 Cal. 245-250, 36 Pac. 516, DONOVAN v. OAKLAND ETC. RAPID TRANSIT CO.

Liability of Street Railway Company for defect in track or street. See note, 52 L. R. A. 453, 462.

Liability for Injuries Caused by Performance of work by independent contractor which is dangerous unless certain precautions are observed. See note, 65 L. R. A. 841, 846.

102 Cal. 254-264, 36 Pac. 522, BLYTHE v. AYRES.

Section 1664, Code of Civil Procedure, was intended to provide means to finally determine in one proceeding conflicting rights of claimants of estate.

Approved in *Weidenhoff v. Primm*, 16 Wyo. 353, 94 Pac. 456, holding decision as to heirship in probate proceeding subject to appeal.

Miscellaneous.—Cited in *Blythe v. Ayres* (Cal.), 36 Pac. 588, companion cases.

102 Cal. 264-266, 36 Pac. 586, IN RE STEPHENS.

Application for Disbarment of Attorney will not be considered when party making it has remedy by civil action.

Approved in *In re Delmas* (Cal.), 72 Pac. 402, and *In re Lowenthal* (Cal.), 37 Pac. 526, both following rule.

Distinguished in *Matter of Danford*, 157 Cal. 429, 108 Pac. 324, disbarring attorney at suit of client for obtaining money under false pretense of his right to practice in federal court.

Disbarment for Criminal Acts Prior to conviction therefor. See note, 114 Am. St. Rep. 841.

102 Cal. 266-271, 36 Pac. 676, FELTON v. WEST.

Action in Another State to Recover Debt secured by mortgage in California is not precluded by section 726, Code of Civil Procedure.

Approved in *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 200, 106 Pac. 718, and *McGue v. Rommel*, 148 Cal. 545, 83 Pac. 1002, both following rule; *Chapman v. Pennie* (Cal.), 39 Pac. 15, holding action did not lie against administrator for deficiency judgment in foreclosure suit where decedent mortgagor was nonresident, service was by publication and he never appeared in action.

When Statute is Ambiguous or Susceptible of different constructions, such liberality of construction is justified as will effect apparent object and promote justice.

Approved in *City of San Buenaventura v. McGuire*, 8 Cal. App. 500, 97 Pac. 527, holding where statute was susceptible of two constructions, one consistent with sound sense and wise policy should be adopted.

102 Cal. 272-275, 36 Pac. 674, **ARMSTRONG v. LUCO.**

Lot Owner is Liable to Adjoining Owner for damage done by defective drains used to carry water from roof, where he has fair means of knowledge of such defects.

Approved in *Huber v. Stark*, 124 Wis. 366, 109 Am. St. Rep. 937, 102 N. W. 15, holding owner liable for injury caused by drip from roof on adjacent lot.

102 Cal. 276-277, 36 Pac. 595, **PIERCE v. HILTON.**

Judgment of Dismissal on Motion of Plaintiff is no bar to another suit on same cause of action.

Reaffirmed in *Carr v. Howell*, 154 Cal. 384, 97 Pac. 890.

102 Cal. 283-294, 36 Pac. 580, 834, **SAWYER v. COLGAN.**

Where Payment is Provided for from Particular Fund, debtor cannot plead limitations without showing particular fund has been provided.

Approved in *Schoenhoeft v. Kearney County*, 76 Kan. 888, 92 Pac. 1098, 16 L. R. A. (n. s.) 803, following rule; *Hewell v. Hogin*, 3 Cal. App. 253, 254, 84 Pac. 1006, holding where levy on irrigation district was made to pay bonds but fund was not available until within two years of commencement of action, limitations could not be set up; *Berkey v. Board of Commissioners*, 48 Colo. 117, 110 Pac. 202, and *Burleigh County v. Kidder County*, 20 N. D. 36, 125 N. W. 1066, both holding county could not plead limitations to action against it to enforce payment from particular fund without showing it had provided such fund.

Liability of State on Bonds Provided for by act of May 3, 1852, was conditioned on failure of Congress to make appropriation to pay them.

Approved in *Reis v. State* (Cal.), 59 Pac. 298, 299, 300, holding state not liable on such bonds, Congress having made sufficient appropriation to pay bonds.

Interest will not be Allowed on Interest Coupons of state bonds after due.

Approved in *Hewel v. Hogin*, 3 Cal. App. 255, 84 Pac. 1007, and *Hewel v. Hogin* (Cal. App.), 84 Pac. 1005, both holding interest not collectible on overdue interest coupons on irrigation bonds.

Debtor cannot Sue State When There is No Act authorizing him to do so.

Approved in *Hollister v. State*, 9 Idaho, 13, 71 Pac. 542, holding authority to sue state to condemn state lands for public use is given by act of February 25, 1899.

Who may Plead Statute of Limitations. See note, 104 Am. St. Rep. 746.

Beginning of Statute to Run Against Action upon obligations of municipal or quasi-municipal body payable out of particular fund. See note, 10 L. R. A. (n. s.) 480.

102 Cal. 294-298, 36 Pac. 672, **BRENOT v. BRENOT.**

Where Defendant in Divorce Sets up grounds for divorce in cross-complaint and both charges are proved, court may deny relief to both parties.

Reaffirmed in *Stoneburner v. Stoneburner*, 11 Idaho, 612, 83 Pac. 941.

Recrimination as Defense in Divorce Proceeding. See note, 86 Am. St. Rep. 334, 338, 340.

Specifications of Insufficiency of Evidence are sufficient if they bring before court particular point aggrieved party desires to have reviewed.

Approved in *Osborn v. Hopkins*, 160 Cal. 505, 117 Pac. 521, specification of insufficiency of evidence held sufficient.

102 Cal. 298-308, 36 Pac. 591, 23 L. R. A. 838, **PEOPLE v. TOWN OF BERKELEY.**

Where Several Petitions Identically Worded are signed by different voters, all may be considered as one petition, and it is sufficient if total number of names is sufficient.

Approved in *Richter v. State*, 156 Ala. 133, 47 So. 165, holding sufficient as one petition several separate identical petitions.

Majority of All Voters Voting at Election is necessary to carry proposition to reorganize town, not merely majority of those voting on that particular question.

Approved in *Knight v. Shelton*, 134 Fed. 431, holding majority of all votes cast necessary to carry constitutional amendments; *Town of Eufaula v. Gibson*, 22 Okl. 522, 98 Pac. 571, holding majority of all valid legal ballots cast at special election upon location of county seat was necessary to carry measure.

Basis for Computation of Majority Essential to adoption of proposition submitted at general election. See note, 22 L. R. A. (n. s.) 480.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 63.

102 Cal. 308-313, 36 Pac. 590, **PEOPLE v. McREYNOLDS.**

Effect of Granting New Trial After Conviction, to extend liability of accused's bond. See note, 20 L. R. A. (n. s.) 862.

102 Cal. 313-317, 36 Pac. 673, **CROSS v. CALIFORNIA ST. ETC. CO.**

Contributory Negligence Sufficient in Law to defeat recovery for injury caused by negligence of defendant must be such negligence as contributes directly to accident.

Approved in *Baster v. Sacramento Gas etc. Co.*, 158 Cal. 519, 111 Pac. 532, holding contributory negligence of husband who was caring for wife barred recovery for her injuries.

Injuries by Street-car Collisions with vehicles or horses. See note, 25 L. R. A. 510, 512.

102 Cal. 317-320, 36 Pac. 675, **MERRILL v. MERRILL.**

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 339.

102 Cal. 320-323, 36 Pac. 649, **FAIRCHILD v. KING.**

Allegation of Indebtedness of Date Long Prior to commencement of action is no evidence of existing debt at commencement.

Cited in Rutz v. Obear, 15 Cal. App. 437, 115 Pac. 68, *arguendo*.

102 Cal. 324-327, 36 Pac. 651, **JOHNSON v. LA GRAVE.**

Where Original Contractor Abandons Contract and gives notice thereof, and owner makes new contract for completion, claims of lien under original contract must be filed within thirty days from cessation of labor thereunder.

Criticised in Robison v. Mitchel, 159 Cal. 590, 591, 114 Pac. 988, holding where contractor abandoned contract and owner completed building, time for filing lien ran from date of completion by owner.

102 Cal. 330-333, 36 Pac. 663, **PEOPLE v. FLOOD.**

Order Granting New Trial will not be Reversed when it can be sustained on any ground stated in motion therefor.

Approved in Witter v. Redwine, 14 Cal. App. 394, 112 Pac. 312, following rule; Warner v. Thomas Parisian etc. Cleaning Works (Cal.), 37 Pac. 153, affirming order granting new trial where grounds for granting it were not stated.

Distinguished in Boca etc. R. R. v. Sierra Valley R. R., 2 Cal. App. 551, 84 Pac. 301, holding on appeal from order granting new trial, limitation as to ground specified in order did not preclude inquiry as to other grounds.

Opinion of Judge in Making Order is no part of order and not subject to review.

Reaffirmed in Bouchard v. Abrahamsen, 4 Cal. App. 431, 88 Pac. 384.

102 Cal. 333-338, 36 Pac. 650, **BAILEY v. COX.**

Where Action is Brought Against Two or more defendants, and only one against whom relief is sought does not reside in county where suit is commenced, he may have venue changed to county of his residence.

Approved in Hannon v. Nuevo Land Co., 14 Cal. App. 704, 112 Pac. 1105, holding where neither defendant was necessary party, rights as to change of venue were same as if both were necessary.

Distinguished in Cochrane v. McDonald, 4 Cal. Prob. 543, refusing change of venue to county where real estate was situated because basis of action was fraud and collusion rather than recovery of realty.

Action to Determine Validity of Mortgage on realty is real action and should be tried in county where land is situated.

Approved in Hannah v. Canty, 1 Cal. App. 227, 81 Pac. 1036, holding action to establish and enforce trust in land was real action and should be tried in county where land was situated, though accounting was asked against defendants resident in another county.

102 Cal. 338-344, 36 Pac. 655, NEARY v. GODFREY.

Decree Assigning Homestead in Divorce should be construed as meaning that court intended to act within its powers, where such construction is possible, and sustained.

Approved in *Howard v. Bryan* (Cal.), 62 Pac. 460, holding decree authorizing mortgage of property of minor heirs was properly construed so as to render it valid.

Court has Power in Divorce Decree to assign homestead for life to innocent party.

Reaffirmed in *Zanone v. Sprague*, 16 Cal. App. 339, 116 Pac. 991.

102 Cal. 347-356, 41 Am. St. Rep. 182, 36 Pac. 669, 25 L. R. A. 593, EX PARTE FOSS.

Existence of Extradition Treaty for Certain Crimes does not deprive either nation of right to exercise discretion in surrendering fugitives for other offenses.

Reaffirmed in *Greene v. United States*, 154 Fed. 410, 85 C. C. A. 251,

Where Fugitive has Been Surrendered but not for crime specified in extradition treaty, rule that he cannot be tried for any other offense than that assumed in extradition proceeding does not apply.

Approved in *Knox v. State*, 164 Ind. 235, 108 Am. St. Rep. 291, 73 N. E. 258, holding fugitive extradited on charge of specific crime may be tried on another and different criminal charge without being afforded opportunity to return to state from which he was extradited.

Extradition Proceedings. See note, 112 Am. St. Rep. 108.

102 Cal. 357-361, 36 Pac. 772, MILLS v. OREGON RY. ETC. CO.

Order of Court in Setting Aside Verdict as not justified by evidence when evidence is conflicting will not be reviewed.

Approved in *Castor v. Bernstein*, 2 Cal. App. 708, 84 Pac. 246, following rule; *Warner v. Thomas Parisian etc. Cleaning Works* (Cal.), 37 Pac. 153, affirming order granting new trial when grounds for granting it were not stated.

102 Cal. 362-370, 41 Am. St. Rep. 188, 36 Pac. 778, BLUM v. WESTON.

Way of Necessity Ceases to Exist when other way is acquired.

Approved in *Cassin v. Cole*, 153 Cal. 679, 96 Pac. 278, holding dedication of road for use of grantee over lands of grantor terminated way of necessity; *Proudfoot v. Saffle*, 62 W. Va. 54, 57 S. E. 257, 12 L. R. A. (n. s.) 482, holding way of necessity could not be extinguished so long as necessity continued.

Easement of Way of Necessity Attaches as appurtenance and passes by each successive transfer of title.

Reaffirmed in *Graham v. Olson*, 116 Mo. App. 278, 279, 92 S. W. 729, 730.

Where Unlocated Right of Way is Granted or reserved in deed, owner of dominant estate may designate it when owner of servient estate fails to do so.

Approved in *Ballard v. Titus*, 157 Cal. 683, 110 Pac. 122, holding servient owner did not fail to make selection.

Implication of Way by Necessity where sale of part of tract involuntary. See note, 12 L. R. A. (n. s.) 483.

Grant of Easements by Implication. See note, 122 Am. St. Rep. 212, 216.

Easements Created by Severance of Tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 342, 343.

102 Cal. 370-377, 36 Pac. 664, KRUMB v. CAMPBELL.

Contract for Services in Relation to Settlement of estate to be paid for by fixed per cent of proceeds is entire, and suit cannot be brought thereon until estate is settled.

Approved in dissenting opinion in *Wagner v. Edison Electric Ill. Co.*, 177 Mo. 69, 75 S. W. 973, majority holding engineer working for several electric companies who were jointly doing certain work could recover on quantum meruit before completion of work.

102 Cal. 381-384, 36 Pac. 661, PEOPLE v. DINSMORE.

In Information for Rape, Particular Date is not material when alleged to be within one year before filing.

Approved in *People v. Sheffield*, 9 Cal. App. 132, 98 Pac. 68, upholding information alleging rape was committed on or about specified date.

102 Cal. 384-388, 36 Pac. 665, PEOPLE v. GREENING.

Fact That Defendant's Intention to commit crime is known to officers beforehand does not palliate offense.

Approved in *People v. Bunkers*, 2 Cal. App. 208, 84 Pac. 369, holding culpability of witness or lack of it could not minimize guilt of defendant.

Arrangement Between Officers and Witness who agrees to act part of co-conspirator of accused cannot affect guilt of accused.

Approved in *People v. Bunkers*, 2 Cal. App. 209, 84 Pac. 370, holding plan to entrap defendant in bribery did not render inadmissible as witnesses those engaged in plan.

102 Cal. 389-393, 36 Pac. 766, NOYES v. WOOD.

Grade or Work of Fellow-employee is immaterial as affecting liability of employer for injuries caused by negligence of fellow-employee.

Approved in *Leishman v. Union Iron Works*, 148 Cal. 282, 283, 113 Am. St. Rep. 243, 83 Pac. 34, 3 L. R. A. (n. s.) 500, holding employer not liable for injury to molder due to negligence of his foreman, and of foreman of carpenter-shop; *McDonald v. Hoffman*, 10 Cal. App. 518, 102 Pac. 674, holding employer not liable for injury to carpenter caused by fall of scaffold erected under direction of foreman.

Distinguished in *Bort v. Quadt*, 8 Cal. App. 292, 96 Pac. 816, holding employer liable when employee was injured by reason of unsafe rope used on scaffold.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 520, 607.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 144, 145, 148.

Responsibility of Master for Appliance constructed by employees as part of work. See note, 3 L. R. A. (n. s.) 501.

Duty of Master to Furnish Safe Appliances as affected by fact that defective appliances are prepared by fellow-servants. See note, 4 L. R. A. (n. s.) 225.

102 Cal. 394-402, 36 Pac. 678, PEOPLE v. FEHRENBACH.

In Criminal Action Based on Conspiracy, question of conspiracy is one of fact for jury.

Approved in *People v. Stokes*, 5 Cal. App. 210, 89 Pac. 998, holding where all evidence bearing on question of conspiracy tended to prove it, its existence was question of fact for jury.

Evidence not Going to Direct Guilt of defendant in larceny trial may be introduced to show knowledge on his part of other and similar transactions, with view to determine motive.

Approved in *Commonwealth v. Stuart*, 207 Mass. 569, 93 N. E. 827, admitting evidence as to transactions which were part of general unlawful scheme.

It is Sufficient That Instructions, taken as whole, correctly state law of case.

Approved in *People v. Besold*, 154 Cal. 370, 97 Pac. 874, instruction held sufficient.

Instruction as to Weight of Testimony of accused considered and approved.

Reaffirmed in *People v. Ryan*, 152 Cal. 368, 92 Pac. 855.

102 Cal. 405-411, 36 Pac. 773, VINCENT v. PACIFIC GROVE.

Granting of Nonsuit After Submission of cause is harmless error where plaintiff was not entitled to recover on case made.

Approved in *Reclamation District v. Clark*, 155 Cal. 351, 100 Pac. 1093, holding failure to rule on motion for nonsuit after submission of cause was harmless error when there was no merit in motion.

102 Cal. 411-413, 36 Pac. 770, PEOPLE v. YOUNG.

What Intoxication will Excuse Crime. See note, 36 L. R. A. 465.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 666.

102 Cal. 413-425, 36 Pac. 658, FLETCHER v. PRATHER.

Act Amending Section of Act Repealed is void.

Reaffirmed in *Carter v. Osborn*, 150 Cal. 622, 89 Pac. 609.

Amended Section of Act Takes Place of original section, and failure of legislature in amending same section second time to refer to it as having been before amended does not affect validity of second amendment.

Reaffirmed in *West v. Board of Commissioners*, 14 Idaho, 361, 94 Pac. 448.

Law cannot be Revised or Amended by reference to its title only.

Distinguished in *Village of Melrose Park v. Dunnebecke*, 210 Ill. 430, 71 N. E. 433, holding act was sufficiently referred to by section numbers and title, and was amended by later act.

Constitutionality of Code Amendment or Revision. See note, 86 Am. St. Rep. 277.

Under Vrooman Act, Superintendent of Streets, within limits fixed by act, has power to fix time for commencement or completion of work.

Approved in *Buckman v. Hatch* (Cal.), 70 Pac. 222, holding it sufficient for superintendent to indorse time for commencement on contract.

Miscellaneous.—Cited in *Williams v. Cuneo* (Cal.), 39 Pac. 207, and *Williams v. Cuneo* (Cal.), 41 Pac. 418, both companion cases.

102 Cal. 426-432, 36 Pac. 810, COUNTY OF SONOMA v. SANTA ROSA.

It is Policy of Government to Localize expense of government, and doubtful language in city charter should be construed to effectuate such policy.

Approved in *Carlisle v. Tulare County* (Cal.), 49 Pac. 5, holding fees earned by marshal in serving process of recorder's court of city while acting as justice's court were chargeable to county.

102 Cal. 433-442, 36 Pac. 767, 1037, WOLFF v. WOLFF.

Court may Modify Order for Permanent Alimony whenever just cause appears.

Reaffirmed in *Soule v. Soule*, 4 Cal. App. 105, 87 Pac. 208, following rule.

102 Cal. 443-445, 36 Pac. 765, DUNLOP v. KENNEDY.

Where Plans and Specifications Referred to as part of building contract are not filed with contract, such contract is void.

Approved in *Burnett v. Glas*, 154 Cal. 255, 97 Pac. 425, following rule; *Blyth v. Torre* (Cal.), 38 Pac. 640, holding insufficient mere memorandum of contract for building to cost over one thousand dollars not containing description of building.

Where Contractor Abandons Building Contract, amount due him capable of being applied on liens is determined by value of work done at contract rates under section 1200, Code of Civil Procedure.

Reaffirmed in *Hoffman-Marks Co. v. Spires*, 154 Cal. 117, 97 Pac. 155.

102 Cal. 446-449, 36 Pac. 806, LYNCH v. BUTTE COUNTY.

Miscellaneous.—Cited in *Bianchi v. Del Valle*, 117 La. 592, 42 So. 150.

102 Cal. 458-466, 36 Pac. 803, NIXON v. SELBY SMELTING ETC. CO.

Employee Authorized to Prepare Place where other employees are to work and to furnish appliances is vice-principal, and employer is liable for injury resulting from his negligence.

Approved in *Boin v. Spreckels Sugar Co.*, 155 Cal. 617, 102 Pac. 939, holding manager of department in sugar refinery who prepared place for plaintiff to work was vice-principal.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 534, 573, 607.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 38, 61, 71.

Duty of Master to Furnish Safe Appliances as affected by fact that defective appliances are prepared by fellow-servants. See note, 4 L. R. A. (n. s.) 222.

102 Cal. 467-468, 36 Pac. 812, IN RE HUDSON.

Miscellaneous.—Cited in *In re Sayre* (Cal.), 36 Pac. 813, companion case.

102 Cal. 469-476, 36 Pac. 336, McOABE v. CARPENTER.

Amount of Tax to be Levied cannot be left to discretion of executive officer.

Distinguished in *Barnes v. Board of Supervisors*, 13 Cal. App. 766, 110 Pac. 823, upholding act for formation of protection districts as not

delegating power to fix assessment to commissioners; Nevada Nat. Bank v. Board of Supervisors, 5 Cal. App. 649, 91 Pac. 126, upholding section 399 of irrigation district act; Chicago etc. R. R. Co. v. State, 129 Wis. 630, 108 N. W. 576, holding chapter 315, Laws of 1903, did not delegate taxing power of legislature.

Act of 1891, Providing for High Schools, is void.

Cited in Hancock v. Board of Education, 140 Cal. 559, 74 Pac. 46, arguendo.

102 Cal. 476-482, 36 Pac. 835, CALLAHAN v. LOUGHRAN.

Pleading is to be Construed Most Strongly against pleader, and no intendments can be indulged in its aid.

Reaffirmed in Evinger v. Moran, 14 Cal. App. 330, 112 Pac. 69, and Bell v. Haun, 9 Cal. App. 45, 97 Pac. 1127.

At Common Law Landlord is not Liable for repairs in absence of any covenant thereto.

Approved in Brett v. Berger, 4 Cal. App. 16, 87 Pac. 224, holding lessor of ranch not bound to repair.

Landlord is Liable for Injury Resulting to tenant from his neglect in course of making repairs which he undertook to make.

Approved in Myhre v. Schlender, 98 Minn. 239, 108 N. W. 278, holding landlord liable to lower tenant caused by negligence of upper tenant whom he had authorized to repair premises.

Liability of Landlord for Injury to Tenant from defect in premises. See note, 34 L. R. A. 830.

102 Cal. 483-493, 41 Am. St. Rep. 194, 37 Pac. 763, FOSTER v. POLICE COMMISSIONERS.

Sale of Intoxicating Liquors by Retail is proper for legislative regulation.

Approved in Denton v. Vann, 8 Cal. App. 681, 97 Pac. 676, upholding ordinance prohibiting granting licenses in precincts voting against granting licenses therein at last general election; In re Kidd, 5 Cal. App. 160, 89 Pac. 987, upholding ordinance prohibiting sale of intoxicants.

Test of Validity of Municipal Ordinance as denying equal protection of the laws. See note, 123 Am. St. Rep. 49.

Power to Exclude Women from Saloons. See note, 18 L. R. A. (n. s.) 657.

Discrimination Against Women in Police Regulations. See note, 49 L. R. A. 111, 112.

102 Cal. 493-501, 37 Pac. 755, QUACKENBUSH v. REED.

Mortgage by Husband Alone on Homestead is void as against homestead right.

Reaffirmed in Edwards v. Simms, 8 Ariz. 264, 71 Pac. 903.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 914, 916.

102 Cal. 502-506, 36 Pac. 839, McLAUGHLIN v. PERKINS.

Owner may Waive Approval by Architect as condition to contractor's demand for payment.

Approved in Valley Lumber Co. v. Struck, 146 Cal. 270, 80 Pac. 407, following rule.

102 Cal. 506-515, 36 Pac. 841, CITY CARPET BEATING ETC WORKS v. JONES.

When Two Causes of Action are not Separately Stated, objection cannot be raised by demurrer upon ground several causes are improperly united.

Approved in *Beckman v. Waters*, 3 Cal. App. 737, 86 Pac. 998, holding fact that cause of action to recover possession of real property was commingled with cause of action to recover rents and profits was not ground for demurrer; *Galvin v. O'Gorman*, 40 Mont. 395, 106 Pac. 888, holding where separate causes were not separately stated, remedy was by motion to make complaint definite and certain by separate statement.

Distinguished in *Estate of O'Gorman*, 4 Cal. Prob. 355, 356, denying motion to make statement of contest and opposition to probate of will more definite and certain by setting out several grounds separately.

Divisibility in Respect of Time or territorial extent of contracts in restraint of trade. See note, 24 L. R. A. (n. s.) 946.

Validity of Agreement in Restraint of Trade, ancillary to sale of business or profession, as affected by territorial scope. See note, 24 L. R. A. (n. s.) 918.

Validity of Agreement by Employee not to Engage in competing business, as affected by scope in time and territorial extent. See note, 24 L. R. A. (n. s.) 933.

102 Cal. 516-520, 36 Pac. 862, CLARKE v. MEAD.

Certificate of Sale by Street Superintendent, for delinquent assessment is not prima facie evidence that previous steps in proceedings were valid.

Approved in *Crocker v. Scott*, 149 Cal. 596, 87 Pac. 111, holding certificate of tax sale of corporate stock was not prima facie evidence of regularity of preceding steps.

102 Cal. 525-527, 36 Pac. 929, FROST v. GRIZZLY BLUFF CREAMERY CO.

All Intendments are in Favor of sustaining instructions of court.

Approved in *Finnall v. Merriman*, 13 Cal. App. 611, 110 Pac. 463, upholding instructions when record did not show they were properly excepted to at time; *Billups v. Utah Canal etc. Extension Co.*, 7 Ariz. 214, 63 Pac. 714, refusing to consider exceptions to instructions when evidence was not in record.

General Exception to All Instructions is insufficient, but exceptions should call attention of court to alleged errors.

Approved in *Love v. Anchor Raisin Vineyard Co. (Cal.)*, 45 Pac. 1046, general exception to whole charge held insufficient.

102 Cal. 528-534, 36 Pac. 939, O'CONNOR v. HOOPER.

All Evidence Admitted, Whether Properly or not, must be considered on motion for nonsuit.

Approved in *Non-Refillable Bottle Co. v. Robertson*, 8 Cal. App. 105, 96 Pac. 325, *Archibald Estate v. Matteson*, 5 Cal. App. 446, 90 Pac. 725, and *Spongberg v. First Nat. Bank*, 15 Idaho, 677, 99 Pac. 713, all following rule.

102 Cal. 537-542, 36 Pac. 864, IN RE DE LEON.

Proceeding Entitled "In Matter of Estate," is valid when pleadings entitle moving party to relief in equity.

Distinguished in *King v. Chase*, 159 Cal. 425, 115 Pac. 210, holding void judgment for accounting rendered against executor of deceased executor in action in equity, brought after enactment of section 1639, Code of Civil Procedure, when executor objected to jurisdiction of court to compel him to account therein.

Where Facts Stated in Petition Made under section 1723, Code of Civil Procedure, are such as to make it bill in equity, superior court having jurisdiction of subject matter and parties may grant proper relief regardless of title of bill.

Approved in *Wakefield v. Wakefield*, 16 Cal. App. 116, 116 Pac. 311, holding where cause of action presented by cross-complaint was of equitable character and facts pleaded were sufficient to support decree, prayer could be disregarded.

Distinguished in *King v. Pauly*, 159 Cal. 553, 115 Pac. 211, holding decree in proceeding under such section was limited to provisions of section, though petition stated cause of action to quiet title to community property, but wife did not appear.

Judgments Against Persons not in Being. See note, 97 Am. St. Rep. 767.

Divestiture of Estates of Persons not in being. See note, 8 L. R. A. (n. s.) 50, 70.

102 Cal. 542-546, 36 Pac. 946, STREETEN v. ROBINSON.

Head of Corporation has Authority to employ attorney when exigencies of company require it.

Approved in *Smith v. Sinbad Development Co.*, 15 Cal. App. 170, 113 Pac. 702, upholding finding that secretary and general manager of corporation had authority to employ plaintiff; *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 466, 84 Pac. 323, upholding finding that corporation employed attorney by its secretary.

102 Cal. 547-552, 41 Am. St. Rep. 200, 36 Pac. 857, MURPHY v. MULGREW.

Evidence That Plaintiff in Replevin gave note to attorneys for services is insufficient to support judgment allowing amount of note as compensation for expense in pursuit of property.

Reaffirmed in *Spooner v. Cady* (Cal.), 44 Pac. 1019.

Change of Possession on Sale of Property by parent to child. See note, 81 Am. St. Rep. 27.

Attacks by Creditors on Conveyances made by husbands to wives. See note, 90 Am. St. Rep. 545, 546.

102 Cal. 552-557, 36 Pac. 932, PEOPLE v. WYMAN.

To Warrant Conviction for Embezzlement, it must be proven that accused, before date of complaint, fraudulently converted to his own use money alleged to have been embezzled.

Approved in *State v. Weber*, 31 Nev. 395, 103 Pac. 414, holding evidence insufficient to prove embezzlement.

Embezzlement. See note, 87 Am. St. Rep. 38.

102 Cal. 558-569, 36 Pac. 952, PEOPLE v. MARTIN.

State is not Barred from Prosecuting Person for obtaining money on false pretenses merely because some other person is participes criminis.

Approved in *Lovell v. State*, 48 Tex. Cr. 88, 89, 86 S. W. 759, 760, holding party who obtained money from another on false pretense it was to bribe county attorney was guilty of theft.

Where Objections to Evidence Go to Weight of testimony rather than to its admissibility, court does not err in admitting it.

Reaffirmed in *People v. Ward*, 5 Cal. App. 39, 89 Pac. 875.

Effect of Apparent Legality of Instrument in prosecution for obtaining property under false pretenses, stated.

Cited in *People v. Smith*, 3 Cal. App. 66, 84 Pac. 450, upholding instruction in prosecution for obtaining money under false pretenses that credulity of prosecuting witness is no defense if false pretenses were intended to and did deceive.

Illegal Intent of Prosecutor as Affecting Guilt of one obtaining property by false pretense. See note, 17 L. R. A. (n. s.) 277.

102 Cal. 569-575, 36 Pac. 934, ESTATE OF PEARSONS.

Sale by Executor Under Power in will is not judicial sale.

Approved in *Goodell v. Sanford*, 31 Mont. 170, 77 Pac. 524, holding vendee bound to examine title on sale under power in will.

102 Cal. 575-583, 36 Pac. 941, McNAMARA v. MacDONOUGH.

Employer Held Liab^{le} for Injury to hod-carrier caused by breaking of scaffold furnished by employer.

Approved in *Pfisterer v. Peter*, 117 Ky. 511, 78 S. W. 453, holding master liable for injuries to servant caused by fall of platform on which he worked.

Duty of Master to Furnish Safe Appliances as affected by fact that defective appliances are prepared by fellow-servants. See note, 4 L. R. A. (n. s.) 222.

Responsibility of Master for Appliance constructed by employees as part of work. See note, 3 L. R. A. (n. s.) 502.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 70.

102 Cal. 583-592, 36 Pac. 936, BODE v. LEE.

Appeal from Decision on Motion for New Trial does not involve review of judgment.

Approved in *Crescent etc. Co. v. United Upholsterers*, 153 Cal. 434, 95 Pac. 872, and *Melvin v. Stone Co.*, 7 Cal. App. 327, 94 Pac. 390, both following rule; *Reclamation District v. Hershey*, 160 Cal. 693, 117 Pac. 904, holding order striking amendments to answer tendering new matters of defense could not be reviewed on appeal from order denying new trial; *Strouse v. Sylvester (Cal.)*, 66 Pac. 660, holding conclusions of law not reviewable on appeal from order denying new trial; *Swift v. Occidental Mining etc. Co. (Cal.)*, 70 Pac. 471, and *Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 795, 96 Pac. 575, both holding sufficiency of complaint could not be reviewed on appeal from order denying new trial.

102 Cal. 590-600, 41 Am. St. Rep. 204, 36 Pac. 923, REDMOND v. PETERSON.

Court has No Jurisdiction to Appoint guardian ad litem for incompetent unless first brought into court by personal service of summons.

Approved in *State v. District Court*, 38 Mont. 170, 129 Am. St. Rep. 636, 99 Pac. 293, holding summons in divorce against insane husband must be served on him personally.

General Guardian may Appear in Action for his ward without service first made on ward.

Approved in *Taylor v. Ellenberger* (Cal.), 65 Pac. 833, holding presentation of commissioner's deed and demand upon general guardian of incompetent mortgagor was sufficient without being made on incompetent.

Admissions and Waivers by Fiduciaries in Actions. See note, 32 L. R. A. 685, 690.

102 Cal. 600-605, 36 Pac. 944, ELDRED v. WHITE.

Decree of Foreclosure Obtained on Unauthorized Appearance will not be set aside to allow pleading of statute of limitations.

Approved in *California Casket Co. v. McGinn*, 10 Cal. App. 10, 100 Pac. 1079, holding default was improperly set aside in absence of affidavit of merits.

102 Cal. 606-611, 36 Pac. 1013, ESTATE OF IRVINE.

Oral Testimony in Contradiction of Terms of written instrument must be full, clear and precise.

Approved in *Duncan v. Jones*, 65 W. Va. 409, 64 S. E. 749, holding admission in writing not overcome by oral testimony.

Oral Testimony in Contradiction of Terms of written instruments diminishes in value from date of instrument which it contradicts.

Approved in *Smith v. Goethe*, 159 Cal. 634, 115 Pac. 225, holding uncertain statements remote from date of instrument could not prevail over its terms.

102 Cal. 615-618, 36 Pac. 928, DYERVILLE MFG. CO. v. HELLER.

Rendition of Judgment in Excess of Stipulation is error of law committed at trial, to be remedied by motion for new trial on appeal.

Approved in *Mann v. Mann*, 6 Cal. App. 612, 613, 92 Pac. 741, 742, holding judgment for nonsuit in divorce, entered without mention of oral reservation of right to move for maintenance, could only be corrected on appeal or motion for new trial; *Tuffree v. Stearns Ranchos Co.* (Cal.), 54 Pac. 827, holding judgment regular on face could not be set aside on motion attacking its validity.

102 Cal. 618-620, 36 Pac. 943, DENNISON v. CHAPMAN.

Order Setting Aside Default to Allow Answer on merits imposes condition against dilatory pleas.

Approved in *Younger v. Moore*, 8 Cal. App. 241, 96 Pac. 1094, holding where defendant had no legal right to vacation of default, court could refuse to allow filing any answer not consented to by parties.

102 Cal. 620-624, 36 Pac. 950, BAKER v. BRICKELL.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 338.

102 Cal. 624-627, 36 Pac. 957, GREENEBAUM v. TAYLOR.

Cost of Property is Evidence tending to show value.

Approved in *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 637, 112 Pac. 894, holding actual cost of completing building was evidence of reasonable cost.

102 Cal. 633-642, 36 Pac. 930, 37 Pac. 231, HOLLAND v. ZOLLNER.

Nonexpert may Testify Whether Person appeared rational or irrational.

Approved in *People v. Vaughn*, 14 Cal. App. 206, 111 Pac. 623, following rule; *State v. Penna*, 35 Mont. 541, 90 Pac. 789, holding only intimate acquaintance could testify as to his opinion of another's sanity; *State v. Lyons*, 113 La. 978, 37 So. 897, holding admissible opinions of nonexpert witnesses to maintain sanity of accused.

Distinguished in *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 708, 87 Pac. 378, holding direct evidence could not be given as to whether another had certain knowledge.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 727.

102 Cal. 658-661, 36 Pac. 925, NICHOL v. LAUMBEISTER.

Instructions are Sufficient if, When Read together, they state law of case.

Approved in *Hayden v. Consolidated Min. Co.*, 3 Cal. App. 138, 84 Pac. 423, following rule.

102 Cal. 661-662, 36 Pac. 927, PEOPLE v. HOLLADAY.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 338.

102 Cal. 663-666, 36 Pac. 922, BUTLER v. ASHWORTH.

Liability of Ministerial Officers for Nonperformance and misperformance of official duties. See note, 95 Am. St. Rep. 84.

Personal Liability of Highway Officers for acts in excess of authority. See note, 13 L. R. A. (n. s.) 235.

Duty and Liability of Municipality with respect to drainage. See note, 61 L. R. A. 699.

Miscellaneous.—Cited in *Evarts v. Santa Barbara etc. Co.*, 3 Cal. App. 715, 86 Pac. 832.

102 Cal. 666-672, 36 Pac. 920, STEELE v. MARSICANO.

To Charge Defendant With Conversion of plaintiff's goods, he must have done some act implying assumption of dominion or title, or inconsistent with plaintiff's right.

Approved in *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 231, 90 Pac. 41, holding evidence showed defendant had used property as his own.

102 Cal. 675-689, 34 Pac. 120, ROBINSON v. THORNTON.

Grantee of Land may Dispute Validity of grantor's title, and may show independent title in himself.

Approved in *Gurnsey v. Antelope Creek etc. Water Co.*, 6 Cal. App. 392, 92 Pac. 328, following rule.

Priority of Judgment Over Conveyance made after beginning of term. See note, 38 L. R. A. 250.

Miscellaneous.—Cited in *Green v. Thornton*, 8 Cal. App. 162, 96 Pac. 383, historically referring to principal case; *North Dakota etc. Cattle Co. v. Serumgard*, 17 N. D. 481, 138 Am. St. Rep. 717, 117 N. W. 459, to point that creditor attaching land during period of redemption acquires valid lien.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 103 CALIFORNIA.

103 Cal. 1-6, 42 Am. St. Rep. 93, 36 Pac. 955, 24 L. R. A. 715, **ROBINSON v. EXEMPT FIRE CO. OF SAN FRANCISCO.**

Opinion of Nonexpert Witness as to apparent health of another is admissible.

Approved in Federal Betterment Co. v. Reeves, 77 Kan. 114, 93 Pac. 628, and Crosby v. Portland Ry. Co., 53 Or. 506, 100 Pac. 304, both upholding rule in actions for personal injury where testimony of lay witnesses as to physical condition before and after injury was received; Davis v. Oregon Short Line R. Co., 31 Utah, 316, 88 Pac. 6, in action for personal injuries, opinion of wife of injured man as to his physical condition before and after injury was admissible.

Opinions of Witnesses not Experts. See note, 89 Am. St. Rep. 242.

103 Cal. 7-14, 36 Pac. 1018, 24 L. R. A. 710, **LYNN v. SOUTHERN PACIFIC CO.**

Railroad Company Running Overcrowded Trains is bound to exercise additional care commensurate with perils.

Approved in Lobner v. Metropolitan Street Ry. Co., 79 Kan. 814, 815, 101 Pac. 464, 21 L. R. A. (n. s.) 972, upholding rule in action by one who, while riding on overcrowded car, was pushed from it and injured; dissenting opinion in Nieboer v. Detroit Electric Ry., 128 Mich. 494, 87 N. W. 629, majority holding person riding on bumper of street-car after being warned of his dangerous position by conductor was guilty of contributory negligence as matter of law.

One Boarding Overcrowded Car has right, in absence of warning not to do so, to stand on platform.

Approved in Lane v. Choctaw, Okla. etc. R. Co., 19 Okl. 337, 91 Pac. 888, in action for injuries to one riding in baggage-car, question of whether train was overcrowded was for the jury.

Riding on Platform of Railroad Car as negligence. See note, 29 L. R. A. (n. s.) 327.

Liability to Passenger for Default or delay in running train. See note, 32 L. R. A. 544.

Injury by Crush in Entering Car at elevated or subway station. See note, 7 L. R. A. (n. s.) 731.

103 Cal. 27-34, 36 Pac. 1015, PEOPLE'S HOME SAVINGS BANK v. SUPERIOR COURT.

In Action to Prohibit Banking Corporation from continuing business, no injunction can issue until after a hearing.

Approved in *People v. Bank of San Luis Obispo*, 154 Cal. 199, 97 Pac. 308, amendment to act of March 30, 1878, was necessary to provide means to prevent waste and diversion of property pending litigation.

Writ of Prohibition. See note, 111 Am. St. Rep. 949.

When and at Whose Instance receiver of corporation may be appointed. See note, 118 Am. St. Rep. 199.

103 Cal. 35-37, 36 Pac. 1020, KELLEY v. PLOVER:

When Action is Joint and Several, court may render judgment against one defendant without determining liability of the others.

Approved in *Bell v. Adams*, 150 Cal. 774, 90 Pac. 119, in action for services by employee against several owners of mines, only one of whom appeared and no objection was made to proceeding with trial, court was authorized to render judgment against answering defendant alone.

103 Cal. 37-48, 36 Pac. 1036, GROPPENGIESSER v. LAKE.

Discretion of Trial Court in Granting motion for new trial will not be interfered with, unless abused.

Approved in *Kramm v. Stockton Electric R. R. Co.*, 10 Cal. App. 274, 101 Pac. 915, affirming order of trial judge setting aside verdict in action for death, as opposed to the evidence.

It is Actual Fraud for a Vendor to state as true what he does not know to be true, intending that purchaser shall act on it.

Approved in *Howe v. Martin*, 23 Okl. 568, 138 Am. St. Rep. 840, 102 Pac. 130, statements made by vendor to his agent and by the agent to the purchaser were sufficient to sustain an action for fraud and deceit.

103 Cal. 43-46, 36 Pac. 1029, BLISS v. SNEATH.

Defective Averment as to Nonpayment can be reached only by special demurrer.

Approved in *Burke v. Dittus*, 8 Cal. App. 177, 178, 96 Pac. 331, averment in complaint that "the whole amount due is the sum of \$2,440," was sufficient statement of nonpayment in absence of special demurrer.

103 Cal. 50-52, 36 Pac. 1033, MERGUIRE v. O'DONNELL.

Doctrine of Caveat Emptor has No Application to right of a party to cancellation of his contract on ground of fraud.

Approved in *Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 638, 100 Pac. 121, applying rule in action to rescind contract to purchase land where question arose as to whether action was brought within time limited after discovery of the fraud.

103 Cal. 53-62, 36 Pac. 1081, TREANOR v. HOUGHTON.

In Absence of Special Demurrer, inferential statements in pleadings are cured by verdict.

Approved in *Spreckels v. Gorrill*, 152 Cal. 387, 92 Pac. 1013, in action to recover money paid for shares of stock sold by misrepresentation, lack of direct allegation that statements made were untrue was cured by finding of court.

City Council has No Right to Enter into separate contracts for the performance of a single improvement.

Approved in *Stimson v. Hanley*, 151 Cal. 382, 90 Pac. 946, where bids were invited for paving of street, bids for less than whole work could be disregarded.

Notice of Intention to Do Street Work must describe the work.

Approved in *Pacific Paving Co. v. Verso*, 12 Cal. App. 365, 107 Pac. 591, assessment levied for street work which covered space outside of limits described in resolution of intention was void on its face.

103 Cal. 67-68, 36 Pac. 951, LANCASTER v. MAXWELL.

Notice of Appeal Must be Served on every adverse party interested in the judgment.

Approved in *Ford v. Cannon*, 5 Cal. App. 188, 89 Pac. 1072, in action to recover money held in trust, where one of the defendants joined with plaintiff in requesting appointment of receiver, he was entitled to notice of appeal from order appointing receiver; *Porter v. Lassen County Land etc. Co. (Cal.)*, 55 Pac. 395, defendant, who was adjudged by decree of foreclosure to hold a second mortgage, was entitled to notice of appeal from such decree.

Distinguished in *Mannix v. Tryon*, 152 Cal. 37, 91 Pac. 986, in action to enforce mechanic's lien, where personal judgment was rendered against contractor, and lien on lot of owner was decreed, on appeal by owner contractor was not an adverse party.

103 Cal. 69-71, 42 Am. St. Rep. 98, 36 Pac. 1034, SAN FRANCISCO v. ANDERSON.

Seat in Stock Exchange Board is not taxable property.

Approved in *Baltimore City v. Johnson*, 96 Md. 739, 54 Atl. 647, 61 L. R. A. 568, seat in Baltimore Stock Exchange was not subject to taxation.

Seat in Stock Exchange can Only be Transferred subject to rules of association.

Approved in *Shannon v. Cheney*, 156 Cal. 570, 105 Pac. 590, assignment of seat to secure debt due from owner gave assignee no greater rights than assignor had.

103 Cal. 75-78, 36 Pac. 1034, DOWLING v. CONNIFF.

Failure to Appeal to Board of Supervisors to correct error in amount of assessment for street work operates as waiver of error.

Approved in *Bates v. Hadamson*, 2 Cal. App. 577, 84 Pac. 53, in proceeding to enforce assessment against lots, defendants were not entitled to assert objection that assessment was excessive.

103 Cal. 79-85, 36 Pac. 1037, FRASER v. SAN FRANCISCO BRIDGE CO.

Moral Obligation Resting on Master to Care for injured employee is sufficient consideration for legal obligation to pay charges for such care.

Approved in *Scott v. Monte Cristo Oil etc. Co.*, 15 Cal. App. 458, 115 Pac. 66, fact that employee was not performing duties of his employment when injured did not prevent recovery from employer for physician's services.

103 Cal. 85-89, 42 Am. St. Rep. 99, 36 Pac. 1039, **ALLEN v. POOK-WITZ.**

Purchaser has Right to Insist upon Strict compliance with terms of contract.

Approved in *Goodwine v. Kelley*, 33 Ind. App. 62, 70 N. E. 834, in action for specific performance, complaint was insufficient for want of averments showing stipulations of contract were complied with.

What Constitutes "Satisfactory Title" within requirement of agreement relating to land. See note, 18 L. R. A. (n. s.) 746.

103 Cal. 89-90, 36 Pac. 1009, **SHANAHAN v. TOMLINSON.**

Prior Possession Alone as Against Mere Intruder is sufficient to support action of ejectment.

Approved in *Stephens v. Hambleton (Cal.)*, 47 Pac. 52, upholding denial of motion for nonsuit where parties buying property took bond for a deed under which they held possession for two years before being ousted.

103 Cal. 91-94, 36 Pac. 1080, **PIERCE v. WILLIS.**

That the Judgment is not Supported by the findings is not a ground for new trial.

Approved in *Helfrich v. Romer*, 16 Cal. App. 436, 118 Pac. 459, applying rule in action on notes where court found another action was pending involving same subject matter, but gave judgment for plaintiff nevertheless.

103 Cal. 94-97, 37 Pac. 142, **MORRISON v. STONE.**

Where Special Verdict of Jury is adopted by the court, it takes the place of findings by the court.

Approved in *Hoyt v. Hart*, 149 Cal. 729, 87 Pac. 572, in suit to restrain interference with waters of irrigation ditch, adoption by court of verdict on issue as to trespass obviated necessity for finding on that issue.

103 Cal. 97-104, 37 Pac. 189, **DIMOND v. SANDERSON.**

Presumption of Unfairness Does not Exist in transactions between husband and wife.

Approved in *Yordi v. Yordi*, 6 Cal. App. 25, 91 Pac. 350, applying rule in action by widow to set aside deed executed to her husband in his lifetime of property he had previously conveyed to her.

103 Cal. 104-108, 37 Pac. 195, **WAGNER v. HANSEN.**

Substantial Compliance With Statute is necessary to support lien for labor performed or materials furnished.

Approved in *Union Lumber Co. v. Simon*, 150 Cal. 757, 89 Pac. 1079, in action for enforcement of lien, description of property contained in notice of lien satisfied the statutory requirement; *Davis v. Treacy*, 8 Cal. App. 396, 97 Pac. 78, complaint to foreclose

laborer's lien which failed to show claim of lien filed with recorder contained anything save description of property did not state cause of action; *Porteous Decorative Co. v. Fee*, 29 Nev. 380, 91 Pac. 136, claim of lien which simply set forth item: "Outside work on house and painting of inside blinds, \$190," was not sufficient to support a lien.

Untrue Statements in Claim of Lien invalidates the lien.

Approved in *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 299, 111 Pac. 764, defect in notice of lien which does not mislead owner to his injury is not material; *Hogan v. Bigler*, 8 Cal. App. 73, 96 Pac. 97, notice of lien showing materials were furnished to a particular person when in fact they were sold to another was more objectionable than if claim of lien had contained no statement in that regard; *Star Mill & Lumber Co. v. Porter*, 4 Cal. App. 475, 88 Pac. 499, incorrect statement in notice as to terms of contract was not material; *Nofziger Bros. Lumber Co. v. Shaffer*, 2 Cal. App. 220, 83 Pac. 285, notice of lien which did not set out terms of contract correctly was untrue in essential particulars.

Where Contract Proven is not Contract Alleged, the variance is fatal.

Approved in *Star Mill etc. Co. v. Porter*, 4 Cal. App. 474, 88 Pac. 499, doctrine of variance has no application to notice of lien; *Lucas v. Rea* (Cal. App.), 101 Pac. 539, discussing question of variance between complaint in mechanic's lien case and contract as proved; *Jones v. Shuey* (Cal.), 40 Pac. 18, applying rule where notice of mechanic's lien and complaint to foreclose lien alleged contract to pay three dollars and one-half per day, while proof showed contract to pay reasonable value, and such value was two dollars and eighty-four cents per day.

103 Cal. 111-117, 37 Pac. 192, WESTERN GRANITE ETC. CO. v. KNICKERBOCKER.

Erection of Structure on One's Own Land which interferes with light and air of neighbor is not unlawful.

Approved in *Anthony Wilkinson Livestock Co. v. McIlquam*, 14 Wyo. 224, 83 Pac. 368, 3 L. R. A. (n. s.) 733, reaffirming rule.

Liability for Malicious Erection of Fence. See note, 40 L. R. A. 181.

Legislature may Regulate Height of division fences and partition walls in cities and towns.

Approved in *Horan v. Byrnes*, 72 N. H. 96, 101 Am. St. Rep. 670, 54 Atl. 946, 62 L. R. A. 602, upholding Public Statutes of 1901, chapter 143, sections 28-30, declaring any fence unnecessarily exceeding five feet in height to be a private nuisance.

Distinguished in *St. Louis Gunning etc. Co. v. St. Louis*, 235 Mo. 151, 173, 137 S. W. 944, 951, enactment of ordinance regulating billboards was within legislative power of town.

Duty and Liability of Land Owners to adjoining proprietors. See note, 123 Am. St. Rep. 573.

103 Cal. 121-123, 37 Pac. 143, BRODER v. SUPERIOR COURT.

While Cause Remains Undecided, Trial Court is not concluded by any ruling it may have made.

Approved in *Noel v. Smith*, 2 Cal. App. 160, 83 Pac. 168, construing Constitution, article VI, section 14, providing that judgment of district court of appeal is not conclusive on rights of parties until expiration of thirty days after judgment.

103 Cal. 124, 37 Pac. 191, BRODER v. SUPERIOR COURT.

Prohibition will not lie where aggrieved party has a plain, speedy, and adequate remedy by appeal.

Approved in *Hamberger v. Police Court*, 12 Cal. App. 155, 106 Pac. 895, upholding denial of application for writ where judgment sought in police court was ordinary money judgment for goods sold.

103 Cal. 125-132, 37 Pac. 211, RUGGLES v. SUPERIOR COURT.

Appeal from Order Directing Payment of money deprives lower court of all power to enforce order appealed from.

Approved in *McAneny v. Superior Court*, 150 Cal. 8, 87 Pac. 1021, filing of undertaking to stay proceedings on appeal from alimony order, operated as a supersedeas.

Writ of Prohibition. See note, 111 Am. St. Rep. 947.

103 Cal. 132-143, 37 Pac. 196, HART v. CARNALL-HOPKINS CO.

Opinion not Concurred in by Majority of court cannot be regarded as authoritative.

Reaffirmed in *Dungan v. Clark*, 159 Cal. 32, 112 Pac. 719.

Jurisdiction of Superior Court cannot be Attacked after voluntary appearance and submission of controversy to that court.

Approved in *Riverside Heights etc. Co. v. Trust Co.*, 148 Cal. 469, 83 Pac. 1008, where parties had stipulated to submit for decision particular question arising out of cross-complaint, court's jurisdiction could not be assailed; *Stehlin v. Superior Court*, 12 Cal. App. 423, 107 Pac. 568, denying application for writ of review to annul judgment of superior court given on appeal from justice's court where parties consented to trial de novo in superior court.

Superior Court has Original and Supreme Court appellate jurisdiction where issue of title and possession of real property is only incidentally involved.

Approved in *Hammer v. Garrett*, 15 Idaho, 664, 665, 99 Pac. 126, where gravamen of action in justice's court was failure to make warranty deed as agreed and damages flowing therefrom, allegations as to title were of no consequence; *Legum v. Blank*, 105 Md. 133, 65 Atl. 1074, justice of the peace has no jurisdiction of action involving question as to whether ground rents mentioned in agreement of sale were original or subground rents.

Distinguished in *Oregon Short Line R. Co. v. District Court*, 30 Utah, 378, 85 Pac. 363, in action before justice of the peace against railroad for killing plaintiff's horse, denial of allegations of complaint did not necessarily raise issue as to title or possession of real property.

103 Cal. 153-156, 37 Pac. 144, WARREN v. MCGILL.

Affidavit to Creditor's Claim is Sufficient if statute be substantially complied with.

Approved in *Empire State Min. Co. v. Mitchell*, 29 Mont. 59, 74 Pac. 81, affidavit to claim of corporation made by one of claimant's

attorneys, stating none of claimant's officers except its attorneys reside in the county, was sufficient to satisfy the statute.

Statement of Claims Against Estates of decedents. See notes, 130 Am. St. Rep. 321, 323; 5 Cof. Prob. 307, 309.

Prior Attempt to Present Claim against an estate is no estoppel to a second presentation within proper time.

Reaffirmed in *Patrick v. Austin*, 20 N. D. 267, 127 N. W. 111,

Miscellaneous.—Cited in *Dalzell v. McGill* (Cal.), 37 Pac. 145.

103 Cal. 157-162, 37 Pac. 199, **MARTIN v. EDE.**

When Broker Earns Commission. See note, 139 Am. St. Rep. 256.

Real Estate Broker's Commissions as Affected by negligence, fraud, or default of principal and defective title. See note, 43 L. R. A. 610, 612, 614.

Performance by Real Estate Broker of contract to find purchaser or effect exchange. See note, 44 L. R. A. 620.

Broker's Right to Commission on Failure of employer's title. See note, 3 L. R. A. (n. s.) 577.

103 Cal. 163-169, 37 Pac. 147, **BENSON v. SHOTWELL.**

Where a Witness is Shown to be Out of jurisdiction of the court, his testimony taken on a former trial is admissible.

Approved in *McGovern v. Hays*, 75 Vt. 111, 53 Atl. 328, no showing of diligent search to ascertain whereabouts of such witness is necessary to make his testimony admissible.

Admissibility of Evidence Given in Former Trial in civil case. See note, 91 Am. St. Rep. 195.

Provisions of Written Contract cannot be Altered by an unexecuted oral agreement.

Approved in *Cughan v. Larson*, 13 N. D. 379, 100 N. W. 1090, upholding rule where modification of contract for sale of real estate pertained only to the performance of the contract.

Where Facts on Second Appeal are Same as on former appeal, decision on former appeal is law of the case.

Approved in *Hartford Fire Ins. Co. v. Enoch*, 79 Ark. 479, 96 S. W. 394, in action on policy, judgment of supreme court remanding cause on ground policy was void for breach of condition and facts did not show waiver thereof was not res adjudicata as to waiver on retrial.

103 Cal. 174-178, 37 Pac. 339, **RYAN v. ALTSCHUL.**

Street Assessment cannot Become a Lien without substantial compliance with statute.

Approved in *Bates v. Hadamson*, 2 Cal. App. 578, 84 Pac. 53, assessment in this case was not void upon its face.

Where Assessment is Void on Its Face, no appeal to board of supervisors is necessary for its correction.

Approved in *Pacific Paving Co. v. Veiso*, 12 Cal. App. 368, 107 Pac. 593, applying rule where lots were assessed for improvements for which the board had no power to assess under any circumstances; *Beckett v. Morse*, 4 Cal. App. 234, 87 Pac. 410, assessment of lot fronting on improvement for more than its proper proportion of cost of work was waived by failure to appeal to city council.

Superiority of Lien of Local Assessment over prior lien. See note, 35 L. R. A. 375.

Charging Expense of Grading for Sidewalk upon abutting owner. See note, 28 L. R. A. 496.

103 Cal. 178-187, 37 Pac. 216, **TAYLOR v. KELLEY.**

No Trust Arises Under Verbal Agreement in respect to purchase of land in absence of fraud or mistake.

Approved in *Cushing v. Heuston*, 53 Wash. 388, 102 Pac. 33, where one who orally agreed, but without consideration, to purchase land for himself and others, took title in his own name, no trust arose in favor of the others.

Finding of Trial Court will not be Disturbed if record shows any evidence to support it.

Reaffirmed in *Showers v. Zanone* (Cal. App.), 85 Pac. 858.

103 Cal. 187-193, 37 Pac. 213, **VALLENS v. TILLMANN.**

Failure of Vendor to Deliver Articles of the quality and character stipulated does not justify vendee in abrogating contract of purchase.

Distinguished in *Bobrick Chem. Co. v. Prest-O-Lite Co.*, 160 Cal. 214, 116 Pac. 749, where buyer of certain number of sets of an appliance manufactured by seller found, on receipt of an installment, appliance would not accomplish purpose contemplated, he could refuse to go on with contract.

103 Cal. 193-200, 42 Am. St. Rep. 102, 37 Pac. 207, **PEOPLE v. STOKES.**

Misconduct of Jurors will be Presumed to be injurious unless contrary appears.

Approved in *People v. Wong Loung*, 159 Cal. 526, 529, 114 Pac. 832, 833, juror's misconduct in listening to reading of damaging newspaper article out of court was prejudicial to defendant; *People v. Feld*, 149 Cal. 478, 86 Pac. 1105, evidence failed to show that the objectionable newspaper articles were read by the jurors during the trial; *People v. White*, 5 Cal. App. 341, 90 Pac. 477, where jury erroneously viewed premises where crime was committed in absence of judge, such error was corrected by another view taken in presence of judge without objection; *United States v. Marino*, 159 Fed. 772, denying a new trial where one accused of using the mails to carry out scheme to defraud did not insist upon withdrawal of juror after examination as to whether he had read certain newspaper articles; *State v. Caine*, 134 Iowa, 156, 111 N. W. 446, upholding rule where members of jury during progress of trial read local newspapers containing accounts thereof; dissenting opinion in *State v. Williams*, 96 Minn. 377, 105 N. W. 275, majority holding that the reading by some of the jurors of certain newspaper articles with reference to defendant and his trial was not prejudicial error.

Misconduct of Jurors, Other Than Their Separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1056.

Where Misconduct is Admitted, Jurors cannot be heard to deny its prejudicial influence.

Approved in *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 397, 104 Pac. 994, counter-affidavits of jurors denying prejudicial influence on their minds by alleged misconduct were inadmissible; *State*

v. Strodemier, 41 Wash. 162, 111 Am. St. Rep. 1012, 83 Pac. 22, upholding rule where, in order to avoid misconduct of one juror, the others made affidavit that such juror was last to consent to verdict of guilty.

Newly Created County has Jurisdiction of one charged with criminal act committed prior to its creation within its boundary lines.

Approved in Pope v. State, 124 Ga. 810, 110 Am. St. Rep. 197, 53 S. E. 387, where county was divided, one on trial in original county for crime committed within territory of new county is entitled to have case transferred to new county on making timely objection.

103 Cal. 200-204, 37 Pac. 222, **PEOPLE v. LEONARD.**

If Forged Instrument be Valid on Its Face, it is not necessary to plead how instrument could result in fraud.

Approved in People v. McPherson, 6 Cal. App. 269, 91 Pac. 1099, upholding information charging forgery of a deed, which did not show how person alleged to be injured could be affected by the forgery.

103 Cal. 204-207, 37 Pac. 218, **EDWARDS v. HELLINGS.**

In Order to Justify Vacation of default judgment party aggrieved must show excusable neglect.

Approved in Victor Power & Mining Co. v. Cole, 11 Cal. App. 502, 105 Pac. 760, where a prior default judgment had been vacated, court was warranted in refusing to vacate a second default.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 265.

Provision That Clerk Shall Enter judgment "immediately" after entering default is merely directory and is for benefit of party obtaining judgment.

Approved in Ritter v. Braash, 11 Cal. App. 261, 104 Pac. 593, unsuccessful party cannot invoke failure to enter default for purpose of annulling judgment; Hull v. Justice's Court, 5 Cal. App. 137, 89 Pac. 871, delay of eight years in entering judgment by default in justice's court after return of service of summons did not divest court of jurisdiction.

Entry or Record Necessary to Complete judgment or order. See note, 28 L. R. A. 622.

Statute of Limitations upon a Judgment runs from time of its entry.

Approved in Feeney v. Hinckley (Cal.), 64 Pac. 409, in action on judgment brought more than five years after its entry, no recovery could be had.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

103 Cal. 208-212, 37 Pac. 220, **SPENOE v. SCHULTZ.**

One Causing Unlawful Obstruction of highway amounting to a nuisance is liable for injury caused thereby.

Approved in Stockton Automobile Co. v. Confer, 154 Cal. 405, 97 Pac. 883, in action for damages to automobile where obstruction in highway was under license and by authority, person responsible was only chargeable with ordinary care; Anderson v. Feutsch, 31 Nev. 505, 103 Pac. 1014, in action for injuries caused by falling into excavation in sidewalk, person making excavation could not shift responsibility

to independent contractor; *Thomas v. Harrington*, 72 N. H. 48, 54 Atl. 287, 65 L. R. A. 742, owners of house, who contracted with one to put water-pipe from road six feet under ground, were liable for injury to one who drove into the unguarded trench.

Liability for Acts of Independent Contractor where injury is direct result of work contracted for. See note, 65 L. R. A. 752.

Liability for Acts of Independent Contractor where injuries result from nonperformance of absolute duties of employer. See note, 66 L. R. A. 124.

103 Cal. 213-214, 37 Pac. 230, **WYMAN v. MOORE.**

A Party in Pari Delicto to an Illegal Contract cannot maintain an action thereon.

Approved in *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 102, 89 Pac. 869, applying rule where both parties to contract regarded it as illegal.

103 Cal. 215-222, 37 Pac. 326, 410, **VALENTINE v. SLOSS.**

Statute of Limitations Does not Begin to Run against conferee of a Mexican grant until patent has been issued.

Reaffirmed in *Adams v. Hopkins* (Cal.), 69 Pac. 230.

Miscellaneous.—Cited in *Valentine v. Sloss* (Cal.), 37 Pac. 329, and *Lyford v. Dulip* (Cal.), 51 Pac. 1099.

103 Cal. 223-233, 37 Pac. 203, 26 L. R. A. 659, **PEOPLE v. MARIN COUNTY.**

Where Right of Public is Acquired by user, boundaries of road are ascertained by reference to user.

Approved in *Cordano v. Wright*, 169 Cal. 621, 115 Pac. 232, if right of public over a road with gates is derived from user alone, such use would not authorize removal of gates.

State Holds the Easement in All Highways in trust for the people, to enable them to pass and repass at will.

Approved in *Long v. Wilson*, 119 Iowa, 272, 97 Am. St. Rep. 315, 93 N. W. 284, abutting owner having interest in street distinct from that of other citizens was not bound by judgment against city lessening width of street.

Authority Over Highways Lying Outside of municipalities is vested in board of supervisors of county.

Approved in *Potter v. Santa Barbara*, 160 Cal. 354, 116 Pac. 1103, applying rule in construing "Permanent Road Division Act" and section 2773 of the Political Code, as providing alternative method for road construction which should operate on highways not within municipal corporations.

To Constitute a Valid Dedication of Land for public highway, intent of donor must be clear.

Approved in *Smith v. Glenn* (Cal.), 62 Pac. 183, where survey and map of land showed strip for road, but evidence showed same were merely made that map might be referred to in making conveyances, there was no dedication of strip as highway; *Silva v. Spangler* (Cal.), 43 Pac. 619, strip of land granted by owner to other land owners to enable them to reach highway, which was used by others without objection, never became public highway; *Northport etc. Campmeeting Assn. v. Andrews*, 104 Me. 348, 71 Atl. 1029, 20

L. R. A. (n. s.) 976, evidence established complete dedication of locus to the use of the public and adjoining lot owners as a park.

Discontinuance or Vacation of Highway by acts of authorities. See note, 26 L. R. A. 821.

Municipal Liability for Defective Plan of street construction. See note, 67 L. R. A. 257.

103 Cal. 236-238, 37 Pac. 149, **BOWEN v. WENDT.**

No Lapse of Time can Legalize a Public Nuisance amounting to an obstruction of a public right.

Approved in Kern Island etc. Co. v. Bakersfield, 151 Cal. 407, 90 Pac. 1053, user for eleven years of ditch in public highway without objection from public authorities created no prescriptive right in favor of owner to continue to maintain same; Donahue v. Stockton Gas etc. Co., 6 Cal. App. 281, 92 Pac. 198, where action did not affirmatively appear to be barred, determination of question whether public nuisance amounted to an actual obstruction of a public right was unnecessary.

Prescriptive Right to Maintain Public Nuisance. See note, 53 L. R. A. 891, 893, 896.

Prescriptive Right to Pollute Stream. See note, 25 L. R. A. (n. s.) 590.

Validity of Statute Prohibiting Pollution of Water, for protection of fisheries. See note, 1 L. R. A. (n. s.) 752.

103 Cal. 239-241, 37 Pac. 152, **HOUGHTON v. TRUMBO.**

Bill of Exceptions Prepared on Motion for new trial by a defendant who does not appeal cannot be used on appeal by a codefendant.

Reaffirmed in In re Burton, 5 Cal. Prob. 239.

103 Cal. 242-246, 42 Am. St. Rep. 108, 37 Pac. 153, **PEOPLE v. HARTMAN.**

A Defendant Accused of Crime has a constitutional right to a public trial.

Approved in State v. Dreany, 65 Kan. 296, 69 Pac. 183, in prosecution for criminal conspiracy in restraint of trade, refusal of court to permit private stenographer of counsel for defendant to take notes in open court was error; State v. Callahan, 100 Minn. 68, 110 N. W. 345, in prosecution for rape, where prosecutrix was seriously embarrassed by presence of spectators, order temporarily clearing courtroom of public was not prejudicial error; State v. Osborne, 54 Or. 293, 297, 103 Pac. 64, in prosecution of assault with intent to commit rape, exclusion of public from courtroom was error.

Right to Public Trial. See note, 116 Am. St. Rep. 741.

Right to Exclude Public During Criminal Trial. See note, 9 L. R. A. (n. s.) 277.

103 Cal. 251-252, 37 Pac. 146, **TOULOUSE v. PARE.**

The Question Presented on a Motion for a Nonsuit is a question of law.

Approved in Smith v. Superior Court, 2 Cal. App. 531, 84 Pac. 55, upholding refusal of superior court to grant trial de novo on appeal from justice's judgment granting a nonsuit, though appeal was taken on questions of both law and fact.

Nonsuit may be Properly Granted on Motion after evidence for both sides is closed.

Approved in *Saul v. Moscone*, 16 Cal. App. 510, 118 Pac. 454, judgment must be regarded as a final decision where no motion was made for judgment of dismissal upon the ground that plaintiff had failed to prove a sufficient case.

103 Cal. 252-254, 37 Pac. 146, STEVENS v. SAN FRANCISCO & NORTH PAC. R. R. CO.

Costs Should be Imposed upon Executor individually, leaving him to seek allowance therefor from probate court.

Approved in *Meyer v. O'Rourke*, 150 Cal. 178, 88 Pac. 707, in action to quiet title against executor, court had discretion to award costs against him personally without finding of mismanagement; *McCarthy v. Speed*, 16 S. D. 590, 94 N. W. 413, in action against executor, where costs were not by the judgment charged upon the estate, executor was personally liable therefor.

103 Cal. 255-258, 42 Am. St. Rep. 111, 37 Pac. 151, WILSON v. STUMP.

Performance of Service Without Knowledge of offer of reward bars recovery.

Approved in *Smith v. Vernon County*, 188 Mo. 513, 107 Am. St. Rep. 324, 87 S. W. 953, 70 L. R. A. 59, one who apprehended murderer before offer of reward, and put him in the hands of justice without knowledge of offer, was not entitled to reward.

Right to Go Behind Judgment Against County or municipality on mandamus to enforce. See note, 9 L. R. A. (n. s.) 1057.

103 Cal. 258-264, 37 Pac. 149, LIVINGSTON v. KODIAK PACKING CO.

Employer is not Liable for Injury to Employee caused solely by neglect of a fellow-servant.

Approved in *Schwind v. Floriston Pulp etc. Co.*, 5 Cal. App. 203, 89 Pac. 1069, reaffirming rule; *Leishman v. Union Iron Works*, 148 Cal. 282, 113 Am. St. Rep. 243, 83 Pac. 34, 3 L. R. A. (n. s.) 500, applying rule when fellow-servant through whom injury was caused was superior of employee injured; *McDonald v. California Timber Co.*, 7 Cal. App. 378, 94 Pac. 377, in absence of proof that appliance provided by master was unsuitable, he was not liable for negligent act of fellow-servant in using appliance.

Distinguished in *Korander v. Penn Bridge Co.*, 16 Cal. App. 252, 116 Pac. 385, negligence of engineer employed upon a machine other than that upon which plaintiff was employed when injured is imputable to the employer.

Vice-principalship Considered With Reference to superior rank of negligent servant. See note, 51 L. R. A. 537, 607.

103 Cal. 264-268, 42 Am. St. Rep. 114, 35 Pac. 1031, 37 Pac. 203, McDOWELL v. HIS CREDITORS.

Premises Used Primarily as a Place of Business cannot be selected as a homestead.

Approved in *Harlan v. Schulze*, 7 Cal. App. 292, 295, 94 Pac. 381, 382, incidental use of home for purposes of prostitution did not destroy right to homestead.

Whether Homestead may Include Hotel. See notes, 79 Am. St. Rep. 123; 96 Am. St. Rep. 280.

103 Cal. 268-277, 37 Pac. 232, COSGROVE v. PITMAN.

Inferences of Negligence cannot be Drawn from presumption, but must be founded upon some fact legally established.

Approved in East Tennessee etc. R. R. Co. v. Lindamood, 111 Tenn. 473, 78 S. W. 103, in action by brakeman suing for injuries, fact that injury was caused by brake latently defective raised no presumption of employer's negligence.

Knowledge by Employer of Single Act of neglect by employee does not render former chargeable with neglect in retaining him.

Approved in Southern Pacific Co. v. Hertzner, 135 Fed. 276, 277, 278, 280, 68 C. C. A. 26, 1 L. R. A. (n. s.) 288, in action for injuries, specific acts of negligence or incompetence, of which master had no notice, are inadmissible to prove incompetence of servant or negligence of master; Wickland v. Saylor Coal Co., 119 Iowa, 338, 93 N. W. 306, applying rule in action by miner for injuries received in accident to cage, where evidence showed engineer in charge had once descended with great force.

Knowledge as Element of Employer's Liability. See note, 41 L. R. A. 99.

Duty of Master With Respect to Employment of his servants. See note, 48 L. R. A. 391.

Liability of Master for Injuries to Servant by incompetency of fellow-servant. See note, 25 L. R. A. 714.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 757, 759, 770, 771.

103 Cal. 278-280, 37 Pac. 398, GREENZWEIG v. STRELINGER.

It is Competent to Collaterally Impeach the Record of a judgment rendered in another state by showing want of jurisdiction.

Approved in Estate of Hancock, 156 Cal. 807, 134 Am. St. Rep. 177, 106 Pac. 59, applying rule in proceeding to determine heirship of second wife to one deceased, where record in foreign court of action for divorce from first wife showed want of jurisdiction.

Judgments of Courts of Other States. See note, 103 Am. St. Rep. 308.

103 Cal. 280-287, 37 Pac. 186, RYAN v. JACQUES.

In Absence of Special Demurrer, that is pleaded with sufficient certainty which is capable of being sufficiently ascertained from complaint.

Approved in Thomas v. Wentworth Hotel Co., 158 Cal. 278, 139 Am. St. Rep. 120, 110 Pac. 943, in action to enforce stockholders' liability, averment in complaint as to the total number of shares then "outstanding" was sufficient to show total subscribed stock, in absence of special demurrer.

103 Cal. 287-294, 35 Pac. 768, 37 Pac. 392, MERRILL v. MERRILL.

Money Paid upon Contract which is subsequently rescinded is not forfeited in absence of agreement to that effect.

Approved in Pierce v. Staub, 78 Conn. 467, 112 Am. St. Rep. 163, 62 Atl. 763, 3 L. R. A. (n. s.) 785, reaffirming rule; Fagan v. Hook,

134 Iowa, 393, 111 N. W. 982, where agreement to exchange personalty for land was rescinded, owner of land was liable for market value of personalty received and disposed of by him.

Right of Vendee Under Land Contract to lien for amount paid where contract fails or is rescinded. See note, 20 L. R. A. (n. s.) 181.

Vendor Who has Never Declined to perform his contract does not consent to a rescission.

Approved in Aikman v. Sanborn (Cal.), 52 Pac. 730, vendor, by insisting that purchaser who has failed to make payments as agreed has forfeited his rights does not thereby rescind the contract.

103 Cal. 297-314, 37 Pac. 225, **TAPSCOTT v. LYON.**

Leave to Sue a Receiver will not be refused in a proper case.

Approved in De Forrest v. Coffey, 154 Cal. 454, 98 Pac. 32, on application for mandate to compel superior court judge to permit independent suit to be brought relative to property in hands of receiver, it was discretionary with court to grant application, or compel intervention in suit in which receiver was appointed.

Appellate Court is Justified in refusing to notice alleged errors not pointed out.

Approved in Hill v. Barner, 8 Cal. App. 68, 96 Pac. 116, where error was pointed out in oral argument, court was not bound to act upon presumption of waiver of points not pointed out in briefs.

Enforcement Against Receiver of Liabilities sounding in tort. See note, 120 Am. St. Rep. 279.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 466.

103 Cal. 319-325, 42 Am. St. Rep. 117, 37 Pac. 401, **KENDALL v. PARKER.**

Indorser of Non-negotiable Instrument may show indorsement was simply for purpose of transferring instrument.

Distinguished in Kinsel v. Ballou, 151 Cal. 757, 91 Pac. 621, discussing whether, in action against one who indorsed promissory note "with recourse," oral evidence was admissible to show parties intended indorsement to be "without recourse."

Agreements and Conditions Destroying Negotiability. See note, 125 Am. St. Rep. 207.

Liability of Indorser of Non-negotiable Instrument. See note, 97 Am. St. Rep. 989.

103 Cal. 325-342, 37 Pac. 393, **SHEEHY v. SHINN.**

Presumptions on Appeal are in Favor of the Judgment.

Approved in Leonhart v. California Wine Assn., 5 Cal. App. 24, 89 Pac. 849, where bill of exceptions shows defendant requested a special verdict which was refused, but fails to specify on what issues it was requested, no error is shown in refusal.

Contracts for the Purchase and Sale of stock on margin, to be delivered at a future day, are void.

Approved in Macomber v. Conradt (Cal.), 37 Pac. 902, reaffirming rule; Pollitz v. Wickersham, 150 Cal. 245, 88 Pac. 914, applying rule in action by stock brokers to recover moneys advanced upon purchase and sale of stock, where evidence warranted conclusion purchases and

sales were made upon margin to be delivered at a future day in violation of the Constitution; *Hocker v. Western Union Tel. Co.*, 45 Fla. 367, 34 So. 902, where intention was to make actual sale of cotton, mere fact that margin was deposited with broker did not necessarily stamp transaction as one where no goods were to pass; *Conrad v. Lepper*, 13 Wyo. 492, 81 Pac. 311, though stock is purchased on margin, if customer afterward pays broker amount of broker's advancements, and receives the certificates of stock, transaction becomes valid in its entirety.

103 Cal. 342-350, 37 Pac. 406, ESTATE OF FAIR.

In Order to Justify Court in changing time for payment of contingent legacies, such intention must clearly appear from will.

Distinguished in *Rector v. Dalby*, 98 Mo. App. 193, 71 S. W. 1079, where testator gave legatee an absolute interest in certain fund but postponed payment thereof until she attained age of thirty, on attaining majority such legatee could compel payment of the money.

103 Cal. 350-352, 37 Pac. 392, IN RE BLYTHE.

It is the Duty of the Court to Decide actual controversies by a judgment which can be carried into effect.

Approved in *Keely v. Ophir Hill Consol. Mining Co.*, 169 Fed. 605, 95 C. C. A. 99, reaffirming rule.

Allowance to Administrator for Interest on Disbursements. See note, 5 Cof. Prob. 396.

103 Cal. 352-355, 37 Pac. 230, EX PARTE CLARK.

Witnesses cannot be Compelled to Answer Questions which would tend to incriminate them.

Approved in *In re Beer*, 17 N. D. 190, 115 N. W. 675, section 9383, Revised Codes of 1905, does not grant sufficient immunity by reason of answering such questions.

Constitutional Guaranty Against Self-incrimination, and equivalent exemption to witness. See note, 1 L. R. A. (n. s.) 168.

Constitutional Protection Against Being Forced to furnish evidence against one's self in a civil case. See note, 29 L. R. A. 813.

Admissibility of Evidence Wrongfully Obtained. See note, 136 Am. St. Rep. 149.

103 Cal. 367-371, 37 Pac. 238, MERBILL v. CLARK.

Deed Purporting to Grant Property in fee simple conveys all after-acquired title.

Approved in *Younger v. Moore*, 155 Cal. 773, 103 Pac. 224, applying rule where grantor at time of executing deed had only a certain undivided interest, and at same time executed a declaration of trust reciting the conveyance of all her right, title and interest in the property.

103 Cal. 372-374, 37 Pac. 232, SMITH v. WAITE.

Averment That Bill was Drawn or note made sufficiently alleges delivery.

Approved in *Stanton v. Singleton* (Cal.), 54 Pac. 589, allegation that defendants "made and entered into" the agreement sufficiently imports delivery.

103 Cal. 377-380, 37 Pac. 179, STOCKTON COMBINED HARVESTER ETC. WORKS v. HOUSER.

Applications for Change of Venue for the Convenience of witnesses are addressed to the sound legal discretion of the trial court.

Approved in *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 673, 86 Pac. 509, fact that a greater number of witnesses resided in county to which change was requested than in county in which action was brought did not show an abuse of discretion in denying change.

103 Cal. 384-387, 37 Pac. 484, RIALTO IRR. DIST. v. BRANDON.

In Condemnation Proceedings It is Sufficient to show the property is necessary for the contemplated use.

Approved in *Northern Light etc. Co. v. Stacher*, 13 Cal. App. 417, 109 Pac. 899, in proceedings to condemn riparian rights for electric light and heat purposes, allegations of complaint were sufficient to show necessity for the taking; *Dallas v. Hallock*, 44 Or. 254, 75 Pac. 206, in action by city to condemn property for waterworks system, mere fact that water could be had from more convenient and less expensive source was no objection to the action.

Decree Confirming Organization of District, rendered by court having jurisdiction, is conclusive on the whole world.

Approved in *Wyman v. Searle*, 88 Neb. 33, 128 N. W. 804, reaffirming rule; *Knowles v. New Sweden etc. District*, 16 Idaho, 250, 101 Pac. 92, action to recover back money alleged to have been paid as assessments was collateral attack upon judgment of confirmation, and such assessments were res adjudicata.

Uses for Which Power of Eminent Domain cannot be exercised. See note, 102 Am. St. Rep. 832.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 63.

103 Cal. 387-392, 42 Am. St. Rep. 121, 37 Pac. 382, CHILDS v. LANTERMAN.

Failure to Appoint Guardian Ad Litem in Action to which infant is a party does not render the judgment void.

Approved in *Johnston v. Southern Pacific Co.*, 150 Cal. 539, 540, 89 Pac. 350, in action by minor for personal injuries where appointment of guardian ad litem was erroneously made, the error was cured by minor's affirmance of all proceedings after attaining her majority; *Skinner v. Knickrehm*, 10 Cal. App. 600, 102 Pac. 949, where guardian ad litem was appointed to prosecute action against original defendant, he was entitled to recover judgment against a corporation defendant subsequently joined as a party defendant; *Estate of Harris*, 3 Cal. Prob. 7, questioning whether rule applies to a probate contest.

Bills by Infants to Impeach or Avoid Decrees. See note, 112 Am. St. Rep. 199, 202.

103 Cal. 397-399, 37 Pac. 385, IN RE JONES.

Affidavit Imputing Bias and Prejudice of judge as ground for change of venue is a contempt in absence of statute authorizing it.

Approved in *Johnson v. State*, 87 Ark. 49, 112 S. W. 145, 18 L. R. A. (n. s.) 619, filing of motion suggesting disqualification on grounds which do not reflect on integrity or impartiality of judge cannot be held to be contempt; *State v. District Court*, 33 Mont. 140, 82 Pac. 789, disqualification of bias and prejudice may be invoked after trial has been had and while motion for new trial is pending.

103 Cal. 399-404, 37 Pac. 386, CONRAD v. ARROWHEAD HOT SPRINGS HOTEL.

Locators and Appropriators of Water have no rights antecedent to date of their location.

Approved in *McEvoy v. Taylor*, 56 Wash. 361, 105 Pac. 853, nonriparian owner could not enjoin natural and reasonable use of water by prior riparian owner of land on which spring was situated.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 674.

Miscellaneous.—Cited in *Conrad v. Arrowhead Hot Springs Hotel Co.* (Cal.), 37 Pac. 388.

103 Cal. 407-408, 37 Pac. 389, PEOPLE v. CHAVEZ.

Court is Justified in Refusing to Give Instruction where no evidence is before jury to which it could refer.

Approved in *People v. Fitts*, 4 Cal. App. 435, 91 Pac. 536, upholding refusal of court to instruct jury that they might find verdict for simple assault under indictment for assault with intent to commit robbery, where evidence justified verdict of guilty as charged or acquittal.

103 Cal. 415-420, 42 Am. St. Rep. 125, 37 Pac. 412, SHEARER v. PARK NURSEY CO.

Measure of Damages for Breach of Warranty is difference at time of discovering breach between actual value and value if warranty had been complied with.

Approved in *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 590, 96 Pac. 320, 321, where place of delivery of apricots was same as place of inspection and resale, damages sued for may all be recovered as general damages; *Krasilnikoff v. Dundon*, 8 Cal. App. 41, 97 Pac. 174, in action for damages for breach of warranty as to efficiency of boilers sent to Siberia, there was no lack of diligence in not discovering breach until boilers reached Siberia; *Waldteufel v. Pacific Vineyard Co.*, 6 Cal. App. 628, 92 Pac. 748, 749, where, under agreement to plant land with certain vines, inferior vines were planted, instruction to award as damages difference between value of land at time of trial and value as it would then be if properly planted was erroneous; *Griffing Bros. Co. v. Winfield*, 53 Fla. 603, 43 So. 691, applying rule where damages were claimed for breach of contract to care for and cultivate fruit trees upon land for term of years.

Measure of Damages for Breach of warranty. See notes, 92 Am. St. Rep. 446; 80 Am. St. Rep. 572.

103 Cal. 421-424, 37 Pac. 408, TAYLOR v. ABBOTT.

When Diversion of Water has Been Completed before subsequent pre-emptor acquires right in land, it is superior to pre-emptor's right.

Approved in *Lower Tule River Ditch Co. v. Angiola Water Co.*, 149 Cal. 499, 86 Pac. 1082, one who made cut in levee confining water to river and diverted water along an excavation to his land had a good appropriation as against subsequent diversion and use.

Lands in Possession of Another cannot be entered upon for purpose of securing water or completing attempted diversion of water.

Distinguished in *De Wolfskill v. Smith*, 5 Cal. App. 183, 89 Pac. 1004, where notice of appropriation was posted and work of diversion properly commenced, right to water acquired thereby was prior to that of locator of land after posting of notice.

103 Cal. 425-428, 37 Pac. 379, PEOPLE v. ROSS.

To Constitute Perjury, Testimony must be willfully false.

Approved in *People v. Wong Fook Sam*, 146 Cal. 118, 79 Pac. 850, the word "false" as used in Penal Code, section 118, defining perjury, means false in point of fact.

Immaterial Testimony as Basis for Charge of subornation of perjury. See note, 25 L. R. A. (n. s.) 121.

103 Cal. 429-431, 37 Pac. 410, IN RE McLAUGHLIN.

Guardian of One Who, as Sole Heir at law, is entitled to administer estate, may be granted letters.

Approved in *Clough v. Borello (Cal.)*, 48 Pac. 330, guardians of minor heirs were entitled to letters of administration in preference to public administrator.

103 Cal. 431-438, 37 Pac. 521, CURRIER v. HOWES.

Easement Acquired by Deed cannot be Lost by mere nonuser.

Reaffirmed in *Petitpierre v. Maguire*, 155 Cal. 250, 100 Pac. 693.

Easement Appurtenant to an Estate Follows every part of the estate.

Approved in *Davidson v. Ellis*, 9 Cal. App. 147, 98 Pac. 256, reaffirming rule; *Tarpey v. Lynch*, 155 Cal. 409, 101 Pac. 11, where owner of land to which a water right was appurtenant sold a portion thereof together with interest in appurtenant water right, easement was appurtenant to segregated portion though it was necessary to carry ditch to land sold over the original estate; *Rollo v. Nelson*, 34 Utah, 125, 96 Pac. 266, 26 L. R. A. (n. s.) 315, cement walk constructed in front of six lots facing on a cul-de-sac passed as an easement appurtenant on sale of such lots.

Creation and Conveyance of Easements Appurtenant. See note, 136 Am. St. Rep. 695.

Easements Created by Severance of Tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 348.

103 Cal. 438-441, 37 Pac. 411, WILLIAMS v. NAFTZGER.

Where Land Encumbered by Mortgage is conveyed subject thereto, grantee becomes primarily liable to mortgagee, and his vendor becomes his surety.

Approved in *Johns v. Wilson*, 6 Ariz. 132, 53 Pac. 585, in foreclosure suit, mortgagee may join grantee of mortgaged property who assumed debt, and obtain deficiency judgment against him therein; *Colchester Savings Bank v. Brown*, 75 Conn. 71, 52 Atl. 317, upholding right of mortgagee to sue one who, in taking a conveyance to himself, assumed payment of mortgage debt of his grantor.

Right of Mortgagee to Enforce Purchaser's Promise to pay mortgage where grantor or promisee was not himself liable. See note, 22 L. R. A. (n. s.) 494.

103 Cal. 447-454, 37 Pac. 414, **PEOPLE v. TEMPLE.**

Judgment not Void on Its Face but Void for Want of jurisdiction may be set aside within reasonable time after its entry.

Approved in *Tuffree v. Stearns Ranchos Co.* (Cal.), 54 Pac. 827, judgment regular on its face cannot be set aside on motion; *George Frank Co. v. Leopold etc. Co.*, 13 Cal. App. 663, 108 Pac. 879, upholding power of court to vacate judgment, void in fact, on motion made six months and one day after rendition of judgment; *State v. District Court*, 38 Mont. 171, 129 Am. St. Rep. 636, 99 Pac. 294, where divorce decree was awarded against insane husband without personal service, independent action could be brought more than six months thereafter to vacate decree.

Attack on Judgment Apparently Valid for purpose of having it declared void is a collateral attack.

Disapproved in *State v. Hindman*, 159 Ind. 591, 65 N. E. 913, in action by state on recognizance, attack on judgment by cross-complaint filed by principal and surety in recognizance was a direct attack.

Affidavit and Order of Publication of Summons, not being part of judgment-roll, cannot be considered in determining validity of judgment.

Approved in *Estate of McNeil*, 155 Cal. 342, 100 Pac. 1090, where such affidavit and order were not properly a part of judgment-roll at time of divorce action, they could not be examined to ascertain their sufficiency though improperly inserted in judgment-roll; *Boyer v. Pac. Life Ins. Co.*, 1 Cal. App. 56, 81 Pac. 672, admission in evidence of judgment-roll in foreclosure suit did not include admission of affidavit and order of publication of summons wrongfully attached to the judgment-roll.

Miscellaneous.—Cited in *People v. Temple* (Cal.), 37 Pac. 416.

103 Cal. 454-461, 37 Pac. 466, **GAY v. DARE.**

Where Purchaser has Option to Return Property and receive back price paid, on exercise of option title at once vests in vendor.

Approved in *George J. Birkel Co. v. Howze*, 12 Cal. App. 648, 108 Pac. 146, reaffirming rule; *Avery v. Cullen*, 15 Cal. App. 415, 114 Pac. 1023, in action on agreement to repurchase mining stock when purchasers became dissatisfied therewith, upon receiving notice from purchasers of their dissatisfaction, defendant became immediately liable for payment of the money; *Brescar v. Pratt*, 4 Cal. App. 290, 87 Pac. 1102, where vendees gave notice of rescission of sale of business for fraudulent misrepresentations, the vendor, by continuing to carry on the business and sell stock, acquiesced in the rescission and became liable for return of deposit made.

103 Cal. 461-471, 37 Pac. 375, **LOS ANGELES CEMETERY ASSN. v. LOS ANGELES.**

To Constitute a Watercourse There must be a Stream flowing in a definite channel.

Approved in *Huffner v. Sawday*, 153 Cal. 91, 94 Pac. 426, in action to enjoin diversion of water, facts that stream is dry during

summer months and location of river-bed is subject to change are not inconsistent with existence of natural watercourse; *Cedersburg v. Dutra*, 3 Cal. App. 575, 86 Pac. 840, in action to restrain construction of dam across channel, evidence showed such channel was a natural watercourse; *Humphreys v. Moulton*, 1 Cal. App. 258, 81 Pac. 1085, applying rule in action to enjoin alleged nuisance in flooding land by surface water, where two or more channels or waterways were brought together in channel complained of.

Erroneous Instruction Which Causes No Injury is not ground for reversal.

Approved in *Kirk v. Santa Barbara Ice Co.*, 157 Cal. 595, 108 Pac. 511, no harm could result from instruction as to contributory negligence in view of finding that there was no contributory negligence.

City has No Right to Collect Water in artificial channel without providing for its escape.

Approved in *Valparaiso v. Spaeth*, 166 Ind. 23, 76 N. E. 517, rule has no application where damages sued for were caused by unprecedented rainstorm and flood.

Municipal Corporation is not Liable for Injury resulting from the obstruction of surface water.

Distinguished in *Hume v. Des Moines*, 146 Iowa, 629, 641, 125 N. W. 848, 852, city is liable for negligence in carrying out its plans to grade and gutter streets to the injury of abutting proprietor.

Obstruction of Surface Water in City. See note, 20 L. R. A. (n. s.) 157.

103 Cal. 472-473, 37 Pac. 375, GRANNIS v. LORDEN.

Dissolution of Preliminary Injunction is discretionary with trial court, and action thereon will not be disturbed on appeal except in case of above.

Approved in *Porter's Bar Dredging Co. v. Beaudry*, 15 Cal. App. 754, 115 Pac. 952, applying rule to preliminary injunction against diversion of watercourse.

103 Cal. 476-488, 42 Am. St. Rep. 129, 37 Pac. 402, EX PARTE MAIER.

It is Within the Police Power of the State to prohibit the possession and sale of wild game within the state.

Approved in *Matter of Yun Quong*, 159 Cal. 512, 114 Pac. 837, amendment to act regulating sale and use of poisons is not unconstitutional in forbidding the possession of opium except as specified; *Ex parte Prindle* (Cal. App.), 94 Pac. 872, ordinance passed by supervisors regulating hunting of game, after amendment to Constitution requiring legislature to divide state into fish and game districts, was invalid; *New York v. Hesterberg*, 211 U. S. 40, 29 Sup. Ct. 12, 53 L. Ed. 79, upholding New York Laws of 1900, chapter 20, prohibiting possession of game within state during closed season; *Hornbeke v. White*, 20 Colo. App. 23, 76 Pac. 929, under game act (Sess. Laws 1899, pp. 187-209, c. 98), mere possession of deer hides, in absence of permission, was unlawful; *Harper v. Galloway*, 58 Fla. 261, 267, 51 So. 228, 230, provisions of section 8, chapter 6005, Acts of 1909, forbidding people of the state who do not reside in a certain county to hunt game therein without giving three days' notice and paying special license tax deny equal protection of the laws;

Sherwood v. Stephens, 13 Idaho, 403, 90 Pac. 346, in action for damages resulting from releasing of fish from private pond, complaint must show such pond was established and stocked with fish in accordance with law; *State v. Leavitt*, 105 Me. 80, 72 Atl. 877, 26 L. R. A. (n. s.) 799, chapter 317, page 489, Priv. & Sp. Laws 1903, giving to inhabitants or residents of town exclusive right to take clams, is not obnoxious to Constitution; *State v. Peabody*, 103 Me. 330, 69 Atl. 274, regulation prohibiting nonresidents from taking clams in town by depriving them of privilege of applying for license was invalid as to nonresidents; *State v. Shattuck*, 96 Minn. 49, 104 N. W. 720, construing section 45, chapter 336, page 606, Laws of 1903, relative to selling ruffed grouse; *Ex parte Fritz*, 86 Miss. 218, 109 Am. St. Rep. 700, 38 So. 723, applying rule in prosecution of one who caught fish in manner prohibited by ordinance; *State v. Weber*, 205 Mo. 45, 120 Am. St. Rep. 725, 102 S. W. 957, 10 L. R. A. (n. s.) 1155, upholding Laws of 1905, page 161, section 13 (Ann. Stats. 1906, p. 3608), making it unlawful to have possession of carcass of any deer not having thereon natural evidence of its sex; *State v. Heger*, 194 Mo. 711, 93 S. W. 253, upholding Laws of 1905, page 162, section 18, prohibiting sale of game whether taken lawfully or unlawfully within the state; *People v. Hesterberg*, 184 N. Y. 131, 76 N. E. 1033, 128 Am. St. Rep. 528, 3 L. R. A. (n. s.) 163, upholding statute prohibiting possession of game coming from without the state during close season; *People v. Bootman*, 180 N. Y. 10, 72 N. E. 508, construing forest, fish, and game law (Laws 1900, p. 22, c. 20), as not intended to make criminal the possession during close season of game killed without the state and brought into state during open season; *Territory v. Long Bell Lumber Co.*, 22 Okl. 909, 99 Pac. 919, declaring monopoly in the business of buying and selling lumber, coal, and grain to be a public nuisance; *State v. Niles*, 78 Vt. 271, 112 Am. St. Rep. 917, 62 Atl. 796, acts of 1896, page 74, No. 94, as amended by acts of 1898, page 84, No. 108, prohibiting killing or possession of deer, does not infringe equality clause of Constitution; dissenting opinion in *People v. Lassen*, 142 Mich. 602, 106 N. W. 145, majority upholding Public Acts of 1899, No. 88, prohibiting possession of fish lawfully caught in foreign waters.

Disapproved in *McDonald v. Southern Express Co.*, 134 Fed. 287, Act S. C. Feb. 16, 1904 (24 Stats. at Large p. 385), prohibiting transportation of shad fish caught outside of state, is unconstitutional; dissenting opinion in *Ex parte Blardone*, 55 Tex. Cr. 192, 116 S. W. 1200, 21 L. R. A. (n. s.) 607, majority upholding constitutionality of Acts 30th Leg. (Gen. Laws 1907), page 278, chapter 144, section 1, prohibiting sale of wild game.

Game Laws. See note, 128 Am. St. Rep. 537, 538.

Prohibition of Possession of Game. See note, 3 L. R. A. (n. s.) 163

If Complaint States Offense of Which Court has jurisdiction, habeas corpus cannot be used to serve purpose of demurrer.

Approved in *In re Avdalas*, 10 Cal. App. 510, 102 Pac. 675, applying rule where complaint, though insufficient as a pleading, clearly showed attempt to charge defendant with defrauding boarding-house keeper; *In re Johnson*, 6 Cal. App. 737, 93 Pac. 200, applying rule where it was claimed on application for writ that complaint charging unlawful keeping of saloon and selling of liquor without first obtaining license stated two distinct offenses.

Where Complaint Does not State Public Offense, prisoner is entitled to discharge on habeas corpus.

Approved in *Ex parte Goldman* (Cal. App.), 88 Pac. 820, facts alleged in indictment for crime "of being accessory to the commission of a felony" did not constitute a public offense; *Ex parte Rickey*, 31 Nev. 89, 135 Am. St. Rep. 651, 100 Pac. 137, applying rule where indictment charged president of bank with receiving deposit, by and through receiving teller, knowing bank was insolvent; *Ex parte Show*, 4 Okl. Cr. 423, 113 Pac. 1066, applying rule where information charging election inspector with defrauding voter of his vote could not be amended so as to state an offense.

Release of Prisoner on Habeas Corpus after judgment and sentence See note, 87 Am. St. Rep. 186, 187.

103 Cal. 488-496, 37 Pac. 627, PEOPLE v. HAMILTON.

Doctrine of Law of the Case is Limited to Rulings on questions actually presented and considered upon former appeal.

Reaffirmed in *Trower v. San Francisco*, 157 Cal. 765, 109 Pac. 618.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 345.

Deposits Received by County Officer in official capacity, not used in payment of fees, must be turned over to proper custodian.

Approved in *Finley v. Territory*, 12 Okl. 632, 73 Pac. 276, probate judges are required to report all fees received by them while acting in townsite matters.

103 Cal. 498-502, 37 Pac. 483, COUNTY OF MODOC v. SPENCER.

Boards of Supervisors are Creatures of the statute, and authority for their acts must be sought in the statute.

Approved in *Denman v. Webster* (Cal.), 70 Pac. 1065, board of education had no power to employ council to defend action brought against it.

Whether Holders are Necessary Parties to proceedings to invalidate money obligations of county, state or municipal corporations. See note, 3 L. R. A. (n. s.) 257.

103 Cal. 503-506, 37 Pac. 485, IN RE YOAKAM.

All Intendments on Appeal are in Favor of regularity of action of lower court.

Approved in *Occidental Co. v. Gantner & Mattern*, 7 Cal. App. 731, 95 Pac. 1044, if action of court in vacating verdict on its own motion can be sustained on either ground allowed under section 662 of Code of Civil Procedure, its order must be upheld; *Leonhart v. California Wine Assn.*, 5 Cal. App. 24, 89 Pac. 849, upholding rule where refusal to direct special verdict was complained of, but record failed to show upon what issues it was desired; *Davis v. Jacobson*, 13 N. D. 432, 101 N. W. 314, motion for new trial made upon court's minutes will not be disturbed in absence of statement embodying evidence essential to review of specifications based thereon.

103 Cal. 506-508, 37 Pac. 514, 777, QUINT v. HOFFMAN.

Collateral Attack upon Existence or Organization of public corporation will not be permitted.

Approved in *Keech v. Joplin*, 157 Cal. 14, 106 Pac. 228, in action against treasurer of county to compel payment of a claim, validity

of organization of protection district could not be questioned by private individuals; *Metcalf v. Merritt*, 14 Cal. App. 247, 111 Pac. 506, *Reclamation District v. McPhee*, 13 Cal. App. 388, 109 Pac. 1108, 1109, and *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 409, 105 Pac. 281, all holding, in actions by reclamation districts to foreclose lien of an assessment, legality of district cannot be attacked; *Whipple v. Tuxworth*, 81 Ark. 402, 99 S. W. 90, decree obtained by an improvement district which was a corporation *de facto* could not be attacked in a subsequent suit; *City of Tyler v. Tyler Bldg. etc. Assn.*, 98 Tex. 75, 81 S. W. 3, in suit by city for collection of taxes levied under authority conferred on cities of over ten thousand inhabitants, taxpayer could not raise question whether city had ten thousand inhabitants; *Purdin v. Washington Nat. Bldg. Assn.*, 41 Wash. 397, 83 Pac. 724, contention that district was not legally organized cannot be made in suit to recover possession of land sold for nonpayment of irrigation taxes.

Irrigation District Organized Under General Law of the state is a public corporation.

Approved in *Perry v. Otay Irr. Dist. (Cal.)*, 60 Pac. 42, collector of irrigation district, after election of his successor, had no right to offset his claim for fees, etc., against moneys in his hands belonging to district.

103 Cal. 508-512, 37 Pac. 510, PEOPLE v. MOORE.

Failure of Court to Instruct Defendant Before Juror is called as to his right of challenge is reversible error.

Overruled in *People v. Russell*, 156 Cal. 458, 459, 105 Pac. 419, where both minutes of court and bill of exception were silent as to whether court instructed defendant as to his right of challenge, it will be presumed the statute was complied with.

103 Cal. 513-516, 37 Pac. 512, PEOPLE v. MALLON.

The Silence of One Who Stands Mute in Face of an accusation of crime may be taken against him as indicating guilt.

Approved in *People v. Ayhens*, 16 Cal. App. 623, 117 Pac. 791, discussing admissibility of declarations made by a codefendant in presence of defendant charging latter with the crime, where defendant promptly denied accusation; *People v. Machado (Cal.)*, 63 Pac. 67, in absence of motion to strike it out, admission of statements of third person to one accused of crime was not error, though not accompanied with proof of conduct of accused; *Parulo v. Philadelphia etc. Ry. Co.*, 145 Fed. 669, under the circumstances proved in action for personal injuries, no reasonable inference of acquiescence could be drawn from silence of person injured.

Uncontradicted Statement in Presence of accused as confession. See note, 25 L. R. A. (n. s.) 549, 571.

103 Cal. 516-519, 37 Pac. 465, PELLISSIER v. CORKER.

Fee Simple Title Passes upon a Grant of real property only where it does not appear from grant lesser estate was intended.

Approved in *Bank of Lemoore v. Fulgham*, 151 Cal. 239, 90 Pac. 938, deed from state of land sold to it for delinquent taxes which described the property as described in the certificate of sale with the added words "with the appurtenances," conveyed no more than

if such words had been omitted; *Peterson v. Machado* (Cal.), 43 Pac. 612, deed conveying "road and right of way over and across" land, conveyed only easement for right of way and not fee simple title; *Overton v. Moseley*, 135 Ala. 605, 33 So. 698, applying rule in considering whether deed conveying land described and also strip along a ditch conveyed easement for drainage over strip or corpus of strip.

Doctrine That if Several Parts of Grant are irreconcilable the former prevails has no application where there is a single grant for use.

. Approved in *Pavkovich v. Southern Pacific R. R. Co.*, 150 Cal. 47, 87 Pac. 1099, construing clause in deed of land for use of a railway to stone quarries as a limitation upon estate of grantee to the extent that it could not take rock except for purpose therein stated.

103 Cal. 519-525, 42 Am. St. Rep. 145, 37 Pac. 509, **HERMAN v. SANTEE.**

Where Proof of Service of Summons is Defective, amended proof may be filed nunc pro tunc as of date of judgment.

Approved in *Morrissey v. Gray*, 160 Cal. 396, 117 Pac. 441, reaffirming rule; *Jones v. Gunn*, 149 Cal. 692, 693, 87 Pac. 579, upholding rule where judgment-roll offered in evidence contained unsigned return of service, and former deputy sheriff, after proving actual service was permitted to complete return by signing name of former principal as sheriff and himself as deputy; *Ranch v. Werley*, 152 Fed. 515, upholding sufficiency of return amended without notice of application for leave to amend, and where order did not specify it should be filed nunc pro tunc; *Call v. Rocky Mt. Bell Tel. Co.*, 16 Idaho, 556, 133 Am. St. Rep. 135, 102 Pac. 147, upholding action of district court in permitting filing of amended proof of service after appeal from default judgment rendered in probate court.

Valid Judgment by Default may be rendered by the court though no formal default has been entered.

Approved in *Lunnun v. Morris*, 7 Cal. App. 716, 95 Pac. 909, upholding denial of relief from consequences of mistake and inadvertence of counsel; *Harpold v. Doyle*, 16 Idaho, 692, 102 Pac. 164, where service of summons was complete, failure of clerk to indorse default upon complaint did not affect jurisdiction.

Notice of Application for Leave to Amend is waived when motion is made and heard in presence of counsel without objection.

Approved in *Lellman v. Mills*, 15 Wyo. 166, 87 Pac. 990, upholding rule where motion for leave to amend petition to conform to proof was made at time of hearing of motion for new trial, and formal written motion was filed later.

103 Cal. 528-529, 37 Pac. 502, **WHITE v. HARRIS.**

Contract Which Provides Street Work shall be commenced within a certain time sufficiently fixes time for commencement of work.

Approved in *Gist v. Rackliffe-Gibson Const. Co.*, 224 Mo. 387, 123 S. W. 926, defining word "fix" in statute providing that ordinances for public improvements shall fix time when work shall be completed.

Miscellaneous—Cited in *Williams v. Cuneo* (Cal.), 41 Pac. 418, and *Williams v. Cuneo* (Cal.), 39 Pac. 207.

103 Cal. 530, 37 Pac. 486, DAVIS v. HART.

Failure of Defendant in Error to File Brief in appellate court will be taken as a confession of alleged errors.

Approved in Nettograph Machine Co. v. Brown, 19 Okl. 79, 91 Pac. 850, following rule; Buttler v. McSpadden, 25 Okl. 466, 468, 107 Pac. 171, applying rule where it was insisted judgment appealed from was not supported by the evidence, and brief filed appeared to sustain contention.

103 Cal. 531-535, 37 Pac. 503, BROWN v. POMONA BOARD OF EDUCATION.

Corporations are Bound by implied contracts within scope of their authority.

Approved in Davoust v. Alameda, 149 Cal. 71, 84 Pac. 761, 5 L. R. A. (n. s.) 536, municipal corporation operating electric light plant is liable for damages caused by negligence of its employees in operating plant.

Burden of Pleading and Proving Defense of ultra vires is on corporation seeking to avoid its contract.

Approved in Wykes v. City Water Co., 184 Fed. 755, city which contracted with private corporation for waterworks to obtain supply of water was estopped from claiming certain of its acts were ultra vires.

Common Counts may be Used in Action of assumpsit against municipal corporation.

Approved in Wallace v. Newark, 69 N. J. L. 498, 55 Atl. 1079, upholding declaration charging municipal corporation by its agents with commission of a tort, without alleging details of authorization.

Liability of Municipality upon Implied Contract for labor or services. See note, 27 L. R. A. (n. s.) 1129.

Liability of Municipality or Other Public Corporation on implied contract. See note, 27 L. R. A. (n. s.) 1117.

103 Cal. 536-537, 37 Pac. 523, HOWARD v. McCHESNEY.

Defect in Proof of Publication may be corrected by filing of amended affidavit of publication.

Approved in Call v. Rocky Mt. Bell Tel. Co., 16 Idaho, 556, 133 Am. St. Rep. 135, 102 Pac. 147, upholding action of district court in permitting filing of amended return of service after appeal from default judgment in probate court.

103 Cal. 541-547, 37 Pac. 500, ESREY v. SOUTHERN PACIFIC CO.

To Commit an Act Recklessly is to commit it wantonly.

Approved in Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 617, 618, 86 Pac. 904, complaint charging that defendant carelessly and negligently and willfully and wantonly ran its cars was not demurrable for uncertainty.

Party Who has Lost Clear Chance of avoiding accident is solely responsible for injury.

Approved in Kramm v. Stockton Electric R. R. Co., 10 Cal. App. 273, 101 Pac. 915, reaffirming rule; Spear v. United Railroads, 16 Cal. App. 659, 117 Pac. 966, this doctrine can only be invoked in favor of person injured and will not operate in favor of either of two parties who have contributed to injury to a third; Ruppel v. United Railroads, 10 Cal.

App. 325, 101 Pac. 805, upholding rule where testimony of motorman in charge of car that collided with wagon showed he could have avoided accident after discovering peril; *Doherty v. California Nav. etc. Co.*, 6 Cal. App. 138, 91 Pac. 421, applying rule in action for injuries to a steamship passenger who was lifted to his feet by captain while helplessly drunk, and left standing without support, by reason whereof he fell and broke his arm; *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 407, 91 Pac. 438, rule cannot be invoked in favor of either of two defendants whose joint or concurrent acts of negligence resulted in plaintiff's injury; *Johnson v. Center*, 4 Cal. App. 621, 88 Pac. 729, upholding rule where engineer of train saw plaintiff in place of danger in ample time to have avoided accident; *Sauer v. Eagle Brewing Co.*, 3 Cal. App. 134, 84 Pac. 428, refusal of court to instruct jury that before defendant could be held liable for failing to avoid injury to plaintiff he must have actual knowledge of dangerous position of plaintiff, was error; *Kramm v. Stockton R. R. Co.*, 3 Cal. App. 616, 86 Pac. 742, on appeal from judgment of nonsuit, case should have gone to jury where it might have decided that motorman could have avoided injury to one employed on street who stepped on track to let sprinkler pass; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 534, 99 Pac. 98, applying rule in action for death of minor child where contributory negligence on part of parents was charged by defendant.

Distinguished in *Benrichsen v. Market Street Ry. Co.*, 149 Cal. 22, 84 Pac. 421, in action by young girl for injuries received from collision with street-car, she was not entitled to recover where motorman did not actually know of her peril; *Wardlaw v. California Ry. Co. (Cal.)*, 42 Pac. 1076, one who climbed up on train from between cars was not entitled to recover for injuries caused by backing of engine against train without knowledge of his perilous position; *Rowe v. Southern California Ry. Co.*, 4 Cal. App. 5, 6, 7, 87 Pac. 221, 222, upholding granting of nonsuit in action for death of foot-passenger who stepped on track in front of train where engineer did all that law required of him.

Care Due to Sick, Infirm, or Helpless Persons, with whom no contract relation is sustained. See note, 69 L. R. A. 544.

103 Cal. 548-549, 37 Pac. 503, PEOPLE v. CURRY.

Where Defendant in a Criminal Case Testifies in his own behalf, it is not error to instruct jury as to his relation to the case.

Approved in *People v. Ryan*, 152 Cal. 368, 92 Pac. 855, refusing to consider instruction given concerning testimony of defendant himself, as evidence of a desire on part of trial judge to be unfair.

Right of Court to Caution Jury as to believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 818.

103 Cal. 550-562, 37 Pac. 504, COFFEE v. WILLIAMS.

Account Stated Need not Necessarily be in Writing.

Approved in *Converse v. Scott*, 137 Cal. 243, 70 Pac. 14, where balance of accounts was orally agreed upon, it became an account stated.

When Account Stated is Admitted, it can only be avoided on proof of fraud or mistake.

Approved in *Kearney v. Bell*, 160 Cal. 670, 117 Pac. 928, where it was claimed assent to account stated was obtained by fraud, proof of falsity of the items was admissible to support charge of fraud; *Daytona*

Bridge Co. v. Bond, 47 Fla. 144, 36 So. 448, where statements of account sent by mail did not definitely purport to charge party receiving them with the debt, no presumption of admission arose from his silence in relation thereto; **Naylor v. Lewiston etc. Ry. Co.**, 14 Idaho, 803, 96 Pac. 578, upholding exclusion of all evidence tending to impeach items of account for labor performed and materials furnished for work on railway right of way; **Martin v. Heinze**, 31 Mont. 73, 77 Pac. 428, code section requiring party alleging account to deliver to adverse party copy of same itemized, on demand, does not apply to actions on accounts stated.

103 Cal. 563-568, 37 Pac. 516, PEOPLE v. SMITH.

Information for Uttering Forged Check which fails to charge defendant with knowledge that check was forged is insufficient.

Approved in **People v. Elphis** (Cal.), 72 Pac. 838, information which failed to charge intent to defraud and that defendant knew check was false and forged was fatally defective.

Variance Between Pleading and Proof in Respect to middle name or initial is immaterial.

Reaffirmed in **People v. Harrison**, 14 Cal. App. 549, 112 Pac. 735.

Neglect to Demur is No Waiver of an Objection based upon ground that information fails to state public offense.

Reaffirmed in **People v. Grinnell**, 9 Cal. App. 240, 98 Pac. 681.

103 Cal. 568-577, 37 Pac. 534, PEOPLE v. GORDAN.

Improper Remarks of Counsel will Justify a reversal only when prejudice clearly results therefrom.

Reaffirmed in **Dimmick v. United States**, 135 Fed. 270, 76 C. C. A. 141.

Under Proper Circumstances Court is Warranted in departing from order of proof prescribed by code.

Approved in **People v. Willard**, 150 Cal. 551, 89 Pac. 127, fact that some evidence offered in rebuttal would have been admissible if offered in chief constituted of itself no ground of complaint.

Character Witness may be Cross-examined as to whether he has heard defendant accused of acts inconsistent with character given him.

Approved in **People v. Weber**, 149 Cal. 342, 86 Pac. 678, applying rule to attack upon reputation of pawnbroker as a witness, where purport of inquiry was to introduce evidentiary matter in form of questions; **People v. Smith**, 9 Cal. App. 649, 99 Pac. 1113, where no evidence as to character of defendant for peace and quietness had been offered, it was error to allow question on cross-examination as to whether he had a violent temper.

Evidence of Good Character to Create Doubt of Guilt. See note, 103 Am. St. Rep. 893, 894.

Right to Testify to Character from personal knowledge. See note, 22 L. R. A. (n. s.) 662.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 735, 737, 740.

103 Cal. 577-581, 37 Pac. 518, PEOPLE v. LANDMAN.

That Injury was Intentionally Inflicted will not be presumed from mere proof of shooting.

Approved in *Stevens v. Continental Casualty Co.*, 12 N. D. 472, 97 N. W. 865, applying rule in action to recover upon accident insurance policy which limited liability of company in case injury to insured was intentionally inflicted; *Lo Toon v. Territory*, 16 Haw. 355, evidence was sufficient to support finding of intent to murder.

Distinguished in *People v. Jones*, 160 Cal. 370, 117 Pac. 181, in the case of murder, proof of the homicide alone established the crime with its necessary ingredient of malice.

Instruction Passing on Question of Intent trenches upon province of jury.

Approved in *Lowe v. State*, 118 Wis. 656, 96 N. W. 422, upholding instruction in prosecution for assault with intent to kill which required jury to find acts mentioned were done with premeditated design.

103 Cal. 582-585, 37 Pac. 513, WICKERSHAM v. CRITTENDEN.

Final Judgment cannot be Opened and changed so as to include claim for attorney's fee.

Distinguished in *Forester v. Boston etc. Min. Co.*, 29 Mont. 405, 74 Pac. 1091, upholding allowance of attorneys' fees as part of costs in action by minority stockholders to obtain decree declaring transfer by corporation null and void.

103 Cal. 585-588, 37 Pac. 520, IN RE MUERSING.

One Making Adverse Claim Against Estate is not thereby rendered incompetent to act as administrator.

Reaffirmed in *Rice v. Tilton*, 13 Wyo. 436, 80 Pac. 832.

Public Administrator is Entitled to Letters as against nonresident father of decedent, or his nominee.

Approved in *Estate of Griffiths*, 3 Cof. Prob. 547, denying application of nominee of nonresident brothers of decedent.

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1163.

Right of Nonresidents to Act as Executors or administrators. See note, 1 L. R. A. (n. s.) 347.

103 Cal. 594-597, 37 Pac. 499, BANK OF SAN LUIS OBISPO v. PACIFIC COAST S. S. CO.

Action upon Liability Created by Statute must be brought within prescribed time after cause of action accrues.

Approved in *O'Neill v. Quarnstrom*, 6 Cal. App. 473, 92 Pac. 392, giving of note by which the debt of corporation was renewed or extended did not affect the running of the statute of limitations in favor of stockholders; *Harby v. Board of Education*, 2 Cal. App. 420, 83 Pac. 1082, action by teacher, who had been summarily removed therefrom, to be restored to position of vice-principal of grammar school is barred by statute of limitations after three years; *Boyd v. Mutual Fire Assn.*, 116 Wis. 169, 96 Am. St. Rep. 948, 90 N. W. 1091, 61 L. R. A. 918, in action by creditors to wind up affairs of insolvent corporation, liability of stockholders accrued on such corporation being adjudged insolvent.

Statute of Limitations in Actions against corporate officers and stockholders. See note, 96 Am. St. Rep. 973.

103 Cal. 614-624, 42 Am. St. Rep. 149, 37 Pac. 750, **EACHUS v. LOS ANGELES CONSOL. ELEC. RY. CO.**

Abutting Owner is Entitled to Compensation for injury to his property resulting from change in use or condition of street.

Approved in *Wilcox v. Engebretsen*, 160 Cal. 299, 116 Pac. 754, abutting owner had right to enjoin prosecution of work for change of grade of street until his damages had been ascertained and paid; *Cushing-Wetmore Co. v. Gray*, 152 Cal. 122, 125 Am. St. Rep. 47, 92 Pac. 71, abutting owner engaged in quarrying and selling rock was entitled to recover damages caused by obstructions placed in street not in front of his property but so as to prevent access thereto by his wagons and teams; *Williams v. Los Angeles Ry. Co.*, 150 Cal. 594, 89 Pac. 331, city had no right to authorize the erection of switch-tower on street in front of abutting owner's property without first making compensation for the damage caused thereby; *Sievers v. Root*, 10 Cal. App. 340, 101 Pac. 926, where, after official grade was fixed, abutting owner erected valuable improvements, supervisors could not thereafter raise official grade without first making compensation for damage caused thereby; *Southern Pac. R. R. Co. v. Hart*, 3 Cal. App. 13, 84 Pac. 219, in action by railroad company to condemn triangular piece of land, defendant was entitled to damages not only to land not taken, but also by reason of construction of improvement in manner proposed; *McLean v. Llewellyn Iron Works*, 2 Cal. App. 348, 83 Pac. 1084, 1085, upholding right of abutting owner on street to maintain action to abate and enjoin obstructions and other nuisances maintained by another on opposite side of street; *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 443, 444, 82 Pac. 641, railroad company having license from city to use street for railroad purposes must compensate abutting owner who was deprived of free access to his property by such use; *Hyde v. Minnesota etc. Ry. Co.*, 24 S. D. 386, 123 N. W. 852, private owner of private property cannot enjoin railroad from operating road on its own property, but his remedy is by action at law for damages; *Dickerman v. Duluth*, 88 Minn. 293, 92 N. W. 1120, all damage to property resulting from lowering or raising grade of street in front of it must be first paid or secured.

Liability of Municipality for Changing Grade in streets. See notes, 125 Am. St. Rep. 865; 98 Am. St. Rep. 549.

Damage to Abutting Owner by First Grading and improvement of street. See note, 7 L. R. A. (n. s.) 110.

Owner of Lot Abutting on Street has Easement over street which is a right of property.

Approved in *Danielson v. Sykes*, 157 Cal. 689, 109 Pac. 88, one who purchased property with reference to map showing streets and ways had easement on alleyway opposite his lot leading to railroad right of way.

Creation and Conveyance of Easements Appurtenant. See note, 136 Am. St. Rep. 699.

In Action for Damages, Plaintiff must Show some injury for which he can recover damages.

Approved in *Brown v. Rea*, 150 Cal. 175, 88 Pac. 715, allegations of complaint, whether seeking damages for construction of railroad or injunction to prevent obstruction of plaintiff's easement in street, were too indefinite and general to furnish basis for relief; *Reynolds*

v. Presidio etc. R. R. Co., 1 Cal. App. 235, 81 Pac. 1120, in action for damages caused by nuisance, averment that nuisance has damaged "rental value" of plaintiff's property is not sufficient to show damage to plaintiff.

Where Nuisance Complained of is a Continuing One, deterioration in value of the land is proper measure of damages.

Approved in **Pochila v. Calvert etc. Ry. Co.**, 31 Tex. Civ. App. 400, 72 S. W. 256, measure of damages for injury caused by construction of railroad is difference in value of property before and after construction, without offset for general benefits therefrom.

Distinguished in **Coats v. Atchison etc. Ry. Co.**, 1 Cal. App. 444, 445, 82 Pac. 641, 642, in action by abutting owner for damages resulting from use of street for railroad purposes, measure of damages is amount which will compensate owner for all damage sustained.

Personal Annoyance or Discomfort does not constitute a damage for which compensation will be made.

Approved in **Latter-day Saints Church v. Oregon Short Line R. R. Co.**, 36 Utah, 246, 103 Pac. 246, applying rule in action for damage to church property caused by operation of a railroad which interfered with religious services; **Lambert v. Norfolk**, 108 Va. 266, 128 Am. St. Rep. 945, 61 S. E. 778, 17 L. R. A. (n. s.) 1061, injury resulting from establishment of cemetery near farm land is not recognized by law as a wrong to be compensated in damages.

Distinguished in **Tidewater R. Co. v. Shartzer**, 107 Va. 571, 59 S. E. 410, 17 L. R. A. (n. s.) 1053, depreciation in market value caused by smoke, noise, dust, and cinders arising from operation of a railroad is a proper subject of compensation.

What Constitutes "Damage" to Property within provision that property shall not be taken or damaged for public use without compensation. See note, 109 Am. St. Rep. 906, 911.

Whether Constitutional Prohibition Against Damaging Property for public use applies to work done after provision takes effect under ordinances previously passed. See note, 3 L. R. A. (n. s.) 404.

103 Cal. 624-630, 37 Pac. 638, **JEFFERSON v. HEWITT**.

Rule That Notice to Agent is Constructive Notice to principal applies to corporations.

Reaffirmed in **Bank of Escondido v. Thomas** (Cal.), 41 Pac. 463.

As Between Original Parties to Note, failure of consideration may be shown by parol.

Approved in **Muir v. Hamilton**, 152 Cal. 636, 93 Pac. 858, applying rule to note given by client to secure his contingent liability to pay his attorney in case latter was successful in a suit.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 471, 476.

Fraudulent and Overissued Corporate Stock. See note, 87 Am. St. Rep. 850, 851.

103 Cal. 631-634, 37 Pac. 529, **PEOPLE v. WELLS**.

To Convict of Perjury, there must be positive testimony to contrary state of facts from that sworn to at previous trial.

Approved in **People v. Chadwick**, 4 Cal. App. 70, 87 Pac. 387, testimony given was "direct" evidence of falsity of defendant's testimony in prosecution for perjury.

103 Cal. 634-640, 37 Pac. 530, TEMPLE STREET CABLE BY. CO. v. HELLMAN.

Whether Act of Corporation is Ultra Vires depends, in the first instance, on its charter.

Approved in *Derr v. Fisher*, 22 Okl. 137, 140, 98 Pac. 982, 983, under its charter, light and power company could enter into valid contract with paving company to provide for paving along line of street railway company.

Right of Surety or Principal to Interpose independent cause of action in favor of latter as defense or counterclaim. See note, 18 L. R. A. (n. s.) 603.

103 Cal. 641-646, 37 Pac. 648, MERCED SAVINGS BANK v. CASACCIA.

Holder of Principal Obligation may maintain separate action upon collateral mortgage.

Approved in *Kreling v. McMullen*, 158 Cal. 434, 111 Pac. 253, where chattel mortgage was but collateral security for performance of conditions of lease, it could be foreclosed without action on principal obligation.

Mortgagee cannot Recover Personal Judgment until he has exhausted his security.

Approved in *State Sav. Bank v. Albertson*, 39 Mont. 422, 102 Pac. 694, in action on note, statement in answer that security had been given for the note was not sufficiently definite to bar action; *Howe v. Sears*, 30 Utah, 348, 84 Pac. 1108, right of action on deficiency judgment entered after foreclosure sale accrued at date deficiency was ascertained.

103 Cal. 646-647, 37 Pac. 640, ADAMS v. BURBANK.

Where Owner Prevents Completion of Contract, contractor is entitled to maintain action for reasonable value.

Approved in *Boyd v. Bargagliotti*, 12 Cal. App. 237, 107 Pac. 154, upholding course of plaintiff in pleading indebtedness under contract in the nature of a common count or indebitatus assumpsit; *Geo. Newhall etc. Co. v. Daly*, 116 Wis. 263, 93 N. W. 14, contractor was entitled to treat act of owner as rescission of contract and recover reasonable value of work prior to rescission.

Right of Contractor to Sue on Quantum Meruit upon breach of construction contract by other party. See note, 13 L. R. A. (n. s.) 449.

Owner is not Personally Liable for debts of contractor to persons furnishing material to him.

Approved in *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 521, 97 Pac. 418, reaffirming rule; *Wood, Curtis & Co. v. El Dorado Lumber Co.*, 153 Cal. 233, 126 Am. St. Rep. 80, 94 Pac. 878, 16 L. R. A. (n. s.) 585, one who hired horses to contractor engaged in building railroad was not entitled to lien on railroad for amount due from contractor.

Liens for Materials Paid by Owner should be offset with costs and expenses, in suit by contractor against owner.

Approved in *Wyman v. Hooker*, 2 Cal. App. 40, 83 Pac. 81, in action by building contractor, amount due from contractor and paid by owner to materialmen was properly allowed with attorneys' fees and expenses, as counterclaim against amount due contractor.

In Action on Quantum Meruit, building contract is evidence of value of materials furnished and services rendered.

Approved in *Naylor v. Adams*, 15 Cal. App. 556, 115 Pac. 339, *Lacy Mfg Co. v. Los Angeles Gas etc. Co.*, 12 Cal. App. 42, 106 Pac. 415, and *City of St. Charles v. Stookey*, 154 Fed. 777, 85 C. C. A. 494, all reaffirming rule; *Inman v. L. E. White Lumber Co.*, 14 Cal. App. 555, 112 Pac. 561, in absence of all other evidence, contract was controlling as to reasonable value of materials furnished.

103 Cal. 652-661, 37 Pac. 643, SKELLY v. WESTMINSTER SCHOOL DIST. ORANGE CO.

Public Corporations cannot be Garnished unless the process is plainly authorized by statute.

Approved in *People v. San Joaquin Valley Agricultural Assn.*, 151 Cal. 806, 91 Pac. 744, property of agricultural association could not be taken in execution and sold to enforce payment of judgment; *Board of Education v. Blake (Cal.)*, 38 Pac. 537, board of education is not subject to garnishment; *Moscow Hardware Co. v. Colson*, 158 Fed. 200, 201, "The Regents of the University of Idaho" is not subject to garnishment process; *Duval County v. Charleston Lumber etc. Co.*, 45 Fla. 261, 33 So. 532, 60 L. R. A. 549, writ of garnishment against county was unauthorized.

Distinguished in *Goldtree v. San Diego*, 8 Cal. App. 511, 97 Pac. 218, upholding lien for labor on public improvement.

Grants of Franchises and Privileges by state to private persons are to be construed most strongly in favor of public.

Approved in *Clark v. Los Angeles*, 160 Cal. 39, 116 Pac. 725, by granting franchise to maintain lighting plant, city was not prevented from establishing its own works for same purpose.

103 Cal. 661-667, 37 Pac. 650, MARQUIS v. SANTA ANA.

Right of Officer to Salary Fixed by Law is not impaired by change in duties of office.

Reaffirmed in *Bennett v. Orange*, 69 N. J. L. 178, 54 Atl. 250.

Distinguished in *Orahoad v. Denver*, 41 Colo. 176, 91 Pac. 1116, termination of officer's term necessarily implied cessation of salary.

Power of Corporation to Fix a Limit to salaries of its officers rests entirely upon statute.

Approved in *State v. Dodson*, 123 La. 913, 49 So. 639, applying rule to ordinance of city abolishing salary of one who had been commissioner and had qualified as marshal.

103 Cal. 668-669, 37 Pac. 758, MARTIN v. YOLO COUNTY.

Board of Supervisors cannot Levy Tax for school building unless district has acquired a lot.

Approved in *Bancroft v. Randall*, 4 Cal. App. 312, 87 Pac. 808, in suit to restrain supervisors from levying tax for construction of school building, allegation that trustees did not own any lot was not equivalent to stating they had made no provision for a lot.

103 Cal. 675-678, 37 Pac. 754, PEOPLE v. BRYON.

Information Charging Crime of Compounding a felony must allege actual commission of crime compounded.

Approved in *State v. Hodge*, 142 N. C. 669, 55 S. E. 628, 7 L. R. A. (n. s.) 709, reaffirming rule.

103 Cal. 678-680, 37 Pac. 649, JONES v. SANDERS.

Judge of Court for Time Being has full power to hear and determine motion for new trial.

Approved in Texas etc. Ry. Co. v. Voliva, 41 Tex. Civ. App. 19, 91 S. W. 355, where special judge who tried case was called away after verdict, a special judge subsequently selected had authority to hear and grant motion for new trial.

Where Evidence Involves Substantial Conflict, action of court below will not be disturbed.

Reaffirmed in Scrivani v. Dondero (Cal.), 44 Pac. 1066.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 104 CALIFORNIA.

104 Cal. 10-15, 37 Pac. 626, **DUNCAN v. HAWN.**

Assignment of Debt Secured by Lien carries right to enforce lien when lien is perfected before assignment.

Approved in California etc. **Cement Co. v. Wentworth Hotel Co.**, 16 Cal. App. 711, 118 Pac. 111, following rule; **Ramboz v. Stansbury**, 13 Cal. App. 652, 110 Pac. 474, holding indorsement and transfer of note by corporation carried with it collateral pledged as security; **Goldtree v. San Diego**, 8 Cal. App. 512, 97 Pac. 218, holding assignable equitable liens of laborers on funds in city treasury for payment of sewer contract; **Kent v. Muscatine etc. Ry. Co.**, 115 Iowa, 386, 88 N. W. 936, holding assignable lien of laborer on taxes voted for railway; **Norman v. Edington**, 115 Tenn. 315, 89 S. W. 745, holding laborer's lien could not be enforced by assignee of claim when required notice by laborer had not been given.

104 Cal. 15-20, 43 Am. St. Rep. 66, 37 Pac. 757, **PERRY v. ROSS.**

Money Borrowed by Husband for purchase of land is community property in hands of husband.

Approved in **Estate of Fay**, 3 Cof. Prob. 272, following rule; **Estate of Hale**, 2 Cof. Prob. 202, holding money borrowed by husband and not secured by his separate property was community.

After-acquired Title Feeds Homestead, and deed by husband alone purporting to convey such after-acquired title is of no effect.

Reaffirmed in **Towne v. Towne**, 6 Cal. App. 704, 92 Pac. 1053.

Lien for Purchase Money of Homestead. See note, 86 Am. St. Rep. 178.

Abandonment of Homestead. See note, 102 Am. St. Rep. 389.

104 Cal. 20-29, 37 Pac. 859, **LOS ANGELES ETC. RY. CO. v. RUMPP.**

Right to Set Off Benefits Against Damages on condemnation. See note, 9 L. R. A. (n. s.) 829.

104 Cal. 30-34, 37 Pac. 775, **PALMER v. LAVIGNE.**

Where Complaint Alleges Contract was with husband and wife jointly, and claim of lien attached avers contract was made with acquiescence of husband, variance is material and subject to demurrer.

Approved in *Bagnell Lumber Co. v. Missouri etc. R. R. Co.*, 180 Mo. 467, 79 S. W. 1144, holding where claim of lien was based on contract with railroad and tie contractors jointly, failure to prove joint contract was fatal.

Distinguished in *Star Mill etc. Co. v. Porter*, 4 Cal. App. 474, 88 Pac. 499, and *Lucas v. Rea*, 10 Cal. App. 646, 102 Pac. 824, both holding technical doctrine of variance did not apply to statement of contract in notice of lien.

Complaint is Demurrable for Ambiguity when its allegations are inconsistent with exhibit thereto attached.

Approved in *S. F. Sulphur Co. v. Aetna Indem. Co.*, 11 Cal. App. 698, 106 Pac. 112, holding variance between complaint and exhibit could not be raised by general demurrer.

104 Cal. 40-44, 37 Pac. 804, HUMPHREYS v. BLASINGAME.

Evidence Held Sufficient to Sustain Finding that use of way was adverse and not permissive.

Approved in *Gurnsey v. Antelope Creek etc. Water Co.*, 6 Cal. App. 390, 92 Pac. 327, upholding finding that use of water was adverse; *Bashore v. Mooney*, 4 Cal. App. 280, 87 Pac. 555, upholding finding of adverse use of ditch.

104 Cal. 45-48, 43 Am. St. Rep. 70, 37 Pac. 770, HOWELL v. HOWELL.

Where Final Judgment has Been Rendered in divorce, and no alimony provided for, and time for appeal has expired, court has no power to grant alimony for wife and children.

Approved in *Calegaris v. Calegaris*, 4 Cal. App. 266, 87 Pac. 562, holding where divorce decree divided community property and gave wife custody of children, failure to provide for their care had legal effect that husband should not be required to make any further payment therefor to wife.

Distinguished in *Bruce v. Bruce*, 160 Cal. 30, 116 Pac. 67, holding temporary alimony could be allowed pending appeal from order fixing alimony; *Harlan v. Harlan*, 154 Cal. 344, 346, 347, 98 Pac. 34, 35, holding where wife had been awarded custody of children in divorce decree, court retained power under section 138, Code of Civil Procedure, to order husband to pay for support of children; *Soule v. Soule*, 4 Cal. App. 101, 107, 87 Pac. 206, 209, holding court had no power to annul decree allowing alimony so as to leave decree as if provision for support of wife had been omitted.

Power of Courts to Modify Decrees for Alimony. See note, 129 Am. St. Rep. 110.

Miscellaneous.—Cited in *Howell v. Howell* (Cal.), 37 Pac. 772, companion case.

104 Cal. 49-59, 37 Pac. 777, 38 Pac. 39, BEAN v. STONEMAN.

Amendment of Complaint at Trial to conform to proof is allowable when defendant is not thereby prejudiced.

Approved in *Green v. Gavin*, 11 Cal. App. 510, 105 Pac. 763, holding amendment to answer properly allowed at trial.

What Covenants Run With the Land. See note, 82 Am. St. Rep. 684.

104 Cal. 60-67, 37 Pac. 780, COUNTY OF SAN LUIS OBISPO v. FELTS.

Later Act, Though Taking Effect at Once, repeals earlier inconsistent act which is not to take effect until after passage of later act.

Approved in *Ex parte Sohncke*, 148 Cal. 263, 113 Am. St. Rep. 236, 82 Pac. 957, 2 L. R. A. (n. s.) 813, holding where later act was invalid it did not affect earlier act.

Expense of Collecting State Poll Tax should be met from percentage of tax itself rather than out of general fund of county.

Approved in *Alameda County v. Dalton*, 148 Cal. 248, 82 Pac. 1050, holding poll tax required to be levied by section 12, article XIII, Constitution, is state tax.

Under Amendment of 1893 to Section 2652, Political Code, county assessor is entitled to receive percentage of poll tax theretofore allowed to road overseer for collection.

Distinguished in *Moore v. Nation*, 80 Kan. 679, 103 Pac. 110, 23 L. R. A. (n. s.) 1115, holding district judge not entitled to additional compensation when duties of jury commissioner were imposed on them during term.

104 Cal. 67-72, 37 Pac. 782, ROBERTS v. GEBHART.

State Acquires No Title to Lieu Lands under act of 1853 until it selects lands.

Approved in *Slade v. County of Butte*, 14 Cal. App. 458, 459, 112 Pac. 487, and *United States v. Laam*, 149 Fed. 584, both following rule; *Brigham City v. Rich*, 34 Utah, 140, 97 Pac. 224, construing enabling act with reference to grant of lands to state.

104 Cal. 73-80, 37 Pac. 796, HOUSE v. LOS ANGELES COUNTY.

Board of Supervisors have No Power to contract with individual for collection on percentage basis for collections for tax sales.

Approved in *State v. Goldthait*, 172 Ind. 224, 87 N. E. 138, holding county board had no power to make tax ferret contract.

Board of Supervisors has No Power to delegate to others performance of duties calling for exercise of discretion.

Approved in *State v. Dickinson County*, 77 Kan. 543, 95 Pac. 393, 16 L. R. A. (n. s.) 476, holding void contract of county commissioners with private person to aid in collection of taxes; *Floyd County v. Owego Bridge Co.*, 143 Ky. 697, 137 S. W. 239, holding fiscal court of county could not delegate to bridge commissioners power to select sites and make contracts for bridges; *Jewell Belting Co. v. Village of Bertha*, 91 Minn. 11, 97 N. W. 424; holding village board could not delegate to committee power to contract for fire apparatus; *McPherson v. San Joaquin County (Cal.)*, 56 Pac. 804, arguendo.

104 Cal. 81-85, 37 Pac. 785, ESTATE OF CARRIGER.

Will Made by Man in Prime of Life, in full possession of mental powers, according to forms of law, without presence of relative, cannot be set aside on ground of undue influence.

Approved in *Estate of Dolbeer*, 3 Caf. Prob. 244, 246, 247, 248, holding will not executed under undue influence.

Undue Influence. See notes, 2 Caf. Prob. 96; 1 Caf. Prob. 252.

Order Granting New Trial will not be Disturbed when evidence is conflicting.

Reaffirmed in *Scrivani v. Dondero (Cal.)*, 44 Pac. 1066.

104 Cal. 86-94, 43 Am. St. Rep. 73, 37 Pac. 799, PEOPLE v. KILVINGTON.

Whether Officer Who Shoots at Fleeing Person in attempt to arrest him, with intention to intimidate, but kills him, is guilty of criminal negligence is question for jury.

Approved in *Petrie v. Cartwright*, 114 Ky. 108, 102 Am. St. Rep. 274, 70 S. W. 299, 59 L. R. A. 720, holding officer not justified in shooting man fleeing to escape arrest for offense less than felony, when officer was acting without warrant.

Homicide by Official Action or by officers of justice. See note, 67 L. R. A. 308, 309, 310.

104 Cal. 94-103, 37 Pac. 894, HOPPE v. HOPPE.

Decree Setting Apart Homestead for Family vests title in beneficiaries.

Reaffirmed in *Estate of Hayes*, 1 Cof. Prob. 554.

Rights Conferred by Probate Homestead cannot be affected by acts of one or more of beneficiaries to detriment of others.

Reaffirmed in *Sanguinetti v. Rossen*, 12 Cal. App. 633, 107 Pac. 564.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 67, 72, 77.

Right of Widow to Convey, Lease, or Encumber homestead during minority of children. See note, 10 L. R. A. (n. s.) 788, 789.

Partition of Homestead. See note, 4 L. R. A. (n. s.) 792.

104 Cal. 106-126, 37 Pac. 876, DAW v. NILES.

Oral Evidence is Inadmissible, in action to foreclose mortgage, to contradict written stipulation for interest on debt secured.

Approved in *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 768, 118 Pac. 95, holding maker of note could not depend on ground it was not intended to be paid where consideration was unquestioned.

Miscellaneous.—Cited in *Bahwell v. Smith* (Cal.), 42 Pac. 822, companion case.

104 Cal. 126-127, 43 Am. St. Rep. 79, 37 Pac. 803, RANDALL v. DUFF.

Miscellaneous.—Cited in *Randall v. Duff*, 107 Cal. 33, 40 Pac. 20, on another appeal.

104 Cal. 128-130, 37 Pac. 869, WALSER v. AUSTIN.

Act of March 31, 1891, Authorizing Appointment of assistant district attorney in counties of eighth class, is special law and void.

Distinguished in *Newman v. Lester*, 11 Cal. App. 580, 105 Pac. 787, upholding law providing for appointment of deputy assessor.

104 Cal. 133-139, 37 Pac. 887, CONROY v. DUNLAP.

Setoff in Bankruptcy. See note, 55 L. R. A. 70.

104 Cal. 140-149, 37 Pac. 883, FAULKNER v. RONDONI.

Finding is not Necessary on Fact admitted by pleadings.

Reaffirmed in *Lambert v. Lambert*, 1 Cal. App. 115, 81 Pac. 715.

Erroneous Finding, if Material, is ground for reversal.

Approved in *De Gottardi v. Donati*, 155 Cal. 111, 99 Pac. 493, holding immaterial erroneous finding was not ground for reversal.

Title to Water Rights may be Acquired by adverse user.

Approved in *State v. Quantic*, 37 Mont. 53, 94 Pac. 499, following rule; *Wutchumna Water Co. v. Ragle*, 148 Cal. 765, 84 Pac. 165, upholding prescriptive right to water rights.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 726.

Use of Water by Riparian Owner is not Adverse to prior appropriator who has at all times received all water he was entitled to.

Approved in *Talbott v. Butte City Water Co.*, 29 Mont. 26, 73 Pac. 1113, following rule; *Jobling v. Tuttle*, 75 Kan. 362, 89 Pac. 703, holding use of water from spring, which did not deprive owner of use, was mere license.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

Witness cannot be Impeached by Showing contradictory statements made by him as to matters merely collateral to issue.

Approved in *Estate of Gird*, 157 Cal. 548, 137 Am. St. Rep. 131, 108 Pac. 505, following rule.

104 Cal. 150-156, 37 Pac. 794, **JENNINGS v. JENNINGS.**

Delivery of Deed to Third Person, or record, or delivery for record, by grantor. See note, 54 L. R. A. 904.

104 Cal. 156-160, 37 Pac. 868, **LANGE v. BRAYNARD.**

Person Made Party to Action by Order of court is not bound by deposition taken before such order.

Distinguished in *Munger v. Yeiser*, 80 Neb. 289, 114 N. W. 167, holding where in action to restrain trespass on real property same is sold during action and vendee substituted as plaintiff, evidence taken before transfer should be considered as if there had been no substitution; *Morris v. Linton*, 74 Neb. 413, 104 N. W. 928, holding alienee pendente lite bound by depositions taken before alienation.

104 Cal. 168-171, 43 Am. St. Rep. 81, 37 Pac. 900, **THOMPSON v. GORNER.**

Executed Written Contract can Only be Altered by contract in writing or by executed oral agreement.

Approved in *Pearsall v. Henry*, 153 Cal. 325, 95 Pac. 157, upholding fully performed oral agreement substituted for written agreement.

Agreements for Higher or Exorbitant Rate of interest after default. See note, 91 Am. St. Rep. 586, 589.

Usury in Agreement for Interest After Maturity. See note, 49 L. R. A. 554.

104 Cal. 171-179, 43 Am. St. Rep. 83, 37 Pac. 865, **McLAUGHLIN v. McLAUGHLIN.**

Mode of Change of Beneficiary Prescribed in Laws of mutual benefit society is part of contract with member.

Approved in *Farra v. Braman*, 171 Ind. 541, 542, 86 N. E. 848, following rule; *Freund v. Freund*, 218 Ill. 203, 109 Am. St. Rep. 283, 75 N. E. 929, holding change of beneficiary of life insurance policy not accomplished when not indorsed on policy; *Knights of Maccabees v. Sackett*, 34 Mont. 364, 115 Am. St. Rep. 532, 86 Pac. 424, holding waiver of by-laws of beneficial association regarding change of beneficiary must occur during life of insured; *St. Louis Police Relief Assn. v. Tierney*, 116 Mo. App. 470, 91 S. W. 975, holding beneficiary sufficiently designated under rules of mutual benefit association.

Assignment of Life Insurance Policies. See note, 87 Am. St. Rep. 516.

104 Cal. 179-183, 37 Pac. 923, OWEN v. MEADE.

Where Complaint Alleges Unconditional Agreement, and proof shows agreement on contingency, variance is fatal.

Approved in *Bailey v. Brown*, 4 Cal. App. 517, 88 Pac. 519, upholding nonsuit granted where complaint alleged promise to marry at any time, and proof showed promise to marry plaintiff after death of her mother.

Distinguished in *Brown v. Crown Gold Milling Co.*, 150 Cal. 382, 89 Pac. 89, holding where complaint was on quantum meruit, proof of contingent contract and of its breach without cause showed no variance justifying nonsuit.

In Action by Assignee, Parol Evidence is admissible to show assignment was to plaintiff though assignee was not bound.

Approved in *Greve v. Echo Oil Co.*, 8 Cal. App. 280, 96 Pac. 906, holding in action by assignee, parol evidence admissible to show transposition of initials of assignee in assignments.

104 Cal. 184-185, 37 Pac. 893, MERRITT v. HILL.

Complaint Alleging Trespass on Pasture Lands of plaintiff, which does not allege lands were inclosed nor that defendants instigated or knew of trespass, states no cause of action.

Approved in *Minter v. Gose*, 13 Wyo. 183, 78 Pac. 949, upholding complaint alleging plaintiff had legal estate in land, and defendants wrongfully caused sheep to be driven on it and depastured it; *Hardman v. King*, 14 Wyo. 509, 85 Pac. 384, holding actionable trespass was not committed on uninclosed lands by reason of cattle straying thereon from adjoining lands.

104 Cal. 186-198, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654, MONTGOMERY v. SANTA ANA ETC. RY. CO.

Where Railroad in Street Interferes With Access of abutting owner to his property, he may recover damages therefor.

Approved in *Coats v. Atchison etc. Ry. Co.*, 1 Cal. App. 443, 82 Pac. 641, following rule.

Use of Public Street for General Railway purposes imposes no new servitude on abutting owner.

Approved in *Mordhurst v. Ft. Wayne etc. Traction Co.*, 163 Ind. 277, 106 Am. St. Rep. 222, 71 N. E. 645, 66 L. R. A. 105, *Kipp v. Davis-Daly Copper Co.*, 41 Mont. 517, 110 Pac. 240, and *Wagner v. Bristol Belt Line Co.*, 108 Va. 601, 62 S. E. 393, all following rule; *Kinsey v. Union Traction Co.*, 169 Ind. 616, 629, 81 N. E. 941, 946, holding use of street for interurban cars imposed no new burden; *Rische v. Texas Transp. Co.*, 27 Tex. Civ. App. 37, 66 S. W. 327, holding operation of street railway as freight road imposed additional servitude.

What are Additional Servitudes in Highways. See note, 106 Am. St. Rep. 235, 239, 248, 255.

Property or Invasion of Possession for which ejectment is maintainable. See note, 116 Am. St. Rep. 585.

Municipal Authorities are in Possession of Streets and hold them for use of public.

Approved in *Colegrove Water Co. v. Hollywood*, 151 Cal. 431, 90 Pac. 1056, 13 L. R. A. (n. s.) 904, holding city could lay water-pipe across street for city use though abutting owners owned fee in street; *Gurnsey v. Northern California etc. Co.*, 7 Cal. App. 542, 94 Pac. 862, holding board of supervisors had power to grant franchise to construct lighting system along suburban highway; *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 679, 87 Pac. 31, holding statutes allowed appropriation of highway longitudinally for railway purposes.

104 Cal. 198-204, 37 Pac. 870, **KINGS COUNTY v. JOHNSON.**

Mandamus as Proper Remedy Against Public Officers. See note, 98 Am. St. Rep. 871.

104 Cal. 208-216, 37 Pac. 890, **WALKERLY v. GREENE.**

Miscellaneous.—Cited in *In re Walkerly's Estate* (Cal.), 37 Pac. 893, on another appeal.

104 Cal. 217-221, 37 Pac. 896, **CRADDOCK v. O'BRIEN.**

Contracts Between Attorneys and Clients. See note, 83 Am. St. Rep. 185.

104 Cal. 221-224, 37 Pac. 889, **DAUGHERTY v. DAUGHERTY.**

Question of Fraudulent Intent in Conveyance is one of fact.

Reaffirmed in *Stevens v. Meyers*, 14 N. D. 403, 104 N. W. 531.

104 Cal. 224-226, 37 Pac. 902, **MCOREA v. JOHNSON.**

Assignee of Claim of Mechanic has No Right to file notice of lien.

Approved in *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 711, 118 Pac. 111, *Fleming v. Greener*, 173 Ind. 266, 87 N. E. 721, and *Fleming v. Greener*, 41 Ind. App. 80, 83 N. E. 355, all following rule.

104 Cal. 227-229, 37 Pac. 903, **MCCORMICK v. BALDWIN.**

Effect of Failure to do Annual Work on mining claim is to render it subject to relocation.

Approved in *Worthen v. Sidway*, 72 Ark. 226, 79 S. W. 781, and *Madison v. Octave Oil Co.*, 154 Cal. 773, 99 Pac. 178, both holding original locator's right not terminated when no other location was made after his failure to do assessment work.

Abandonment and Forfeiture of Mining Claims. See note, 87 Am. St. Rep. 415.

Relocation of Mining Claim as Abandoned or Forfeited. See note, 68 L. R. A. 840.

104 Cal. 230-231, 37 Pac. 902, **BOUCHE v. LOUTTIT.**

Guarantor for Payment to Mortgagee of deficiency of debt secured by mortgage is released from liability by failure of mortgagee to foreclose mortgage.

Approved in *Smith v. Show*, 16 N. D. 311, 112 N. W. 1063, holding guarantor of water, secured by mortgage, to pay after security was exhausted could not be held until security was exhausted. A

104 Cal. 232-237, 37 Pac. 918, **PEOPLE v. MARKHAM.**

Where New Office is Created, Legislature has power to provide for filling it until beginning of constitutional term.

Approved in *Bush v. Nye*, 6 Cal. App. 302, 92 Pac. 110, holding when legislature provided for additional judge, governor could appoint judge to act provisionally until election of judge.

104 Cal. 239-243, 37 Pac. 904, BLYTH v. ROBINSON.

Forbearance to Foreclose Lien Which Party is under legal obligation not to foreclose is no consideration for note given for amount of lien.

Approved in *Alaska Packers' Assn. v. Domenico*, 117 Fed. 105, 54 C. C. A. 485, holding agreement to perform work which party was already legally bound to perform was no consideration for new contract to do same work.

Surety on Building Contractor's Bond who has guaranteed delivery of building free of liens cannot enforce lien against building.

Distinguished in *Burnett v. Glas*, 154 Cal. 257, 97 Pac. 426, holding partnership not barred from asserting lien because one member in individual capacity was surety on contractor's bond to deliver building free of liens.

Miscellaneous.—Cited in *Blyth v. Torre* (Cal.), 38 Pac. 640, to point that when surety on contractor's bond seeks to foreclose lien on building, owner may set up bond in defense, prove plaintiff's liability and his damage, and demand offset.

104 Cal. 248-254, 37 Pac. 922, BURRIS v. PEOPLE'S DITCH CO.

Any Allegation of Answer Which, if Found True, necessarily shows allegation of complaint as to same matter is untrue is good traverse, and sufficient as denial.

Approved in *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 502, 115 Pac. 324, following rule.

104 Cal. 254-257, 37 Pac. 930, O'BOURKE v. VENNEKOHL.

New Trial Will not be Granted on Ground of newly discovered evidence, where party has not shown due diligence in discovering and producing it.

Approved in *Rockwell v. Italian-Swiss Colony*, 10 Cal. App. 636, 103 Pac. 164, and *State v. Fleming*, 17 Idaho, 505, 106 Pac. 318, both following rule; *O'Connor v. Clarke* (Cal.), 44 Pac. 483, holding trial court had discretion to refuse new trial on ground of newly discovered evidence.

Necessity of Qualifying by Reference to conscious falsity instruction under statute enacting maxim, "Falsus in uno, falsus in omnibus," without that qualification. See note, 29 L. R. A. (n. s.) 681.

104 Cal. 258-260, 37 Pac. 900, BANKS v. YOLO COUNTY.

Laws of Special or Local Application are never deemed repealed by general legislation except upon most unequivocal manifestation of intent to that effect.

Approved in *Estate of Brewer*, 156 Cal. 93, 103 Pac. 488, holding section 1715, Code of Civil Procedure, not repealed by section 941a, 941b and 941c.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 277, 282.

104 Cal. 262-264, 37 Pac. 931, MELEY v. BOULON.

Notice of Appeal from Order Denying new trial, and from order denying motion to set aside judgment, does not include appeal from judgment.

Approved in *State v. Preston*, 30 Nev. 306, 95 Pac. 920, holding fatally defective notice that two persons convicted of manslaughter and murder respectively intend to appeal from "judgment of district court herein."

Distinguished in *Idaho Comstock etc. Co. v. Lundstrom*, 9 Idaho, 266, 74 Pac. 977, holding sufficient notice of appeal, in name of original parties, from judgment and order denying new trial where it is shown other parties were brought in by cross-complaint.

104 Cal. 264-268, 37 Pac. 927, LA POINT v. BOULWARE.

Filing of Sufficient Petition is Essential to commencement of insolvency proceeding.

Distinguished in *Newlove v. Mercantile Trust Co.*, 156 Cal. 665, 105 Pac. 975, holding failure of insolvent to include certain real property in inventory did not affect jurisdiction of court.

104 Cal. 269-272, 37 Pac. 925, VAN LOO v. VAN AKEN.

Where Mortgage is Given to Secure Note according to its terms, which contains no provision for collection of note, or for foreclosure of mortgage before maturity, mortgagor has no right to foreclose until maturity of note.

Distinguished in *California Safe Deposit Co. v. Sierra Valleys Ry. Co.*, 158 Cal. 696, 112 Pac. 277, holding holder of overdue bond could foreclose mortgage securing payment of bonds.

Proceedings to Enforce Mortgage for Part of mortgage debt. See note, 37 L. R. A. 740.

104 Cal. 272-278, 37 Pac. 1044, EX PARTE ROACH.

Section 11, Article XII, Constitution, makes direct constitutional grant of police power of state to every municipal corporation for local purposes.

Approved in *In re Pfahler*, 150 Cal. 80, 88 Pac. 274, 11 L. R. A. (n. s.) 1092, upholding provision for initiative in freeholders' charter; *Home Telephone etc. Co. v. Los Angeles*, 155 Fed. 566, upholding right under freeholders' charter to control telephone rates as exercise of police power.

Miscellaneous.—Cited in *Ex parte Scherrer* (Cal.), 37 Pac. 1046, companion case.

104 Cal. 279-282, 37 Pac. 939, BLACK v. SHARKEY.

Delivery of Deed is Question of Fact depending more upon intention than upon mode of fulfilling it.

Approved in *Follmer v. Rohrer*, 158 Cal. 758, 112 Pac. 546, holding deed delivered; *Daneri v. Gazzola*, 2 Cal. App. 357, 83 Pac. 457, holding deed not delivered; *Hayden v. Collins*, 1 Cal. App. 263, 81 Pac. 1122, holding revocable delivery in escrow did not pass title.

Possession of Deed by Grantee is prima facie evidence of delivery, but it may be shown by parol deed was never delivered.

Approved in *Drinkwater v. Hollar*, 6 Cal. App. 122, 91 Pac. 666, holding delivery to have been without grantor's consent and void; *Towne v. Towne*, 6 Cal. App. 701, 92 Pac. 1052, holding presumption of delivery arising from possession not rebutted; *Koester v. Port Huron Co.*, 24 S. D. 559, 124 N. W. 745, upholding finding that order for thresher and purchase notes and mortgage placed in hands

of seller's agent were not delivered with intent to take immediate effect.

Distinguished in *Dennison v. Barney*, 49 Colo. 454, 113 Pac. 523, holding where complaint alleged delivery of deed, question of delivery was not in issue; *Whitney v. Dewey*, 10 Idaho, 653, 654, 80 Pac. 1121, 1122, 69 L. R. A. 572, holding parol evidence inadmissible to show deed absolute delivered to grantee should take effect only on condition.

104 Cal. 282-286, 37 Pac. 917, **BEQUETTE v. PATTERSON.**

Finding That Road is Public Highway is not conclusion of law.

Approved in *People v. McCue*, 150 Cal. 197, 88 Pac. 900, following rule; *Leverone v. Weakley*, 155 Cal. 397, 101 Pac. 305, holding allegation that certain land was public highway was allegation of fact; *Corea v. Higuera*, 153 Cal. 455, 95 Pac. 884, 17 L. R. A. (n. s.) 1018, holding averment street was highway was statement of fact.

Municipal Power Over Nuisances Affecting highways and waters. See note, 39 L. R. A. 665.

104 Cal. 286-288, 37 Pac. 934, **SANTA CRUZ ROCK PAV. CO. v. BOWIE.**

Advice of Attorney Contrary to Rulings of court is not surprise for which new trial may be granted.

Approved in *Porter v. Anderson*, 14 Cal. App. 726, 113 Pac. 350, following rule; *Le Tourneux v. Gilliss*, 1 Cal. App. 555, 82 Pac. 630, holding application for relief from mistake in law must be made before judgment.

104 Cal. 288-293, 43 Am. St. Rep. 100, 38 Pac. 81, **ROGERS v. CADY.**

Courts Take Judicial Notice of Government surveys of lands.

Approved in *Stanton v. Hotchkiss*, 157 Cal. 654, 108 Pac. 865, following rule; *Merritt v. Trinity County*, 3 Cal. App. 170, 84 Pac. 675, holding court bound to take judicial notice of situs of land within county in action to recover taxes.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 440, 445.

Facts of Which Courts will Take Judicial Notice. See note, 124 Am. St. Rep. 34.

104 Cal. 293-297, 37 Pac. 935, **WAGNER v. WAGNER.**

Question of Good Faith of Husband in making offer to provide home for wife is to be determined by court.

Reaffirmed in *Bordeaux v. Bordeaux*, 43 Mont. 116, 115 Pac. 31.

Decree Against Plaintiff in Divorce Suit as bar to subsequent action. See note, 26 L. R. A. (n. s.) 579.

104 Cal. 298-302, 37 Pac. 1049, **BARNETT v. BARNETT.**

In Construing Deed, Intention of Grantor is to be ascertained from entire instrument.

Approved in *Pavkovich v. Southern Pacific R. R. Co.*, 150 Cal. 45, 47, 87 Pac. 1098, 1099, holding deed to quarry prohibited taking stone for any but purposes specified therein; *Burnett v. Piercy*, 149 Cal. 190, 86 Pac. 607, holding conveyance to trustee gave life estate though words "life estate" were not used; *Peterson v. Ma-*

chado (Cal.), 43 Pac. 612, deed to right of way construed to convey only easement; King v. Samuel, 7 Cal. App. 61, 93 Pac. 392, holding ambiguity in deed must be construed against grantee who caused it to exist; Triplett v. Williams, 149 N. C. 397, 63 S. E. 80, 24 L. R. A. (n. s.) 514, holding all parts of deed should be considered and given effect.

Remainder After Life Estate Which is Granted to "heirs" is estate in property capable of being transferred in same manner as present interest.

Approved in County of Los Angeles v. Winans, 13 Cal. App. 262, 109 Pac. 652, holding action to quiet title brought against "heirs" entitled to remainder after life estate concluded their rights; Utter v. Sidman, 170 Mo. 292, 301, 70 S. W. 704, 707, holding deed to grantee and heirs conveyed life estate to grantee with remainder to heirs.

Effect of Other Language in Deed to cut down estate conveyed by granting clause. See note, 12 L. R. A. (n. s.) 957, 964.

Section 779, Civil Code, Abrogates Rule in Shelley's Case.

Approved in Wilson v. Linder, 18 Idaho, 445, 138 Am. St. Rep. 213, 110 Pac. 275, holding rule in Shelley's Case abolished by section 3076, Revised Codes.

Rule in Shelley's Case. See note, 29 L. R. A. (n. s.) 1105, 1160.

Habendum Clause will Prevail Over Granting Clause in deed when it purports to limit or enlarge estate granted.

Approved in Jacobs v. All Persons, 12 Cal. App. 168, 106 Pac. 898, holding habendum clause limited grant to life estate.

Repugnant Clauses in Deeds. See note, 111 Am. St. Rep. 775.

104 Cal. 302-306, 37 Pac. 1048, 38 Pac. 109, **CHAPMAN v. HUGHES.**

What Constitutes a Partnership. See note, 115 Am. St. Rep. 414.

104 Cal. 310-313, 37 Pac. 1037, **BLOOM v. HAZZARD.**

Contracts, Consideration for Which has Partly Failed, or is partly illegal. See note, 117 Am. St. Rep. 522.

104 Cal. 318-321, 37 Pac. 942, **JACOBS v. ELLIOTT.**

Trial Jurors are Entitled to Per Diem only when in attendance upon court.

Reaffirmed in Emmer v. Bostock, 130 Mich. 342, 89 N. W. 964.

104 Cal. 321-325, 37 Pac. 1035, **COULTERVILLE ETC. TURNPIKE CO. v. STATE.**

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 55.

104 Cal. 326-334, 43 Am. St. Rep. 105, 37 Pac. 1042, **VISALIA GAS ETC. CO. v. SIMS.**

Lease of Light and Gas Plant having franchise from city to third party for period of years is void.

Approved in South Pasadena v. Pasadena Land etc. Co., 152 Cal. 583, 93 Pac. 492, holding quasi public corporation could not without legislative consent transfer its entire property to another.

Corporation is Liable for Money received by it under contract void for want of authority.

Reaffirmed in Laidlaw v. Pacific Bank (Cal.), 67 Pac. 899.

Where Contract With Corporation is Ultra Vires and also against public policy, neither party is entitled to relief.

Approved in *State v. Corning State Sav. Bank*, 136 Iowa, 88, 113 N. W. 504, holding where savings bank, prohibited by law from borrowing money, borrowed money, lender could not recover with other creditors when bank became insolvent; *Montgomery v. Whitbeck*, 12 N. D. 392, 96 N. W. 329, holding void insurance policy issued by mutual insurance company in total disregard of law governing such companies.

Right to Transfer or Mortgage Privilege to use streets for telegraph, telephone, or other quasi-public purposes. See note, 47 L. R. A. 88.

104 Cal. 334-340, 37 Pac. 1038, RECLAMATION DIST. NO. 542 v. TURNER.

Validity of Organization of Irrigation District cannot be collaterally attacked.

Approved in *Keech v. Joplin*, 157 Cal. 14, 106 Pac. 228, *Metcalf v. Merritt*, 14 Cal. App. 247, 111 Pac. 506, and *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 409, 105 Pac. 281, all following rule; *Reclamation District v. McPhee*, 13 Cal. App. 388, 109 Pac. 1109, holding validity of assessment did not rest on de jure character of reclamation district.

Trustee of Reclamation District is Disqualified from acting with respect to acquisition by district of levee owned by himself.

Approved in *Reclamation Dist. v. Birks*, 159 Cal. 237, 113 Pac. 171, holding invalidity of assessment on reclamation district could be shown by evidence that majority of trustees were financially interested in purchase for which assessment was made.

Procedure for Establishment of Drains and Sewers. See note, 60 L. R. A. 242.

104 Cal. 340-344, 37 Pac. 1050, PORPHYRY PAVING CO v. ANCKER.

Publication of Resolution of Intention to Improve Street is prerequisite to power of council to order work done.

Approved in *Gay v. Engebretson*, 158 Cal. 27, 137 Am. St. Rep. 67, 109 Pac. 879, following rule.

"Thereupon," as Used in Law Providing for posting resolution of intention to improve street, does not require immediate posting.

Approved in *Hagerty v. Conlan*, 15 Cal. App. 648, 115 Pac. 765, holding "thereupon," as used in section 1118, Code of Civil Procedure, did not mean immediately, but imported reasonable time; *Dudley v. Superior Court*, 13 Cal. App. 276, 110 Pac. 148, holding "thereupon," as used in statute, imported reasonable time.

104 Cal. 344-346, 37 Pac. 941, BAXTER v. HART.

Partner Who Becomes Sole Owner of partnership claim may maintain action on such claim.

Approved in *Boyce v. Gordon*, 11 Cal. App. 772, 106 Pac. 265, following rule; *Ban v. Columbia Southern Ry. Co.*, 117 Fed. 28, 54 C. C. A. 407, upholding action by one partner brought to foreclose mechanic's lien filed in name of partnership when such partner was bound to account to other for only share of net profits, and none such were earned.

104 Cal. 347-354, 38 Pac. 45, BRUCH v. COLOMBERT.

Law is not General or Constitutional when it confers particular privileges or imposes peculiar disabilities in exercise of common right upon class of persons arbitrarily selected from general body.

Approved in *Wheeler v. Herbert*, 152 Cal. 233, 92 Pac. 357, holding act providing for change of boundary of Fresno and King's counties was general law; *Johnson v. Gunn*, 148 Cal. 749, 84 Pac. 666, holding act classifying townships in counties of twenty-seventh class was general law; *Ex parte Sohncke*, 148 Cal. 267, 113 Am. St. Rep. 236, 82 Pac. 959, 2 L. R. A. (n. s.) 813, holding act of March 20, 1905, fixing rates of interest and charges on chattel mortgages on specified kinds of personal property, was special law and void.

Miscellaneous.—Cited in *Parker v. Long* (Cal.), 38 Pac. 47, companion case.

104 Cal. 354-363, 43 Am. St. Rep. 111, 38 Pac. 49, FEALEY v. FEALEY.

Judgment can Only be Set Aside in Equity for extrinsic fraud in its procurement.

Approved in *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 276, 90 Pac. 44, holding judgment conclusive when no extrinsic fraud was shown; *Hanley v. Hanley*, 4 Cal. Prob. 484, refusing to set aside on ground of fraud order setting apart probate homestead when court had jurisdiction; *Boring v. Ott*, 138 Wis. 289, 119 N. W. 876, 19 L. R. A. (n. s.) 1080, holding judgment could not be attacked on ground it was obtained by perjury.

Relief in Equity Against Judgments on ground of fraud. See note, 87 Am. St. Rep. 105.

Perjury as Ground for Relief Against Judgment. See note, 10 L. R. A. (n. s.) 231.

Relief from Decrees of Courts having exclusive jurisdiction over estates of decedents, minors and incompetent persons. See notes, 106 Am. St. Rep. 646; 1 Cal. Prob. 269.

Order Setting Apart Probate Homestead vests title to land set apart in beneficiaries.

Reaffirmed in *Estate of Hayes*, 1 Cal. Prob. 554.

104 Cal. 363-368, 37 Pac. 1031, PEOPLE v. LANG.

Instruction as to Credibility of Testimony of accused in his own behalf considered and disapproved.

Approved in *Lang v. State*, 42 Fla. 601, 28 So. 857, approving instructions on weight of testimony of witnesses generally when accused testified in his own behalf.

Right of Court to Caution Jury as to Believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 808, 819.

104 Cal. 369-372, 36 Pac. 93, 38 Pac. 43, CHURCHILL v. BAUMANN.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 323.

104 Cal. 373-381, 37 Pac. 943, PEOPLE v. NEARY.

Names of Witnesses Need not be Indorsed on information.

Reaffirmed in *People v. Overacker*, 15 Cal. App. 626, 115 Pac. 758.

Commission of Homicide by Accused, if proved, does not cast upon him burden of proving circumstances in mitigation or excuse by preponderance of evidence.

Approved in *State v. Hazlet*, 16 N. D. 436, 113 N. W. 377, following rule; *Prince v. United States*, 3 Okl. Cr. 705, 109 Pac. 243, holding instruction did not cast upon defendant burden of proof of circumstances in mitigation.

104 Cal. 381-389, 38 Pac. 82, **MEYER v. GREAT WESTERN INS. CO.**

Appellate Court on Review of Evidence will consider all evidence in favor of prevailing party as true as well as all reasonable inferences deducible therefrom.

Approved in *Walsh v. Bradshaw*, 16 Cal. App. 587, 117 Pac. 690, following rule; *Showers v. Zanone* (Cal. App.), 85 Pac. 858, upholding findings when evidence was conflicting; *Dietz v. Kucks* (Cal.), 45 Pac. 833, holding denial of motion for new trial would not be reversed where there was some evidence in support of verdict.

Admissibility of Reports by Agent or Employee to employer, to prove fact in issue. See note, 18 L. R. A. (n. s.) 232.

104 Cal. 390-395, 37 Pac. 1046, **JOHNSTON v. GLENN COUNTY.**

Erroneous Finding of Board of Supervisors within jurisdiction is not reviewable.

Reaffirmed in *Sacramento County v. Glann*, 14 Cal. App. 786, 113 Pac. 362.

104 Cal. 395-400, 38 Pac. 53, **WATKINS v. WILHOIT.**

Right to Bring Creditor's Bill to Set Aside assignment for benefit of creditors as in fraud of plaintiff's right accrues when execution on plaintiff's judgment is returned unsatisfied.

Approved in *Watt v. Morrow*, 19 S. D. 325, 326, 103 N. W. 47, holding limitations began to run against creditor's right of action to set aside sale of land alleged in fraud of his claim when he recovered judgment thereon.

Miscellaneous.—Cited in *Littlehead v. Wilhoit* (Cal.), 38 Pac. 54, companion case.

104 Cal. 402-407, 38 Pac. 51, **SHAIN v. SRESOVICH.**

Fraud and Mistake are in Same Category as regards application of statute of limitations to actions based thereon.

Cited in *American Min. Co. v. Basin & Bay etc. Min. Co.*, 39 Mont. 482, 104 Pac. 526, 24 L. R. A. (n. s.) 305, arguendo.

Means of Knowledge is Equivalent to Knowledge.

Approved in *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 318, 119 Am. St. Rep. 199, 88 Pac. 363, 8 L. R. A. (n. s.) 682, upholding service by publication under *McEnerney Act*; *Williamson v. Beardsley*, 137 Fed. 470, 69 C. C. A. 615, holding where complainants had notice of pendency of administration proceedings, they were deemed to have knowledge of recorded conveyances therein; *Peacock v. Barnes*, 142 N. C. 219, 55 S. E. 100, holding cause of action for mistake accrued when mistake should have been discovered by exercise of ordinary diligence.

Distinguished in *Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 638, 100 Pac. 121, holding mere existence of opportunities for pur-

chaser to examine into truth of representations made by vendor could not remove fraud in law arising from their falsity.

Statutes of Limitation are Vital to welfare of society, and are favored in law.

Approved in Lilly-Brackett Co. v. Sonnemann, 157 Cal. 197, 106 Pac. 717, holding limitations could be pleaded as meritorious defense after default was set aside.

Failure to Notify Other Party of Mistake made by him as fraud which will toll limitations. See note, 21 L. R. A. (n. s.) 950.

Beginning of Limitations to Run Against Action to recover money paid by mistake. See note, 11 L. R. A. (n. s.) 1198.

104 Cal. 407-415, 43 Am. St. Rep. 118, 38 Pac. 89, **WICKERSHAM v. JOHNSTON.**

Where There is No Evidence as to Law of foreign country, it is presumed to be same as in this state.

Approved in Cuba R. R. Co. v. Crosby, 170 Fed. 376, 95 C. C. A. 539, and Lasseter v. Railroad Co., 136 N. C. 92, 48 S. E. 643, both following rule.

Foreign Law is Matter of Fact, which must be pleaded and proved.

Approved in Ryan v. North Alaska Salmon Co., 153 Cal. 439, 95 Pac. 863, following rule.

Notes of Deceased can Only be Sold under and by order of probate court.

Approved in Jones v. Wheeler, 23 Okl. 775, 101 Pac. 1114, following rule; Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 305, 90 Pac. 204, holding assignment of mortgage by executrix was made by order of probate court.

Foreign Judgments. See note, 94 Am. St. Rep. 534.

Probate of Foreign Wills. See note, 113 Am. St. Rep. 214.

104 Cal. 415-418, 38 Pac. 88, **PEOPLE v. PORTER.**

Perjury Must be Proven by Two Witnesses or by one witness and corroborating circumstances.

Approved in People v. Chadwick, 4 Cal. App. 70, 87 Pac. 387, upholding verdict of guilty on charge of perjury.

104 Cal. 420-428, 38 Pac. 92, **SAN FRANCISCO BREWERIES v. SCHURTZ.**

Mortgage Including Personal Property not mortgageable is not void as to other property covered by it.

Approved in Old Settlers' Investment Co. v. White, 158 Cal. 242, 110 Pac. 925, following rule.

Fixtures Retaining by Agreement the Character of personal property. See note, 84 Am. St. Rep. 897.

104 Cal. 429-432, 38 Pac. 93, **IN RE KENNEDY.**

Party Calling Witness Who Gives Only Negative testimony cannot impeach witness by showing declarations made by him.

Distinguished in Estate of Johnson, 152 Cal. 783, 93 Pac. 1017, holding rule did not apply where witness gave evasive answers as to contents of last will, which she had before stated she had read and told of contents.

Party Calling Witness cannot Get naked declarations of witness before jury as independent evidence.

Approved in *Bollinger v. Bollinger*, 154 Cal. 706, 99 Pac. 201, holding where witness called by party failed to testify he had heard certain statements made, proof could not be made by other witnesses that he had heard such statements.

Error in Admitting Evidence is Ground for reversal, unless appellate court can see from record appellant was not injured thereby.

Approved in *Madsen v. Utah Light & Ry. Co.*, 36 Utah, 545, 105 Pac. 804, holding respondent entitled to show testimony erroneously admitted was not fatal.

104 Cal. 432-437, 43 Am. St. Rep. 123, 38 Pac. 87, IN RE DOBBEL.

Insurance Policy on Life of Husband payable to wife, her executors, administrators, or assigns is separate property of wife, and is part of her estate when she dies before husband.

Approved in *Perry v. Tweedy*, 128 Ga. 405, 119 Am. St. Rep. 393, 57 S. E. 784, following rule; *Burdett v. Burdett*, 26 Okl. 427, 109 Pac. 926, holding life insurance policy payable to insured, or his executors, administrators, or assigns, was his separate property and became part of his estate on his death.

Assignment of Life Insurance Policies. See note, 87 Am. St. Rep. 498.

Effect of Death of Beneficiary before the insured. See notes, 123 Am. St. Rep. 804; 132 Am. St. Rep. 816.

104 Cal. 437-440, 38 Pac. 106, COOPER v. MONTEREY COUNTY.

Finding That Strip of Land was Traveled by public with knowledge of owner, and without objection, is only finding of probative fact, and not of fact of dedication.

Approved in *Village of Harley v. Riley*, 14 Idaho, 494, 95 Pac. 691, 17 L. R. A. (n. s.) 86, holding finding that interruption of use of water on streets of townsite would materially affect public convenience was not sufficient to show intention to dedicate water.

Section 2619, Political Code, to Effect that "all roads used as such for five years became highways," was repealed by act of March 30, 1874.

Approved in *Hartley v. Vermillion (Cal.)*, 70 Pac. 273, holding use by public of road for fifteen years with knowledge and acquiescence of owner did not show dedication; *Sutton v. Nicolaisen (Cal.)*, 44 Pac. 806, holding occasional travel over road across public domain, which had never been laid out, recorded, or worked as road did not make it public highway.

Miscellaneous.—Cited in *Cooper v. Monterey County (Cal.)*, 38 Pac. 311, companion case.

104 Cal. 440-443, 38 Pac. 195, PEOPLE v. TUCKER.

Evidence of Commission of Different and distinct offense is inadmissible in proof of offense charged.

Approved in *People v. Glass*, 158 Cal. 679, 112 Pac. 288, holding on charge of bribery of one supervisor evidence of payment of money to others was admissible to show act charged was part of general scheme; *People v. Tomalty*, 14 Cal. App. 233, 111 Pac. 517, holding in prosecution for falsification of public record, evidence of shortage in treasurer's accounts was admissible to show motive; *People v. Rowland*, 12 Cal. App. 19, 106 Pac. 433, holding admissible in embezzlement case

evidence of general shortage in bank while under defendant as cashier; *State v. Williams*, 36 Utah, 281, 103 Pac. 253, holding statement of defendant that he had raped other children inadmissible in proof of rape charged.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 980; 62 L. R. A. 198.

104 Cal. 443-450, 38 Pac. 109, TUTTLE v. BLOCK.

Reasonable Limitation by Statute of Time within which remedy may be allowed for enforcement of contract does not impair obligation of contract.

Approved in *Title Ins. etc. Co. v. Lusk*, 15 Cal. App. 362, 115 Pac. 55, holding act of 1909 relative to proceedings for street improvements then pending did not violate constitutional inhibition against vested rights.

104 Cal. 455-461, 38 Pac. 312, BELSER v. HOFFSCHNEIDER.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 920.

104 Cal. 462-464, 38 Pac. 310, PEOPLE v. BAIRD.

Defendant Who Testifies on His Own Behalf may not be cross-examined on matters as to which he did not testify.

Reaffirmed in *People v. Smith*, 9 Cal. App. 648, 99 Pac. 1113.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 1003; 62 L. R. A. 251.

104 Cal. 464-468, 38 Pac. 199, FARWELL v. MURRAY.

Complaint in Assumpsit for Work and labor as proper pleading.

Approved in *Donegan v. Houston*, 5 Cal. App. 630, 631, 90 Pac. 1074, upholding complaint in form of indebitatus assumpsit.

Complaint in Assumpsit Need not Set Forth items of account.

Reaffirmed in *Nelson v. Henriksen*, 31 Utah, 193, 87 Pac. 268.

Right to Jury Trial can Only be Waived in manner provided by section 631, Code of Civil Procedure.

Approved in *Chessman v. Hale*, 31 Mont. 592, 79 Pac. 259, 68 L. R. A. 410, holding defendant did not waive jury trial.

104 Cal. 468-472, 38 Pac. 107, YOCCO v. CONROY.

Riparian Owner Who Grants Right to convey water over his land to nonriparian owner is estopped to claim any use of water adverse to such right.

Approved in *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 218, 110 Pac. 932, holding plaintiff estopped by deed of grantor conveying all water for irrigation of his land to defendant's grantors.

104 Cal. 473-481, 38 Pac. 102, SAVINGS BANK OF SAN DIEGO CO. v. BURNS.

Written Instrument may be Plead by Attaching It to complaint and referring thereto.

Approved in *Santa Rosa Bank v. Paxton*, 149 Cal. 198, 86 Pac. 194, holding power of attorney to execute notes sued on was properly pleaded by being attached to complaint and referred to therein.

Act of April 1, 1876, Requiring Banks to record or publish statements of their business as condition to maintaining suits, was repealed by act of March 9, 1893.

Reaffirmed in *Savings Bank v. Fisher* (Cal.), 41 Pac. 491.

Note and Mortgage Given by Officer of savings and loan corporation for loan to himself, though illegal, is not unenforceable by savings bank.

Approved in *Buhrer v. Baldwin*, 137 Mich. 269, 100 N. W. 470, holding sureties on bond of banking partnership with which county funds had been deposited could not defend in suit on bond on ground deposit by treasurer with partnership was forbidden by law; *Latham v. Harrod*, 71 Kan. 569, 81 Pac. 216, holding policy-holder in fire insurance company not authorized to transact business in this state was not in pari delicto with its agents, and could recover amount of policy from agents when company was insolvent.

104 Cal. 482-487, 38 Pac. 198, PEOPLE v. HITCHCOCK.

Defect in Indictment not Affecting substantial rights of parties is not ground for reversal of judgment of conviction.

Approved in *Smith v. Territory*, 14 Okl. 164, 77 Pac. 187, holding clerical error in spelling word in indictment did not warrant reversal.

Court may Instruct Jury as to Credibility of testimony of defendant given in his own behalf.

Approved in *State v. Farnham*, 35 Mont. 379, 89 Pac. 730, and *People v. Ryan*, 152 Cal. 368, 92 Pac. 855, both approving instruction as to credibility of accused testifying in his own behalf.

Right of Court to Caution Jury as to Believing testimony of accused in own behalf. See note, 19 L. R. A. (n. s.) 818.

104 Cal. 491-493, 38 Pac. 203, PEOPLE v. DODGE.

Error in Incorporating Proper Notice in summons renders it voidable, but not void, so as to oust court of jurisdiction.

Approved in *Snake River Valley Irr. Dist. v. Stevens*, 18 Idaho, 547, 110 Pac. 1034, holding error in notice in summons not fatal to jurisdiction of court.

104 Cal. 494-497, 38 Pac. 101, WICKERSHAM v. COMERFORD.

Relief from Decrees of Courts Having Exclusive Jurisdiction over estates of decedents, minors and incompetent persons. See notes, 106 Am. St. Rep. 646; 1 Cal. Prob. 269.

104 Cal. 497-502, 38 Pac. 194, GAROUTTE v. HALEY.

Court may Make Order Granting or refusing new trial dependent on performance of condition by party in whose favor order is made.

Approved in *Harrington v. Butte etc. Ry. Co.*, 39 Mont. 24, 101 Pac. 150, holding order denying new trial upon condition of remission of certain part of damages became final on compliance with condition; *Winningham v. Philbrick*, 56 Wash. 41, 105 Pac. 145, holding order granting new trial unless damages were reduced became final on plaintiff's failure in stipulated time to accept reduction.

104 Cal. 502-506, 38 Pac. 318, KNOX v. MOSES.

Rule That Findings Based on Conflicting Evidence will not be disturbed applies when action was tried and submitted on testimony taken in two other cases.

Approved in *Rounthwaite v. Rounthwaite* (Cal.), 68 Pac. 304, holding rule that finding based on conflicting evidence would not be disturbed on appeal applied when evidence consisted mainly of depositions; *Whitaker v. California Door Co.*, 7 Cal. App. 759, 95 Pac. 911, refusing to disturb order denying new trial, though made by another judge who did not hear evidence.

Whether Deed was Made to Defraud Creditors is question of fact.

Approved in *Stevens v. Meyers*, 14 N. D. 403, 104 N. W. 531, following rule; *Wolters v. Rossi* (Cal.), 57 Pac. 74, holding transfer of property by insolvent debtor to wife without consideration, made after order for his examination in supplementary proceedings and on day before that set for hearing, was fraudulent.

Attacks by Creditors on Conveyance made by husbands to wives. See note, 90 Am. St. Rep. 505.

104 Cal. 506-510, 38 Pac. 897, **BUTTERWORTH v. LEVY.**

Insufficient Statement of General Character of work in building contract filed with recorder renders it void.

Approved in *Blyth v. Torre* (Cal.), 38 Pac. 640, holding contract recorded which merely stated that "building is to be frame building" was fatally defective.

104 Cal. 511-514, 38 Pac. 892, **CHAPPELL v. SCHMIDT.**

Judgment will not be Reversed for harmless error in giving instruction which could not prejudice appellant.

Approved in *Kirk v. Santa Barbara Ice Co.*, 157 Cal. 595, 108 Pac. 511, holding no harm shown from erroneous instruction.

Right to Use Deadly Weapon in resisting trespass. See note, 22 L. R. A. (n. s.) 725.

104 Cal. 515-524, 38 Pac. 900, **DERBY v. MODESTO.**

Ordinance Passed Under Act of 1889 regarding issuance of bonds for municipal waterworks and sewers are governed by act as amended in 1891, and may be passed on same day as introduced.

Approved in *State v. Ross*, 46 Wash. 32, 89 Pac. 159, upholding ordinance for issuance of bonds introduced at one meeting and passed at adjourned meeting, one week later, though charter provided for monthly meetings.

Publication from 6th to 19th, Both days included, is for two weeks.

Approved in *Petition of Los Angeles Trust Co.*, 158 Cal. 608, 112 Pac. 58, holding publication from July 27th to August 24th, both dates included, to be for four weeks; *Sherwood v. Wallin*, 154 Cal. 739, 99 Pac. 192, holding publication beginning February 17, 1903, and continuing to meeting held on March 4th, to be for two weeks; *Cosgriff v. Election Commissioners*, 151 Cal. 410, 91 Pac. 99, holding certificate of nomination filed October 17th to be filed twenty days before election on November 6th; *Reclamation District v. McPhee*, 13 Cal. App. 385, 109 Pac. 1107, holding publication four times from March 11th to April 3d not to be once each week for four weeks preceding April 4th; *Forsman v. Bright*, 8 Idaho, 471, 69 Pac. 474, holding publication in five weekly issues, first being July 18th and last being August 15th, was for one month.

Distinguished in *Wilcox v. Engebretsen*, 160 Cal. 291, 116 Pac. 751, holding where last day for filing objections to street improvement fell on Sunday, time was extended to next day.

Ordinance Changing Number of Bonds and amount of each from number and amount stated in published notice of special election does not affect validity of bonds.

Approved in *Santa Barbara v. Davis*, 6 Cal. App. 345, 92 Pac. 310, following rule; *Cheyenne v. State*, 17 Wyo. 103, 96 Pac. 248, holding notice of bond election sufficiently specified rate of interest on bonds so as to render them valid.

Miscellaneous.—Cited in *Clark v. Los Angeles*, 160 Cal. 43, 116 Pac. 727, to point that failure in publication of ordinance to precede it by words in bold type describing its purport did not render it void; *San Diego v. Potter*, 153 Cal. 294, 95 Pac. 149, to point that propositions for incurring indebtedness for more than one object may be submitted at one election.

104 Cal. 524-532, 43 Am. St. Rep. 127, 38 Pac. 364, 26 L. R. A. 423,
EX PARTE COHEN.

Person Giving Evidence Under Purity of election law is exempt from any prosecution for offense by himself which he may thus disclose.

Cited in *State v. Murphy*, 128 Wis. 209, 107 N. W. 473, *arguendo*.

Exemption from Self-crimination as Affected by statutes prohibiting use of testimony against witness. See note, 26 L. R. A. 418.

Constitutional Guaranty Against Self-incrimination, and equivalent exemption to witness. See note, 1 L. R. A. (n. s.) 170.

Admissibility of Evidence Wrongfully Obtained. See note, 136 Am. St. Rep. 151.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 183.

Conclusiveness of Witness' Statement that his answer would tend to criminate him. See note, 24 L. R. A. (n. s.) 168.

104 Cal. 532-541, 38 Pac. 410, **ALEXANDER v. CENTRAL LUMBER ETC. CO.**

Judgment will not be Reversed for harmless error in overruling demurrer for ambiguity.

Approved in *Burr v. Maclay Rancho Water Co.*, 160 Cal. 271, 116 Pac. 717, *Huffner v. Sawday*, 153 Cal. 89, 94 Pac. 425, *Bank of Lemoore v. Fulgham*, 151 Cal. 237, 90 Pac. 937, *Warren v. Southern Cal. Ry. Co. (Cal.)*, 67 Pac. 2, *Krieger v. Feeny*, 14 Cal. App. 545, 112 Pac. 903, *Preston v. Central Cal. etc. Irr. Co.*, 11 Cal. App. 198, 104 Pac. 465, *Lowe v. Yolo County etc. Water Co.*, 8 Cal. App. 172, 96 Pac. 381, *Young v. Clark*, 7 Cal. App. 196, 93 Pac. 1057, *Yordi v. Yordi*, 6 Cal. App. 32, 91 Pac. 353, *Leonhart v. California Wine Assn.*, 5 Cal. App. 22, 89 Pac. 848, *Wilkerson v. Wilkerson*, 3 Cal. App. 206, 84 Pac. 785, and *Butler v. Delafield*, 1 Cal. App. 371, 82 Pac. 261, all following rule; *Nolan v. Nolan*, 155 Cal. 481, 132 Am. St. Rep. 99, 101 Pac. 522, holding judgment would not be reversed for harmless error in overruling objection to evidence.

Employer has Burden of Proving Employee had knowledge of defect causing injury.

Approved in *Williams v. Sleepy Hollow Min. Co.*, 37 Colo. 74, 86 Pac. 341, 7 L. R. A. (n. s.) 1170, following rule.

104 Cal. 542-547, 38 Pac. 413, JAGER v. CALIFORNIA BRIDGE CO.

Harmless Error in Overruling Demurrer for uncertainty does not warrant reversal.

Approved in *Burr v. Maclay Rancho Water Co.*, 160 Cal. 271, 116 Pac. 717; *Bank of Lemoore v. Fulgham*, 151 Cal. 237, 90 Pac. 937; *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 61, 91 Pac. 427; and *Wilkerson v. Wilkerson*, 3 Cal. App. 206, 84 Pac. 785, all following rule.

Liability to Servant for Injuries due to defective machinery and appliances. See note, 98 Am. St. Rep. 296.

104 Cal. 547-550, 38 Pac. 361, VON SCHMIDT v. VON SCHMIDT.

Upon Appeal from Judgment on Judgment-roll alone, all intendments are in favor of judgment.

Approved in *Segerstrom v. Scott*, 16 Cal. App. 261, 116 Pac. 692; and *Continental Bldg. etc. Assn. v. Woolf*, 12 Cal. App. 728, 108 Pac. 730, both following rule; *Lunnun v. Morris*, 7 Cal. App. 716, 95 Pac. 909, holding all proceedings necessary to validity of judgment are presumed to have been had where record shows nothing to contrary; *In re Estate of Bouyssou*, 3 Cal. App. 41, 84 Pac. 460, holding action of court in vacating former decision in same cause will be presumed correct, in absence of contrary showing.

Where Judgment-roll on Appeal shows two judgments, later in time is presumed valid.

Reaffirmed in *Haese v. Heitzeg*, 159 Cal. 574, 114 Pac. 818.

104 Cal. 551-553, 38 Pac. 360, HERRLICH v. McDONALD.

Effect of Statute of Limitations on judgments and executions and proceedings for their enforcement. See note, 133 Am. St. Rep. 73.

104 Cal. 554-570, 38 Pac. 543, ESTATE OF MURPHY.

Two Instruments Held to Constitute Will.

Cited in *In re Noyes' Estate*, 40 Mont. 237, 106 Pac. 357, holding letter referring to imperfectly executed will did not with such will constitute valid will.

Court cannot Construe Will in determining its right to probate.

Reaffirmed in *Higgins v. Vandever*, 85 Neb. 95, 122 N. W. 845.

104 Cal. 570-593, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595, IN RE GARCELON.

Genuineness and Due Execution of instrument set out in answer is admitted by failure to file affidavit denying same.

Approved in *Tonopah Lumber Co. v. Riley*, 30 Nev. 318, 95 Pac. 1002, holding where contract set up in answer did not appear to have been executed, plaintiff was not required to file affidavit denying due execution.

Appeal from Order Dismissing Contest of will instituted after probate considered by court.

Distinguished in *Estate of Edelman*, 148 Cal. 235, 113 Am. St. Rep. 231, 82 Pac. 962, holding order dismissing contest of will instituted before probate reviewable on appeal from final order admitting it to probate.

Plaintiff has Right, Without Denying genuineness and due execution of instrument set out in answer, to show other matters in confession or avoidance thereof.

Approved in *Baker v. Baker*, 9 Cal. App. 740, 100 Pac. 894, holding fraud in delivery of deed set up in answer in quiet title suit could be proven without pleading it.

Legislature, in Enactment of Statutes, is not presumed to intend to overturn long-established principles of law unless such intention is made clear by express declaration or necessary implication.

Approved in *Lowe v. Yolo County etc. Water Co.*, 8 Cal. App. 174, 96 Pac. 382, holding fact that law provides for actual damages for failure to deliver water did not prevent allowance of exemplary damages in case of oppression, fraud or malice.

Covenant not to Contest Will Upheld.

Approved in *Grochowski v. Grochowski*, 77 Neb. 511, 112 N. W. 336, 13 L. R. A. (n. s.) 484, holding contract by one interested in opposing probate of will not to object thereto was not void as against public policy; *Estate of Hite*, 155 Cal. 440, 101 Pac. 444, 21 L. R. A. (n. s.) 953, and *Estate of Miller*, 156 Cal. 121, 122, 103 Pac. 843, 844, 23 L. R. A. (n. s.) 868, both upholding condition in will against contest; *Estate of Wickersham*, 153 Cal. 607, 612, 96 Pac. 312, 314, upholding agreement not to contest will upon showing of valid consideration; *Estate of Edelman*, 148 Cal. 236, 237, 238, 113 Am. St. Rep. 231, 82 Pac. 963, holding agreement of separation between husband and wife, by which each released all right to inherit from others, barred husband from contesting wife's will.

Distinguished in *Cochran v. Zachery*, 137 Iowa, 590, 126 Am. St. Rep. 307, 115 N. W. 487, 16 L. R. A. (n. s.) 235, holding agreement to join in contest of will for consideration was void as against public policy.

Contract not to Contest Will. See note, 128 Am. St. Rep. 1038.

Assignment of Expectancy of Heir Made for adequate consideration is enforceable in equity upon death of ancestor.

Approved in *Cox v. Hughes*, 10 Cal. App. 562, 102 Pac. 959, holding contract to assign private wages to be earned under future employment for adequate consideration was not void as against public policy; *Eissler v. Hoppel*, 158 Ind. 86, 62 N. E. 694, upholding contract between heirs whereby one agreed to accept specific amount advanced to him in full for his expectancy.

Distinguished in *Elliott v. Leslie*, 124 Ky. 557, 124 Am. St. Rep. 418, 99 S. W. 621, holding void written contract whereby son, in consideration of payment to him by father, released claim to estate as against father and any of his heirs and devisees.

Assignment or Release of Expectant Estates. See notes, 124 Am. St. Rep. 425; 33 L. R. A. 266.

Who can Contest a Will. See note, 130 Am. St. Rep. 218.

104 Cal. 595-601, 38 Pac. 362, **KULLMAN v. SIMMENS.**

Whether Transaction for Purchase of Stock not immediately delivered is illegal under article IV, section 26, Constitution, is question of fact to be determined from circumstances of case.

Approved in *Pollitz v. Wickersham*, 150 Cal. 245, 250, 88 Pac. 914, 916, holding evidence sufficient to show sale was on margin; *George J. Birkel Co. v. Howze*, 12 Cal. App. 647, 108 Pac. 146, upholding transfer of stock at agreed price with agreement to repurchase, on demand, within a year at agreed price plus interest.

104 Cal. 602-608, 38 Pac. 443, DUFFY v. DUFFY.

Harmless Error in Refusing to Strike Out evidence is not ground for reversal.

Approved in *Estate of Dolbeer*, 149 Cal. 230, 86 Pac. 697, and *Love v. Anchor Raisin Vineyard Co. (Cal.)*, 45 Pac. 1046, both following rule; *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 571, 86 Pac. 824, holding error in admission of evidence of fact not essential to case, finding on which was in favor of appellant, would not change result.

Action to Compel Conveyance of Real Property must be commenced in county where situated, but venue may be changed by agreement or order of court.

Approved in *State v. Campbell*, 3 Cal. App. 604, 86 Pac. 841, holding defendant in action by controller to recover moneys which come into his hands officially could have venue changed to county of his residence.

104 Cal. 608-616, 38 Pac. 502, PEOPLE v. BIDDLEMAN.

In Trial for Embezzlement, Proof of other remote embezzlements is admissible if tending to show system for concealing conversion of moneys embezzled.

Approved in *People v. Tomalty*, 14 Cal. App. 234, 111 Pac. 517, holding in prosecution for falsification of public records, evidence of other like acts was admissible as showing scheme to cover shortage in treasury.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 1001; 62 L. R. A. 226.

Competency of Witnesses to Handwriting. See note, 63 L. R. A. 979.

Miscellaneous.—Cited in *Ortega v. Territory*, 8 Ariz. 42, 68 Pac. 545, to point that allegation in indictment that offense was committed on or about specified date and before finding thereof is sufficient.

104 Cal. 616-623, 38 Pac. 448, CALIFORNIA & NEVADA R. R. CO. v. MECARTNEY.

Redemption may be had from tax sale at any time prior to filing certain affidavits and application for deed.

Approved in *Johnson v. Taylor*, 150 Cal. 205, 119 Am. St. Rep. 181; 88 Pac. 905, 10 L. R. A. (n. s.) 818, holding law passed subsequent to tax sale could not take away right of redemption by dispensing with requirement of notice of application for deed.

104 Cal. 623-626, 38 Pac. 456, ESTATE OF DONOVAN.

Right of Nonresident to Act as executor or administrator. See notes, 113 Am. St. Rep. 564; 1 L. R. A. (n. s.) 347.

Right of One First Entitled to Administration to nominate third person. See note, 22 L. R. A. (n. s.) 1163.

104 Cal. 626-630, 38 Pac. 451, BJORMAN v. FORT BRAGG REDWOOD CO.

Negligence of Fellow-servant as Defense to action for damages for injury is affirmative defense to be established by defendant.

Approved in *Duff v. Willamette Steel Wks.*, 45 Or. 482, 78 Pac. 364, following rule.

Contributory Negligence in Entering or remaining in an employment. See note, 49 L. R. A. 34, 47.

104 Cal. 631-635, 38 Pac. 422, **PEOPLE v. LEHMANN.**

Common-law Marriages. See note, 124 Am. St. Rep. 111; 3 Cal. Prob. 203.

104 Cal. 635-642, 38 Pac. 505, **OLMSTEAD v. DAUPHINY.**

Verdict Sustained by Some Evidence will not be disturbed on appeal.

Approved in *Showers v. Zanone* (Cal. App.), 85 Pac. 858, upholding findings based on conflicting evidence.

Cause of Action to Recover Back Money paid by mistake may be joined with cause of action on express contract to pay rent.

Approved in *Darknell v. Coeur D'Alene etc. Transp. Co.*, 18 Idaho, 67, 108 Pac. 538, holding cause of action on express contract for payment for services could be joined with cause of action on implied contract to pay reasonable value of same services.

Assumption of Debts on Dissolution of partnership. See note, 9 L. R. A. (n. s.) 56, 70.

104 Cal. 642-649, 38 Pac. 500, **DARCY v. SAN JOSE.**

Classification must not be Arbitrary for mere purpose of classification so that legislation really local or special may seem to be general.

Approved in *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 323, 119 Am. St. Rep. 199, 88 Pac. 366, 8 L. R. A. (n. s.) 682, holding proceeding created by McEnerney Act was sufficiently distinct from ordinary civil actions to justify creation of class to be characterized by special rules of procedure; *Johnson v. Gunn*, 148 Cal. 749, 84 Pac. 666, upholding act classifying townships in counties of twenty-seventh class with reference to population for purpose of fixing salaries of justices of peace; *Ex parte Sohncke*, 148 Cal. 267, 113 Am. St. Rep. 236, 82 Pac. 959, 2 L. R. A. (n. s.) 813, holding void act restricting interest rates on chattel mortgages on certain kinds of personal property; *Johnson v. Gunn* (Cal. App.), 84 Pac. 373, upholding act regulating salaries of justices of peace in counties of given class; *Woman's Relief Corps Home Assn. v. Nye*, 8 Cal. App. 536, 538, 97 Pac. 211, 212, holding "veterans of Civil War" were class founded on natural distinction; *Stratman v. Commonwealth*, 137 Ky. 509, 136 Am. St. Rep. 299, 125 S. W. 1097, holding void act imposing severer penalty on barber for working on Sunday than on persons engaged in other occupations; dissenting opinion in *State v. Smith*, 158 Ind. 571, 63 N. E. 218, majority upholding act providing for deduction of mortgage debts to extent of seven hundred dollars from assessment on mortgaged property.

104 Cal. 655-660, 38 Pac. 445, 26 L. R. A. 651, **LUNDY v. DELMAS.**

Nature of Incorporated Institutions belonging to state. See note, 29 L. R. A. 385.

104 Cal. 661-664, 38 Pac. 447, **LAY v. PARSONS.**

Provision of Election Law That Voter mark ballot by means of stamp by putting cross opposite name of candidate voted for is mandatory.

Approved in *Murphy v. San Luis Obispo* (Cal.), 48 Pac. 977, holding provision by ordinance for marking ballots at special election was mandatory; *Westville v. Stillwell*, 24 Okl. 897, 105 Pac. 666, and *Rampendahl v. Crump*, 24 Okl. 888, 105 Pac. 206, both holding provision for delivery and deposit of ballots in presence of voter was mandatory.

Marking Official Ballot. See note, 47 L. R. A. 820, 827.

104 Cal. 668-671, 38 Pac. 511, HEINTZE v. COOPER.

Diligence is Relative Term, and Depends upon particular circumstances of each case.

Approved in *People v. Boyd*, 16 Cal. App. 133, 116 Pac. 324, upholding ruling that diligence was shown in attempt to subpoena witness; *People v. Johnson*, 13 Cal. App. 779, 110 Pac. 966, holding diligence not shown in effort to subpoena witness; *Rockwell v. Italian-Swiss Colony*, 10 Cal. App. 636, 103 Pac. 164, upholding ruling that diligence in procuring evidence was not shown.

104 Cal. 672-676, 38 Pac. 507, BROWN v. ROUSE.

It is of Very Essence of Ratification that it be done advisedly, with full knowledge of party's rights.

Approved in *Munroe v. Fette*, 1 Cal. App. 334, 82 Pac. 207, holding erroneous instruction as to ratification which omitted reference to knowledge of acts ratified; *Findlay v. Hildenbrand*, 17 Idaho, 413, 105 Pac. 793, holding ratification of agent's contract not shown.

104 Cal. 677-679, 38 Pac. 421, FARNUM v. WARNER.

Provision for Compensation of Clerk of County Auditor is in addition to salary provided for auditor.

Approved in *Newman v. Lester*, 11 Cal. App. 581, 105 Pac. 787, holding separate allowance to officer for office expenses and deputies made during his term did not violate constitutional provision against increasing compensation of officer during term.

Regulation of Compensation of County Officers applying to all counties of given class is not special or local legislation.

Approved in *Johnson v. Gunn*, 148 Cal. 750, 84 Pac. 667, upholding act fixing salaries of justices of peace in counties of twenty-seventh class.

104 Cal. 680-683, 38 Pac. 516, MALONE v. BOSCH.

Repeal by Implication is not Favored, and conflict must be irreconcilable, or intent to repeal manifest, or both statutes will stand.

Approved in *Matter of Shay*, 160 Cal. 407, 117 Pac. 445, holding amendment of 1891 to subdivision 13, section 1209, Code of Civil Procedure, relative to contempts, did not modify subdivision 3 of same section; *Estate of Brewer*, 156 Cal. 92, 103 Pac. 488, holding sections 941a, 941b, and 941c, Code of Civil Procedure, relative to appeals, did not repeal section 1715.

Entry or Record Necessary to Complete Judgment or Order. See note, 28 L. R. A. 627.

104 Cal. 684-689, 38 Pac. 533, PERINE CONTRACTING & PAV. CO. v. QUACKENBUSH.

Board of Supervisors has Power to Contract for use of patented materials for paving.

Approved in *Saunders v. Iowa City*, 134 Iowa, 143, 144, 111 N. W. 532, 9 L. R. A. (n. s.) 392, holding requirement for use of patented pavement did not restrict competition when contract must be let to lowest bidder; *Dillingham v. Spartanbury*, 75 S. C. 558, 117 Am. St. Rep. 917, 56 S. E. 384, 8 L. R. A. (n. s.) 412, and *Baltimore v. Flack*, 104 Md. 141, 64 Atl. 715, both holding city council could contract for use of patented article for paving; *Reed v. Rockliff-Gibson Const. Co.*, 25 Okl. 639, 138 Am. St. Rep. 937, 107 Pac. 170, upholding paving contract requiring use of patented materials; dissenting opinion in *Monaghan v. Indianapolis*, 37 Ind. App. 290, 76 N. E. 427, majority holding contract for use of patented pavement was violative of act requiring contract to be let to lowest bidder.

Disapproved in *Monaghan v. Indianapolis*, 37 Ind. App. 318, 76 N. E. 437, holding contract for use of patented pavement was violative of act providing for letting contract to lowest bidder.

Special Contracts and Obligations to Make Payment in gold or silver. See note, 29 L. R. A. 522.

104 Cal. 690-697, 43 Am. St. Rep. 150, 38 Pac. 457, CHAPMAN v. STATE.

When State Acts as Individual and not in governmental capacity, it is governed by same rules as determine rights of private citizens.

Approved in *Boston Molasses Co. v. Commonwealth*, 193 Mass. 390, 79 N. E. 828, holding lease of lands by state was in individual capacity.

Distinguished in *Union Trust Co. v. State of California*, 154 Cal. 728, 99 Pac. 188, 24 L. R. A. (n. s.) 111, holding state not liable for failure of agents, acting in official capacity, to collect assessments on bonds issued under state law for widening of street.

Where Goods Intrusted to Wharfinger are Lost through his negligence, owner may sue on contract for damages.

Approved in *Morse v. Steele*, 149 Cal. 305, 86 Pac. 694, holding claim against estate based on failure of executor to care for live-stock intrusted to decedent for breeding purposes was based on contract, and not on tort.

Duty and Liability of Owner or occupant of dock or wharf. See note, 100 Am. St. Rep. 547.

Liability for Safety of Wharf or Dock. See note, 61 L. R. A. 951.

Liability of State for Negligence or misfeasance of its officers. See note, 116 Am. St. Rep. 214.

What Claims Constitute Valid Demands against a state. See note, 42 L. R. A. 35, 38, 55, 65.

Suits Against the United States. See note, 96 Am. St. Rep. 663.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 105 CALIFORNIA.

105 Cal. 1-9, 38 Pac. 521, FELIZ v. FELIZ.

Instructions must be Read Together as a whole.

Approved in Hayden v. Consolidated Min. Co., 3 Cal. App. 138, 84 Pac. 423, instructions held not contradictory.

Creation of Prescriptive Title by Adverse Possession of one cotenant. See note, 109 Am. St. Rep. 624.

105 Cal. 9-11, 38 Pac. 513, WHITE v. BEER.

Findings of Trial Court will not be set aside where there is substantial conflict in evidence.

Approved in Dietz v. Kucks (Cal.), 45 Pac. 833, and Grunsky v. Field, 1 Cal. App. 624, 82 Pac. 979, both reaffirming rule.

105 Cal. 12-14, 38 Pac. 507, MAHAN v. WOOD.

Findings of Trial Court will not be set aside where there is substantial conflict in evidence.

Reaffirmed in Dietz v. Kucks (Cal.), 45 Pac. 833.

Answer may be Stricken Out though no objection made to question.

Reaffirmed in Spotswood v. Spotswood, 4 Cal. App. 714, 89 Pac. 963.

105 Cal. 15-20, 38 Pac. 510, MACDONOUGH v. STARBIRD.

Office Erected in Lumber-yard and resting upon mudsills may be removed by tenant as trade fixture.

Approved in Shafter Estate Co. v. Alvord, 2 Cal. App. 605, 84 Pac. 280, house and barn built on mudsills for use of guests and keeper of game preserve are removable.

Fixtures Retaining by Agreement the Character of personal property. See note, 84 Am. St. Rep. 885.

Mere Transfer of Title does not affect lease from month to month.

Approved in Teich v. Arms, 5 Cal. App. 481, 90 Pac. 965, fact that land has been sold by state for taxes is defense to unlawful detainer suit by former landlord.

105 Cal. 20-31, 45 Am. St. Rep. 17, 38 Pac. 524, 26 L. R. A. 733,
JORY v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.

Beneficiary Under Benefit Certificate who has fraudulently prevented change of beneficiary is estopped from profiting thereby.

Approved in *Carter v. Carter*, 35 Ind. App. 78, 72 N. E. 188, where benefit certificate was transferred to wife under antenuptial agreement, attempted change of beneficiary was ineffectual; dissenting opinion in *Great Camp etc. v. Savage*, 135 Mich. 464, 98 N. W. 28, majority holding wife incompetent to testify as to her equitable right to proceeds of benefit certificate.

Distinguished in *Farra v. Braman*, 171 Ind. 541, 86 N. E. 848, where member did not comply with rules of order in substituting new beneficiary, latter not entitled to proceeds; *Clark v. Supreme Council*, 176 Mass. 471, 57 N. E. 788, wife not entitled to proceeds of benefit certificate where she paid assessments relying upon husband's promise to have certificate transferred to her; *Knights of Maccabees v. Sackett*, 34 Mont. 367, 115 Am. St. Rep. 532, 86 Pac. 425, no change of beneficiary where request for such change was not received through mails until six hours after death of insured.

Member of Mutual Benefit Association may so contract as to give beneficiary vested right in proceeds of certificate.

Approved in *Sage v. Finney*, 156 Mo. App. 41, 135 S. W. 999, one who agrees to pay dues on benefit certificate in consideration of one-half of proceeds not entitled to more, though dues exceed that amount.

Power of Insured to Destroy Rights of beneficiary. See note, 49 L. R. A. 750.

Beneficiary Under Benefit Certificate may be changed, even though certificate is in possession of beneficiary who has paid dues thereon.

Approved in *Preusser v. Supreme Hive*, 123 Wis. 167, 101 N. W. 359, applying rule where husband paid dues on wife's benefit certificate.

Effect of Consideration Moving from Original Beneficiary in mutual benefit certificate, upon right to change beneficiaries. See note, 12 L. R. A. (n. s.) 1209.

Assignment of Life Insurance Policies. See note, 87 Am. St. Rep. 516.

105 Cal. 32-36, 38 Pac. 513, **PEOPLE v. ANDERSON.**

Where Court has Fully Instructed Jury upon reasonable doubt, it is not error to instruct as to circumstances of mitigation in language of section 1105, Penal Code.

Reaffirmed in *People v. Gee Gong*, 15 Cal. App. 32, 114 Pac. 79.

Instructions to Jury must be Read as a whole.

Approved in *People v. Besold*, 154 Cal. 370, 97 Pac. 874, not error to charge that intention of accused is manifested by means used to accomplish killing and circumstances connected with offense.

Instruction as to Defendant's Testimony held not sufficient ground for reversal.

Approved in *People v. Ryan*, 152 Cal. 368, 92 Pac. 855, refusing to reverse for similar instruction, because case tried before *People v. Maughs*, 149 Cal. 253, decided.

Evidence to Show Credibility or bias of witness. See note, 82 Am. St. Rep. 53.

105 Cal. 36-41, 38 Pac. 538, PEOPLE v. EPPINGER.

Where Information Specifies, With Sufficient clearness, acts constituting offense of making fictitious instrument, additional designation of offense as "forgery" is immaterial.

Approved in *People v. Izlar*, 8 Cal. App. 604, 97 Pac. 686, immaterial that assault with deadly weapon was designated as "assault with a deadly weapon with the intent to commit murder"; *People v. Morley*, 8 Cal. App. 374, 97 Pac. 85, immaterial that offense of maliciously burning personal property to defraud insurer was designated as "arson."

City Directory is Competent Evidence that name of firm is fictitious.

Approved in *People v. Spencer*, 16 Cal. App. 759, 117 Pac. 1040, fact that when check was presented much less than amount thereof was on deposit is enough evidence to prove that accused did not have sufficient credit with bank; *People v. Gordon*, 13 Cal. App. 685, 110 Pac. 472, to prove signature to draft fictitious, it was sufficient to show to common certainty that there was no such person in vicinity of and connected with acts charged.

Testimony of Bank Teller that no such firm had account with bank is prima facie evidence of fictitious character of check.

Reaffirmed in *People v. Walker*, 15 Cal. App. 407, 114 Pac. 1011.

105 Cal. 41-44, 38 Pac. 517, LAWRENCE NAT. BANK v. KOWALSKY.

Where Complaint is Sufficient to Sustain Judgment, general demurrer is properly overruled.

Approved in *Hunt v. Jones*, 149 Cal. 300, 86 Pac. 688, that complaint is indefinite or uncertain is matter for special demurrer.

Equitable Assignment of Demand may be made by instrument in form of bill of exchange.

Approved in *Provident Nat. Bank v. Hartnett Co.*, 100 Tex. 219, 97 S. W. 692, where claim assigned was damages for breach of contract.

105 Cal. 45-49, 38 Pac. 541, LICHTENBERG v. McGLYNN.

In Action Against Executors upon Rejected Claim, plaintiff can recover only upon claim presented and rejected.

Approved in *Bichtel v. Chase*, 156 Cal. 712, 106 Pac. 83, and *Columbia Savings Assn. v. Clause*, 13 Wyo. 178, 78 Pac. 710, both reaffirming rule; *Burke v. Maguire*, 154 Cal. 462, 98 Pac. 23, claim should have been presented for moneys in hands of decedent as executrix for payment of legacies; *Pollitz v. Wickersham*, 150 Cal. 250, 88 Pac. 916, claim need not state facts with preciseness and detail required in complaint; *Enscoe v. Fletcher*, 1 Cal. App. 661, 662, 82 Pac. 1076, claim sued on held identical with claim presented; In re *Smith's Estate*, 13 N. D. 515, 101 N. W. 891, claim may be allowed in spite of previous rejection.

Distinguished in *Scott Stamp etc. Co., Ltd., v. Leake*, 9 Cal. App. 514, 99 Pac. 732, where claim was rejected because it appeared to be barred, subsequent action, alleging intestate's absence from state, was on claim presented.

105 Cal. 52-59, 45 Am. St. Rep. 25, 38 Pac. 539, GREEN v. BERGE.

Adverse Party to Appeal is Party whose interest in subject of appeal is in conflict with reversal.

Approved in *Mannix v. Tryon*, 152 Cal. 34, 91 Pac. 984, contractor, defendant in mechanic's lien suit, not adverse party to appeal by owner on whose lot lien had been decreed.

Right of Lateral Support. See note, 87 Am. St. Rep. 657.

Liability for Removal of Lateral or subjacent support of land in its natural condition. See note, 68 L. R. A. 680, 683, 692, 695.

105 Cal. 66-70, 38 Pac. 518, **PEOPLE v. BROWN.**

Larceny. See note, 88 Am. St. Rep. 607.

105 Cal. 70-77, 38 Pac. 527, **WATSON v. EDWARDS.**

Where Mortgage is Made by Deed and separate defeasance, deed may be made absolute by surrender of defeasance.

Approved in *Sears v. Gilman*, 199 Mass. 393, 85 N. E. 467, where deed is absolute and equities of grantor lie in parol, such equities may be discharged by subsequent parol agreement.

Mortgage may Purchase Mortgagor's Equity of redemption.

Approved in *Greenlaw v. Eastport Sav. Bank*, 106 Me. 207, 76 Atl. 485, bond for reconveyance surrendered seven years after date of mortgage; *Wagg v. Herbert*, 19 Okl. 560, 92 Pac. 264, purchase by mortgagee held invalid because of fraud, undue influence and unconscionable advantage.

Maxim "Once a Mortgage Always a Mortgage." See note, 131 Am. St. Rep. 917.

Effect of Deed Delivered in Escrow as further security for debt. See note, 2 L. R. A. (n. s.) 629.

105 Cal. 77-84, 38 Pac. 535, **MULLIN v. CALIFORNIA HORSE-SHOE CO.**

In Order to be Guilty of contributory negligence, injured employee must have known not only unsafeness of place, but danger to which he personally was exposed.

Approved in *Bird v. Utica Gold Mine Co.*, 2 Cal. App. 677, 84 Pac. 257, though injured employee saw water percolating through roof of mine, it was not necessarily patent to him that place was unsafe.

That Minor Knew or Ought to have known of danger to which he was exposed, held not established by evidence.

Approved in *Quinn v. Electric Laundry Co.*, 155 Cal. 506, 101 Pac. 797, inexperienced girl nineteen years old held not to have assumed risk from laundry mangle with guard not properly adjusted; *Jenson v. Will & Finck Co.*, 150 Cal. 405, 89 Pac. 116, cash boy twelve and one-half years old ordered to remove goods from warehouse by means of elevator, held not to have assumed risk from defect in elevator; *Avery v. Nordyke & Marmon Co.*, 34 Ind. App. 550, 70 N. E. 891, whether servant assumed risk from fall of pile of pig iron question for jury.

Duty of Master to Instruct and Warn Servants as to perils of employment. See note, 44 L. R. A. 75.

Vice-principalship as Determined With Reference to character of act causing injury. See note, 54 L. R. A. 72, 166.

Miscellaneous.—Cited in *Indianapolis etc. Traction Co. v. Henderson*, 39 Ind. App. 328, 79 N. E. 541, complaint held good though containing alternative averments.

105 Cal. 84-86, 38 Pac. 627, SOUTHERN PACIFIC R. R. CO. v. SUPERIOR COURT.

Upon Appeal from Order Granting or denying new trial, notice of intention to move for new trial is no part of record.

Reaffirmed in *Sprigg v. Barber* (Cal.), 54 Pac. 900.

105 Cal. 87-95, 38 Pac. 530, EISENHUTH v. ACKERSON.

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 286.

105 Cal. 95-98, 38 Pac. 498, IN RE OGBURN.

Description of Premises Designated as homestead held sufficient.

Distinguished in *Donnelly v. Tregaskis*, 154 Cal. 263, 97 Pac. 422, description by reference to map is insufficient without production and identification of map; *Jones v. Gunn*, 149 Cal. 690, 87 Pac. 578, description of land as "all lands owned by" husband of declarant in designated township is insufficient.

Homestead Character of Premises is not destroyed where husband and wife use part of building for their work as artisans.

Approved in *Hohn v. Pauly*, 11 Cal. App. 730, 106 Pac. 268, homestead not affected by fact that part of building was used for hotel purposes; *In re Stone*, 116 Fed. 37, in Arkansas, bankrupt is entitled to homestead though building chiefly occupied for business purposes.

105 Cal. 102-109, 38 Pac. 643, HYDE v. BOYLE.

Order Based upon Conflicting Affidavits will be affirmed.

Reaffirmed in *Doak v. Bruson*, 152 Cal. 19, 91 Pac. 1002.

Miscellaneous.—Cited in *Green v. Thornton*, 8 Cal. App. 163, 96 Pac. 383, referring to cited case as involving lands in controversy.

105 Cal. 109-113, 38 Pac. 641, MENZIES v. WATSON.

Priority of Judgment Over Conveyance made after beginning of term. See note, 38 L. R. A. 248.

105 Cal. 114-118, 38 Pac. 635, GOLDEN GATE LUMBER CO. v. SAHRBACHER.

Nonpayment of Installment due under building contract justifies rescission.

Distinguished in *Fairchild-Gilmore-Witmore Co. v. Southern Refining Co.*, 158 Cal. 274, 110 Pac. 955, quare, whether mere failure to pay installment due under contract for sale of goods justifies rescission.

Where Contractor Abandons Contract, rights of lien claimants are measured by section 1200, Code of Civil Procedure.

Distinguished in *Steiger etc. Pottery Works v. Sonoma*, 9 Cal. App. 704, 100 Pac. 716, upon abandonment by contractor, owner is not entitled to materials not actually sold and delivered to contractor.

In Action to Foreclose Mechanic's Lien, successful plaintiff is entitled to recover percentage as costs.

Reaffirmed in *Doyle v. Eschen*, 5 Cal. App. 64, 89 Pac. 840.

Right of Building Contractor to Recover for substantial performance of contract. See notes, 134 Am. St. Rep. 688; 24 L. R. A. (n. s.) 845.

105 Cal. 118-123, 45 Am. St. Rep. 30, 38 Pac. 645, CUNNINGHAM v. KENNEY.

Warehouseman not Entitled to Storage where hay destroyed by fire, though contract provided he would not be responsible for loss by fire.

Approved in *Clough v. Stillwell Meat Co.*, 112 Mo. App. 192, 86 S. W. 585, warehouseman not entitled to storage on apples burned, though he kept them insured in compliance with contract.

105 Cal. 124-126, 38 Pac. 687, TURNER v. LUNING.

In Action upon Note Sold at large discount, evidence that defendant sold other notes at large discount at about same time is admissible.

Approved in *Moody v. Peirano*. 4 Cal. App. 421, 88 Pac. 383, in action for breach of warranty of variety of seed wheat, evidence of similar warranties during same season is admissible.

105 Cal. 126-130, 38 Pac. 633, PEOPLE v. BAIRD.

General Objection to Evidence is not sufficient to raise point that proper foundation has not been laid.

Approved in *People v. Walker*, 15 Cal. App. 406, 114 Pac. 1011, objection properly overruled where no legal ground stated; *Sanders v. Davis*, 153 Ala. 384, 44 So. 982, general objection cannot be considered unless testimony is plainly inadmissible for any purpose.

105 Cal. 131-138, 38 Pac. 647, DAVIS v. CALIFORNIA STREET CABLE R. R. CO.

One Who Knows That Rail is on sidewalk, but forgets it while on errand of curiosity, is guilty of contributory negligence.

Approved in *Brett v. Frank*, 153 Cal. 273, 94 Pac. 1052, employee who knew of existence of hole in floor guilty of contributory negligence in stepping backward into it.

Negligence in Falling on Uneven Sidewalk. See note, 17 L. R. A. (n. s.) 198, 200.

Violation of Police Ordinance as ground for private action. See note, 5 L. R. A. (n. s.) 257.

105 Cal. 138-142, 38 Pac. 649, HENNESSY v. NICOL.

When Defendant is Entitled to Change of venue under section 395, Code of Civil Procedure, court has no discretion but to grant it.

Approved in *State v. Campbell*, 3 Cal. App. 605, 86 Pac. 841, defendant entitled to have action brought by state to recover moneys received by him as superintendent of insane asylum tried in county of his residence.

105 Cal. 143-148, 38 Pac. 640, ZELLER v. JORDAN.

Giving of Check by Wife to Husband, with understanding that it is not to be presented until after her death and unaccompanied by delivery of pass-book, is invalid.

Distinguished in *Fisher v. Ludwig*, 6 Cal. App. 150, 91 Pac. 660, valid gift inter vivos where decedent gave to defendant pass-book and written authority for bank to pay deposit to defendant.

Check or Note as Subject of Gift by Maker. See note, 27 L. R. A. (n. s.) 308.

Donatio Causa Mortis must be Made in contemplation of near approach of death by some present disease or other impending peril.

Approved in *O'Neil v. First Nat. Bank*, 49 Mont. 512, 117 Pac. 890, evidence held not to establish gift.

Gifts Causa Mortis. See note, 99 Am. St. Rep. 905.

Gift Inter Vivos, to be Valid, must take effect at once.

Approved in *Estate of Hall*, 154 Cal. 532, 98 Pac. 271, written instrument whereby decedent purported to give wife personal property, ineffectual as to bank deposit where decedent retained pass-book and complete control; *Beebe v. Coffin*, 153 Cal. 177, 94 Pac. 768, no valid gift where decedent placed release of mortgage in envelope and handed it to mortgagor.

105 Cal. 151-161, 38 Pac. 682, VON SCHMIDT v. WIDBER.

Municipal Corporation can Exercise only powers expressly granted or fairly implied.

Approved in *Gassner v. McCarthy*, 160 Cal. 85, 116 Pac. 75, city of San Francisco has no power to establish assessment district for construction of tunnel; *South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 590, 93 Pac. 495, city authorized to maintain waterworks can acquire water supply outside of city; *Hyatt v. Williams*, 148 Cal. 587, 84 Pac. 42, charter provisions held not to authorize city to engage in business of supplying its inhabitants with light; *Ft. Scott v. Eads Brokerage Co.*, 117 Fed. 54, 54 C. C. A. 437, holding invalid contract of city with brokerage company to compensate latter for purchasing city's bonds; dissenting opinion in *State v. Brown*, 111 Minn. 85, 126 N. W. 409, majority holding park commission had power to erect building to be used as residence and office by park superintendent.

Especial Powers and Liabilities of Municipalities in time of epidemics. See note, 26 L. R. A. 728.

105 Cal. 162-166, 38 Pac. 693, SANTA CRUZ ROCK PAVEMENT CO. v. HEATON.

Statute Authorizing City Council to prescribe general rules as to materials and mode of executing street work is permissive.

Approved in *Kerker v. Bocher*, 20 Okl. 757, 95 Pac. 990, abutting property owners held estopped from setting up irregularity in street assessment proceedings not going to jurisdiction.

Plans and Specifications for Street Improvement may be adopted by resolution.

Approved in *Haughwout v. Raymond*, 148 Cal. 313, 83 Pac. 54, reaffirming rule; *Martin v. Oskaloosa*, 126 Iowa, 685, 102 N. W. 530, where entire procedure for street improvement is regulated by statute, assessment is valid without ordinance.

105 Cal. 168-173, 38 Pac. 689, PEOPLE v. WORTHINGTON.

Upon Issue of Insanity, Family Physician may testify as to weakness of mind of accused.

Approved in *State v. McGruder*, 125 Iowa, 747, 101 N. W. 648, father of accused should have been allowed to testify whether accused was capable of appreciating difference between right and wrong; *State v. Berberick*, 38 Mont. 448, 100 Pac. 218, testimony of acquaintance as to weakness of mind of accused is admissible.

Expert Opinions as to Sanity or Insanity. See note, 39 L. R. A. 308, 320.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 728.

Evidence to Show Credibility or Bias of witness. See note, 82 Am. St. Rep. 55.

Hypnotism. See note, 40 L. R. A. 269.

105 Cal. 173-184, 38 Pac. 715, BATES v. HOWARD.

Superior Court may Grant New Trial, where evidence is conflicting, if it believes verdict is against weight of evidence.

Approved in *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 429, 83 Pac. 440, *Scrivani v. Dondero* (Cal.), 44 Pac. 1066, and *Walker v. Beaumont Land etc. Co.*, 15 Cal. App. 727, 115 Pac. 767, all reaffirming rule.

Title of Heirs to Real Estate comes directly from ancestor, subject to administration.

Approved in *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 227, 107 Pac. 297, insured owning property, subject only to her right and duty to hold it as executrix of her husband's estate, had the only insurable interest; *Trippet v. State*, 149 Cal. 529, 86 Pac. 1087, 8 L. R. A. (n.s.) 1210, fact that inheritance tax vests on decedent's death does not deprive him of right to hearing on amount of tax; *State v. Miller*, 149 Cal. 210, 85 Pac. 610, title of nonresident alien heir is forfeited if he does not appear within five years from death of decedent; *In re Wickersham's Estate* (Cal.), 70 Pac. 1080, heirs of wife may appeal from order obtained by husband's executors for sale of community property under power in husband's will; *Hume v. Laurel Hill Cemetery*, 142 Fed. 562, such interest will support action against third party with respect to real estate.

Notice Posted on July 12th, Giving notice of hearing on July 22d, is sufficient as ten day notice, under section 1373, Code of Civil Procedure.

Approved in *Petition of Los Angeles Trust Co.*, 158 Cal. 608, 112 Pac. 58, applying rule to notice required in section 1277, Code of Civil Procedure, as to application by corporation for change of name; *Cosgriff v. Election Commissioners*, 151 Cal. 410, 91 Pac. 99, applying rule to certificate of party nominations, mentioned in section 1192, Political Code.

First and Last Days in Computation of Time. See note, 49 L. R. A. 221.

Miscellaneous.—Cited in *Cabrea v. Payne*, 10 Cal. App. 677, 103 Pac. 177, under contract purchaser of realty held entitled to good or perfect record title.

105 Cal. 192-201, 38 Pac. 636, WHITNEY v. DODGE.

Conflict of Laws as to Sales of Personal Property. See note, 64 L. R. A. 828.

Conflict of Laws as to Wills. See note, 2 L. R. A. (n.s.) 433.

Miscellaneous.—Cited in *Estate of Spreckels*, 5 Cal. Prob. 369, to point that section 715, Civil Code, as to suspension of alienation, applies to personal as well as real property.

105 Cal. 203-208, 38 Pac. 691, LONDON & LANCASTER FIRE INS. CO v. LIEBES.

Recovery cannot be had for Fraudulent representation without damage.

Approved in *Nelson v. Grondahl*, 12 N. D. 133, 96 N. W. 300, reaffirming rule; *United Real Estate etc. Co. v. Barnes*, 159 Cal. 216, 113 Pac. 169, appointment of interested persons as commissioners to assess benefits and damages from opening of street, not actionable without proof of damage.

105 Cal. 214-219, 38 Pac. 728, BARNARD v. BOLLER.

Homestead on Public Lands is not Liable for debt contracted prior to issuance of patent.

Approved in *In re Cohn*, 171 Fed. 570, homestead to which no patent has issued does not pass to entryman's trustee in bankruptcy; *Sprinkle v. West*, 62 Wash. 588, 114 Pac. 430, homestead not liable for judgment on note given between making of final proof and issuance of patent.

105 Cal. 219-227, 38 Pac. 947, GRAND GROVE ETC. OF DRUIDS v. GARIBALDI GROVE.

Conclusiveness of Decisions of Tribunals of associations or corporations. See note, 49 L. R. A. 364.

105 Cal. 232-237, 38 Pac. 723, MILLS v. HOME BENEFIT LIFE INS. CO.

Miscellaneous.—Cited in *San Francisco Sav. Union v. Long* (Cal.), 53 Pac. 910, referring historically to cited case.

105 Cal. 244-253, 45 Am. St. Rep. 33, 38 Pac. 881, BOLTON v. GILLERAN.

Board of Supervisors cannot Delegate authority to determine necessity, character or extent of street improvement.

Approved in *Healey v. Anglo-California Bk., Ltd.*, 5 Cal. App. 285, 287, 288, 90 Pac. 56, 57, 58, contract for building irrigation system held invalid because of discrepancies between notice and plans; *Lambert v. Cummings*, 2 Cal. App. 645, 84 Pac. 267, assessment held void where resolution of intention did not specify rock to be used in macadamizing and merely declared that gutters should be of concrete and four feet wide; *Bluffton v. Miller*, 33 Ind. App. 530, 70 N. E. 992, resolution for paving street with sheet asphalt or brick paving blocks or bituminous macadam is invalid.

Distinguished in *McCaleb v. Dreyfus*, 156 Cal. 205, 209, 103 Pac. 924, 926, provision in sewer specifications that, if city engineer shall deem it necessary to form any part of foundation of concrete, it shall be paid for extra work at contract price, is valid; *Burns v. Casey*, 13 Cal. App. 161, 109 Pac. 98, specification that "proper foundation" shall be prepared by tamping earth on which curbs, gutters and round corners are to rest, is valid; *Harton v. Avondale*, 147 Ala. 470, 41 So. 939, assessment not void though specifications and material left to judgment of street committee, where city council accepted work; *Hildreth v. Longmont*, 47 Colo. 91, 105 Pac. 112, contract for sewer system not invalid because location of sub-drains left to discretion of city engineer.

Quieting Title Against Lien for Street Assessment. See note, 122 Am. St. Rep. 892.

Sufficiency of Specification for Guidance of bidder for public contract. See note, 30 L. R. A. (n.s.) 215.

105 Cal. 254-257, 38 Pac. 892, **INGRAHAM v. LYON.**

It is Sufficient That Publication was understood by those to whom it was addressed as conveying slanderous charge.

Approved in *Ervin v. Record Publishing Co.*, 154 Cal. 82, 97 Pac. 22, 18 L. R. A. (n.s.) 622, language that might be understood as implying that plaintiff was woman of unchaste character held libelous.

What Words are Libelous Per Se. See note, 116 Am. St. Rep. 817.

Charging One With Refusal to Pay Debts as libel. See note, 3 L. R. A. (n.s.) 339.

105 Cal. 258-262, 38 Pac. 729, **SCHAMMEL v. SCHAMMEL.**

Notwithstanding Divorce Decree Awards Custody of children to one parent, upon death of that parent other parent becomes entitled to such custody.

Approved in *Wilson v. Mitchell*, 48 Colo. 469, 111 Pac. 27, decree of divorce is not evidence of ground on which it was rendered in proceeding for custody of child.

Effect of Death of Parent to Whom Custody of child awarded upon rights of surviving parent. See note, 20 L. R. A. (n.s.) 171.

105 Cal. 262-268, 38 Pac. 720, **PEOPLE v. DANIELS.**

It is Duty of Counsel to Point Out place in transcript where error appears.

Reaffirmed in *People v. Glaze*, 139 Cal. 163, 72 Pac. 969, and *Bell v. Staacke*, 151 Cal. 548, 91 Pac. 324.

In Criminal Prosecution for Conspiracy, declarations of conspirators may be shown before conspiracy has been proved, subject to be stricken out.

Reaffirmed in *People v. Stokes*, 5 Cal. App. 209, 89 Pac. 998.

Fact That Defendant Heard only part of conversation does not render inadmissible what he heard.

Approved in *State v. Lu Sing*, 34 Mont. 38, 85 Pac. 524, applying rule where witness did not understand all of conversation.

Defendants were not Prejudiced by Refusal of court to advise acquittal.

Reaffirmed in *State v. Wrights*, 20 N. D. 218, 126 N. W. 1023.

105 Cal. 268-271, 38 Pac. 730, **McAULIFFE v. COUGHLIN.**

Semble, That Order to Show Cause why execution should not issue on judgment apparently satisfied is not appealable.

Approved in *Morehouse v. Pacific Hardware etc. Co.*, 177 Fed. 339, 100 C. C. A. 647, *semble*, that no appeal lies from order to show cause in contempt proceeding.

105 Cal. 271-273, 38 Pac. 739, **RANDALL v. DUFF.**

On Appeal from Order of Superior Court, lack of bill of exceptions is ground for affirmance.

Approved in *Estate of Young*, 149 Cal. 177, 85 Pac. 146, failure to serve draft of bill of exceptions upon adverse parties necessitates

affirmance so far as points contained only in bill of exceptions are concerned.

105 Cal. 273-277, 38 Pac. 891, HOLT v. THOMAS.

It is not Legal Duress to threaten to sue for enforcement of obligation.

Approved in *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 759, 103 Pac. 943, no duress where defendant demanded boxes under alleged contract, which did not exist, and plaintiff demanded and received market price, it being impossible to obtain boxes elsewhere; *Kiler v. Wohletz*, 79 Kan. 720, 101 Pac. 475, note executed as result of compromise held not given under duress; *Michel Brewing Co. v. State*, 19 S. D. 310, 103 N. W. 42, 70 L. R. A. 911, payment of unconstitutional tax on nonresident for wholesale liquor establishment not made under duress; *Walla Walla Fire Ins. Co. v. Spencer*, 52 Wash. 374, 100 Pac. 743, notes given to manager of branch office of insurance company, who was discharged before expiration of contract, held not executed under duress.

105 Cal. 277-284, 38 Pac. 733, BURKE v. GOULD.

Threat to Foreclose Mortgage in usual way is not duress.

Approved in *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 761, 103 Pac. 944, refusal to sell more goods until purchaser had paid for what he had received not duress.

Payment of Illegal Bonus for Discharge of mortgage pending foreclosure, as duress. See note, 2 L. R. A. (n.s.) 576.

105 Cal. 284-291, 45 Am. St. Rep. 40, 38 Pac. 903, CHILDERS v. MERCURY PRINTING & PUB. CO.

Malice in Law is Necessary to cause of action for libel.

Approved in *Davis v. Hearst*, 160 Cal. 156, 116 Pac. 536, criticising use of expression "legal malice" in cases of civil libel.

Malice in Fact may be Defined as a spiteful or rancorous disposition which causes an act to be done for mischief.

Approved in *Lee v. Crump*, 146 Ala. 659, 40 So. 610, upholding instruction that if slanderous words were used because of anger and ill-will toward plaintiff, they were used maliciously.

Malice, Actual or Presumed, Under Section 3294, Civil Code, allowing exemplary damages, is always malice in fact.

Approved in *Davis v. Hearst*, 160 Cal. 175, 116 Pac. 544, applying same interpretation to words "express or implied" in section as amended.

Publication Charging Another With Commission of felony is libelous per se.

Approved in *Woolley v. Plaindealer Pub. Co.*, 47 Or. 624, 84 Pac. 475, 5 L. R. A. (n.s.) 498, publication charging school director with having pecuniary interest in erection of schoolhouse libelous per se.

What Words are Libelous Per Se. See note, 110 Am. St. Rep. 813.

Where Publication is Libelous Per Se, right to actual damages is conclusively established.

Approved in *Sheibley v. Nelson*, 84 Neb. 396, 121 N. W. 460, reaffirming rule; *Paxton v. Woodward*, 31 Mont. 214, 107 Am. St. Rep. 416, 78 Pac. 219, instruction that jury should find for defendant if damage caused in part by libel other than that set forth in complaint, held erroneous.

Disputable Presumption of Malice in fact arises from libelous character of publication.

Approved in *Tingley v. Times-Mirror*, 151 Cal. 16, 89 Pac. 1103, reaffirming rule; *Walker v. Chanslor*, 153 Cal. 125, 126 Am. St. Rep. 61, 94 Pac. 608, 17 L. R. A. (n.s.) 455, evidence of good faith held admissible to rebut claim for exemplary damages.

Disapproved in *Davis v. Hearst*, 160 Cal. 177, 116 Pac. 545, inference of malice may be drawn from character of publication, but no presumption arises.

Malice in Fact in Libel is Material only in establishing right to exemplary damages or in rebutting defendant's plea of privilege.

Reaffirmed in *Davis v. Hearst*, 160 Cal. 163, 116 Pac. 539.

Corporate Liability for Libel and Slander. See note, 115 Am. St. Rep. 725.

105 Cal. 292-298, 38 Pac. 726, STONE v. OWENS.

Assignment of Contracts as Security for money advanced is simply pledge, and does not bind pledgee to pay for work performed under contracts.

Approved in *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 301, 111 Pac. 765, surety on contractor's bond did not become liable under contract by taking assignment of moneys to become due thereunder merely as indemnity and to insure proper application thereof.

Distinguished in *McCarty v. Owens* (Cal.), 41 Pac. 861, 862, facts held to show absolute assignment.

105 Cal. 299-310, 38 Pac. 740, PERRY v. QUACKENBUSH.

Findings of Probative Facts will not Control findings of ultimate facts.

Approved in *People v. McCue*, 150 Cal. 199, 88 Pac. 901; *Fairbanks v. Rollins* (Cal.), 54 Pac. 79, and *Pacific Pav. Co. v. Diggins*, 4 Cal. App. 243, 87 Pac. 417, all reaffirming rule; *Chaffee-Miller Land Co. v. Barber*, 12 N. D. 485, 97 N. W. 852, findings that plaintiff is owner in fee simple of real estate and that defendant has no claim or right of possession are sufficiently specific.

Distinguished in *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 109, 93 Pac. 902, ownership held to be conclusion of law where it depended on construction of deed.

If Conclusions Deduced from Findings necessarily follow, judgment must be affirmed.

Approved in *Jules Levy & Bro. v. Mautz*, 16 Cal. App. 669, 117 Pac. 937, reaffirming rule.

Building Contractor may Recover where he has substantially performed, though there are some unimportant defects arising through accident or inadvertence.

Approved in *City Street Imp. Co. v. Kroh*, 158 Cal. 325, 110 Pac. 941, where work is materially diminished by alteration in plan, employer is entitled to have contract price proportionately reduced; *Schindler v. Green* (Cal. App.), 82 Pac. 632, contract not substantially performed where windows not placed in workmanlike manner; *Carpenter v. Ibbetson*, 1 Cal. App. 274, 81 Pac. 1114, contract held substantially performed in spite of defects in stairwork.

Distinguished in *Seebach v. Kuhn*, 9 Cal. App. 488, 99 Pac. 725, where building contract provided that, in case of destruction, owner

should be liable for accrued installments, contractor could not recover installments payable on completion.

105 Cal. 311-313, 38 Pac. 725, EVANS v. GERKEN.

In Action on Executor's Bond it is no defense that moneys misappropriated were derived from realty which executor had been permitted to sell without giving additional bond required by law.

Approved in *Ellyson v. Lord*, 124 Iowa, 136, 99 N. W. 586, sureties on administrator's bond liable for proceeds of sale of real estate improperly sanctioned.

105 Cal. 314-321, 38 Pac. 899, REA v. WOOD.

Whether Witness may be Re-examined as to matters about which he has already been examined is for discretion of court.

Reaffirmed in *People v. Rigby*, 11 Cal. App. 276, 104 Pac. 841.

What Words are Libelous Per Se. See note, 116 Am. St. Rep. 815.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 694.

105 Cal. 321-326, 45 Am. St. Rep. 45, 38 Pac. 914, ADAMS v. GRAND LODGE A. O. U. W.

Relations Between Insured and Beneficiary may create equities which insured will be estopped from defeating.

Distinguished in *Leftwich v. Wells*, 101 Va. 260, 99 Am. St. Rep. 865, 43 S. E. 365, no contract shown to affect rights of beneficiary; *Preusser v. Supreme Hive*, 123 Wis. 166, 167, 101 N. W. 359, where wife obtained benefit certificate payable to husband, fact that husband paid dues did not give him vested right so as to preclude change of beneficiary.

105 Cal. 327-334, 38 Pac. 889, ADLARD v. RODGERS.

Chattel Mortgage not Acknowledged or proved and certified is void as against attaching creditor, unless mortgagee has reduced property to possession.

Approved in *Frick Co. v. Oats*, 20 Okl. 479, 94 Pac. 684, where mortgagee had taken possession of property.

105 Cal. 335-344, 38 Pac. 945, PEOPLE v. WARD.

Juror may be Challenged for cause after he has been sworn.

Approved in *People v. Schmitz*, 7 Cal. App. 347, 94 Pac. 411, reversing where district attorney was permitted to challenge peremptorily juror already sworn.

Simple Offer by District Attorney of inadmissible evidence, without apparent evil motive, is not ground for reversal.

Approved in *Dimmick v. United States*, 135 Fed. 270, 70 C. C. A. 141, reaffirming rule; *People v. Willard*, 150 Cal. 552, 89 Pac. 128, that district attorney stated to jury that decedent had twice committed accused to insane asylum, not ground for reversal, though fact not in evidence; *People v. Davis*, 1 Cal. App. 12, 81 Pac. 718, references to evidence introduced by defendant and to presence of his mother and other relatives at trial, held not ground for reversal; *Chadwick v. United States*, 141 Fed. 246, 72 C. C. A. 343, description by district attorney of distress resulting from bank failure held not ground for reversal.

Circumstantial Evidence Should be Sufficient to exclude every other rational hypothesis than guilt.

Approved in *Union Pacific Coal Co. v. United States*, 173 Fed. 740, 97 C. C. A. 578, reversing because all substantial evidence as consistent with innocence as with guilt; *Vernon v. United States*, 146 Fed. 123, 76 C. C. A. 547, circumstantial evidence held insufficient to establish guilt of bribery.

Circumstantial Evidence. See note, 97 Am. St. Rep. 777.

Accused must Establish Defense of insanity by preponderance of evidence.

Reaffirmed in *People v. Willard*, 150 Cal. 552, 89 Pac. 128.

Presumption and Burden of Proof as to Sanity. See note, 36 L. R. A. 727.

Measure of Proof of Insanity in criminal cases. See note, 39 L. R. A. 739.

105 Cal. 344-350, 38 Pac. 731, 27 L. R. A. 158, **PEOPLE v. BRAY.**

Law Forbidding Sale of Liquor to Indians is valid.

Approved in *People v. Gebhard*, 151 Mich. 199, 115 N. W. 56, and *State v. Mamlock*, 58 Wash. 632, 633, 137 Am. St. Rep. 1085, 109 Pac. 47, both reaffirming rule.

Miscellaneous.—Cited in *People v. Goodrich* (Cal.), 38 Pac. 954, and *People v. Lemon* (Cal.), 38 Pac. 905, both decided upon authority of cited case.

105 Cal. 350-353, 38 Pac. 957, **CROWE v. DOBBEL.**

What is Community Property. See notes, 126 Am. St. Rep. 119; 4 Cof. Prob. 61.

105 Cal. 368-372, 38 Pac. 954, **IN RE OROCKER.**

Whether Estate "is but Little Indebted" depends upon amount of debts compared with value of estate.

Approved in *Estate of Chesney*, 1 Cal. App. 34, 81 Pac. 680, payment of legacy held rightly granted, under circumstances, without requiring bond.

Distinguished in *Estate of Glenn*, 153 Cal. 80, 94 Pac. 231, even though estate but little indebted, heir may be estopped by conduct from obtaining partial distribution to prejudice of other heirs.

105 Cal. 372-376, 38 Pac. 955, **FREEMAN v. BADGELY.**

Assumption of Debts on Dissolution of Partnership. See note, 9 L. R. A. (n. s.) 54, 58, 64.

105 Cal. 379-389, 38 Pac. 957, **HANSEN v. SOUTHERN PAC. CO.**

Evidence That Railroad Track had been used as footpath for years is admissible to show consent to such use.

Reaffirmed in *Davey v. Southern Pac. Co.* (Cal.), 45 Pac. 171.

Where Evidence as to Consent of Railroad to use of its tracks by pedestrians is conflicting, question is for jury.

Approved in *Pittsburg etc. R. R. Co. v. Simons*, 168 Ind. 342, 79 N. E. 913, reaffirming rule.

Railroad Company must Use Reasonable care to avoid injuring licensee upon its tracks.

Approved in *Pittsburg etc. R. R. Co. v. Simons*, 168 Ind. 341, 79 N. E. 913, railroad company liable for injury to child from its foot

catching in unblocked switch at point where children were accustomed to pass; *Mathews v. Seaboard Air Line Ry. Co.*, 67 S. C. 511, 46 S. E. 339, 65 L. R. A. 286, railroad company liable where licensee fell into excavation at night.

Distinguished in *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 57, 76 Pac. 527, railroad company not required to keep bridge in such condition that licensee could not fall through opening between ties.

Miscellaneous.—Cited in *Palmer v. Oregon Short Line R. R. Co.*, 34 Utah, 478, 98 Pac. 695, that public may have implied license to pass over railroad right of way, use must have been definite, long, open and continuous.

105 Cal. 389-403, 38 Pac. 974, PEPPER v. SOUTHERN PACIFIC CO.

Though Railroad Train Gave No Signal of rapid approach at crossing, plaintiff cannot recover if he was himself negligent.

Approved in *Hutson v. Southern California Ry. Co.*, 150 Cal. 704, 89 Pac. 1094, contributory negligence held under evidence to be question for jury; *Bilton v. Southern Pacific Co.*, 148 Cal. 449, 83 Pac. 443, where view of train was obstructed, evidence held insufficient to show that person killed at crossing was negligent; *Wheeler v. Oregon R. R. etc. Co.*, 16 Idaho, 394, 102 Pac. 353, whether person who stepped on railroad track to avoid danger from fractious team was guilty of negligence is question for jury; *Dey v. United Rys. Co.*, 140 Mo. App. 471, 120 S. W. 138, driver of carriage held guilty of contributory negligence in going too fast to avoid collision with street-car; *Royster v. Southern Ry. Co.*, 147 N. C. 351, 61 S. E. 180, one who steps just in front of rapidly approaching train is guilty of negligence; *Wilkinson v. Oregon Short Line R. R. Co.*, 35 Utah, 117, 99 Pac. 469, plaintiff, who was driving alongside of railroad track and, without looking, attempted to cross in front of approaching engine, guilty of negligence.

Distinguished in *Warren v. Southern California Ry. Co. (Cal.)*, 67 Pac. 3, where view was obstructed to within twenty-five feet of track, question whether driver was negligent in trying to hurry across rather than turn aside was for jury.

In Action for Death of Relative, relations between plaintiff and deceased can be considered only in estimating pecuniary loss.

Approved in *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 710, 87 Pac. 378, reaffirming rule; *Hale v. San Bernardino Traction Co.*, 256 Cal. 716, 106 Pac. 85, in determining loss from death of husband and father, jury may consider deprivation of society, comfort, care and protection of deceased; *Birmingham Ry. Light etc. Co. v. Baker*, 161 Ala. 138, 135 Am. St. Rep. 118, 49 So. 756, in action by father for injuries to four months old daughter, he cannot recover for loss of her society; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 520, 521, 99 Pac. 92, 93, in estimating damages, jury may consider intimacy existing between father and child, loss of companionship and child's ability to contribute to welfare, comfort and happiness of parent; *Christensen v. Floriston Pulp etc. Co.*, 29 Nev. 571, 92 Pac. 217, ten thousand dollars held excessive damages for death of laborer who did not contribute to support of parents for whose benefit action was brought.

Liability of Railroad for Injuries due to frightening of animals by emission of steam. See note, 133 Am. St. Rep. 869.

105 Cal. 403-409, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786, **MERRIMAN v. WALTON.**

Equity will Enjoin Enforcement of judgment obtained and concealed through fraud of justice and attorneys.

Approved in *Fidelity & Deposit Co. v. Crenshaw*, 120 Tenn. 610, 110 S. W. 1017, setting aside judgment obtained in violation of agreement that no further proceedings would be had without notice to parties; *Keith v. Alger*, 114 Tenn. 26, 85 S. W. 77, refusing to set aside judgment where plaintiff conveyed interest pending suit where judgment was otherwise unimpeachable.

Injunctions Against Judgments for Want of jurisdiction or invalidity. See note, 31 L. R. A. 205.

Injunctions Against Judgment for Matters subsequent to rendition. See note, 30 L. R. A. 561.

Equitable Jurisdiction in Regard to injunctions against judgments. See note, 32 L. R. A. 328.

Relief from Judgment Suffered in Reliance upon promise not observed. See note, 13 L. R. A. (n. s.) 580.

Negligence as Cause for and as Bar to injunctions against judgments. See note, 31 L. R. A. 34.

105 Cal. 409-413, 38 Pac. 960, **WARNER v. THOMAS CLEANING ETC. WORKS.**

Action of Trial Court in Granting new trial will not be set aside unless there was clear abuse of discretion.

Approved in *Scrivani v. Dondero* (Cal.), 44 Pac. 1066, and *Eidinger v. Sigwart*, 13 Cal. App. 676, 110 Pac. 525, both reaffirming rule; *Dietz v. Kucks* (Cal.), 45 Pac. 833, order denying new trial will not be reversed where there is any evidence to support verdict.

Settlement and Allowance of Statement on motion for new trial may be vacated where statement is inaccurate.

Reaffirmed in *Estate of Thomas*, 155 Cal. 491, 101 Pac. 799.

105 Cal. 420-425, 45 Am. St. Rep. 53, 38 Pac. 979, **JOHNSTON v. FISH.**

Plaintiff in Ejectment is not Entitled to fruits of land.

Approved in *Snyder v. Harding*, 38 Wash. 673, 80 Pac. 792, lessee under invalid lease entitled to portion of crop assigned him therein.

Replevin by or Against One in Adverse Possession of land for things severed. See note, 69 L. R. A. 732.

105 Cal. 425-431, 38 Pac. 962, **BUCKER v. HALL.**

Where Facts Establishing Liability are peculiarly within knowledge of defendants, plaintiff may state his cause of action variously, and should not be compelled to elect.

Approved in *Spotswood v. Morris*, 10 Idaho, 136, 77 Pac. 217, reaffirming rule; *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal. App. 752, 108 Pac. 718, debtor pleading both farmer's and teamster's exemptions should not be compelled to elect; *Rucker v. Omaha etc. Refining Co.*, 18 Colo. App. 491, 72 Pac. 683, refusing to compel election between court on undertaking in attachment and court for malicious prosecution; *Blankenship v. Decker*, 34 Mont. 298, 85 Pac. 1036, real estate broker suing for services rendered may plead both express contract and quantum meruit; *Oberndorfer v. Moyer*, 30 Utah, 332,

84 Pac. 1105, refusing to compel election between counts on open account and on account stated.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 615.

105 Cal. 431-434, 45 Am. St. Rep. 57, 38 Pac. 1106, **MASTERSON v. MUNRO.**

Description by Metes and Bounds is subordinate to description by number of block.

Approved in *Gudger v. White*, 141 N. C. 517, 54 S. E. 390, reference to former deed controls description by metes and bounds.

105 Cal. 434-447, 39 Pac. 20, **TREWEEK v. HOWARD.**

It is Unnecessary in Subsequent counts to repeat facts set forth in first count, where proper reference is made.

Approved in *Schoner v. Allen*, 25 Okl. 24, 105 Pac. 192, where demurrer was sustained and petition was repeated unchanged except for addition of second count, subsequent demurrer ran only to second count.

Sureties on Executor's Bond are Liable for debt due from him to decedent.

Approved in *United Brethren v. Akin*, 45 Or. 252, 253, 77 Pac. 749, 66 L. R. A. 654, reaffirming rule.

Duty Owed by Creditor to Surety. See note, 115 Am. St. Rep. 94.

Decree Settling Executor's Account is binding upon his sureties.

Approved in *Bell v. Wilson*, 159 Cal. 64, 112 Pac. 1103, decree settling accounts of agent of nonresident distributee binds his surety.

Liability for Debt of Executor or Administrator owing to the estate. See note, 112 Am. St. Rep. 411, 412.

Admissibility and Effect Against Surety of judgment against principal. See note, 132 Am. St. Rep. 765, 766.

105 Cal. 447-459, 39 Pac. 61, **DENNISON v. CHAPMAN.**

Conflicting and Erroneous Instruction given at request of appellant is not ground for reversal.

Reaffirmed in *People v. Hower*, 151 Cal. 644, 91 Pac. 509.

105 Cal. 459-464, 39 Pac. 19, **STEWART v. KYSER.**

Soldiers, College Students or Inhabitants of veterans' home may acquire residence for purpose of voting in county where they live.

Approved in *Cory v. Spencer*, 67 Kan. 663, 73 Pac. 924, 63 L. R. A. 275, reaffirming rule.

105 Cal. 467-470, 38 Pac. 1109, **WORKS v. MERRITT.**

Chattel Mortgage is Good as between parties and as against subsequent purchasers, though not executed with prescribed formalities.

Reaffirmed in *Bank of Ukiah v. Gibson* (Cal.), 39 Pac. 1070.

105 Cal. 471-486, 45 Am. St. Rep. 59, 38 Pac. 511, 884, **IN RE PHILBROOK.**

Use of Unwarrantable Language in Brief in assailing justice of supreme court and attempt to influence decision by appeals to supposed timidity of justices are grounds for suspension of attorney.

Approved in *Lamberson v. Superior Court*, 151 Cal. 464, 91 Pac. 102, 11 L. R. A. (n.s.) 619, attorney who presented affidavit attaching integrity of judge, without supporting facts, guilty of contempt; *State Board of Law Examiners v. Hart*, 104 Minn. 113, 116 N. W. 214, 17 L. R. A. (n.s.) 585, suspending attorney for six months for writing personal letter to chief justice impugning intelligence and integrity of justices in certain decisions; *In re Dunn*, 85 Neb. 623, 124 N. W. 127, attorney suspended for attack upon integrity and legal attainments of judge contained in petition for rehearing; *In re Egan*, 24 S. D. 330, 123 N. W. 490, attorney disbarred for charging justices of supreme court with corruption in newspapers held not entitled to readmission; *In re Robinson*, 48 Wash. 159, 161, 92 Pac. 931, 932, 15 L. R. A. (n.s.) 525, suspending attorney who stated in petition for rehearing that it was rumored that certain of the judges would vote in interest of controlling political ring; *Cobb v. United States*, 172 Fed. 645, 96 C. C. A. 477, attorney suspended for publishing article in newspaper charging judge with being under improper influence.

Want of Due Respect Toward Court in legal papers as ground for disbarment. See note, 15 L. R. A. (n.s.) 527.

Court is Judge of Offenses against itself.

Approved in *Lamberson v. Superior Court*, 151 Cal. 462, 91 Pac. 101, 11 L. R. A. (n.s.) 619, judge is not disqualified to try for contempt attorney who has presented affidavit impugning judge's integrity.

105 Cal. 486-504, 39 Pac. 24, PEOPLE v. LEARY.

Reading by Jurors of Newspapers containing matter calculated to prejudice their minds is ground for reversal.

Approved in *People v. Wong Loung*, 159 Cal. 528, 114 Pac. 832, reversing where wife of juror read to him newspaper article stating that accused was noted highbinder and that he had been convicted of murder; *State v. Caine*, 134 Iowa, 156, 111 N. W. 446, reversing where jurors read sensational newspaper accounts of trial.

Use by Jurors of Small Amount of liquor, not producing intoxication, is not ground for reversal.

Approved in *Territory of Hawaii v. Ferris*, 15 Haw. 149, reaffirming rule; *People v. Cord*, 157 Cal. 571, 108 Pac. 515, momentary separation of jury caused by fire held not prejudicial to defendant.

Misconduct of Jurors, Other Than Their Separation, for which verdict may be set aside. See note, 134 Am. St. Rep. 1035, 1056.

Irresistible Impulse as Excuse for Crime. See note, 27 L. R. A. (n.s.) 465.

105 Cal. 504-514, 39 Pac. 16, PEOPLE v. COLLINS.

In Indictment or Information in state courts, it is not necessary to negative jurisdiction of federal courts.

Approved in *State v. Tully*, 31 Mont. 370, 78 Pac. 761, reaffirming rule; *Ex parte Hornef*, 154 Cal. 361, 97 Pac. 893, complaint for practicing dentistry without license need not negative proviso that act does not affect dentist's rightfully practicing at time of its passage; *State v. Buckaroo Jack*, 30 Nev. 334, 335, 96 Pac. 498, unnecessary for indictment in state court for offense committed by one

Indian against another to allege that offense was committed off reservation.

Where Venireman Fails to Respond, court need not delay trial until he can be produced.

Approved in *Stevens v. Union R. R. Co.*, 26 R. I. 106, 58 Atl. 498, 66 L. R. A. 465, allowance of too many peremptory challenges not ground for reversal where no prejudice shown.

105 Cal. 514-525, 45 Am. St. Rep. 87, 39 Pac. 200, **MATTINGLY v. PENNIE**.

Decision upon Former Appeal as to question of fact is not law of case.

Approved in *Allen v. Bryant*, 155 Cal. 258, 100 Pac. 705, reaffirming rule; *Tally v. Ganahl*, 151 Cal. 421, 90 Pac. 1050, where supreme court, in deciding case, states principle of law necessary to decision, that principle becomes law of case.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 344, 346.

Broker cannot Recover Commission unless he procured written agreement from purchaser or introduced him to seller.

Approved in *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 398, 107 Pac. 624, broker who did not procure binding contract not entitled to commission; *Mott v. Minor*, 11 Cal. App. 780, 781, 106 Pac. 246, 247, broker must prove that person procured by him made offer to purchase, though defendant refused to sell; *Logan v. McMullen*, 4 Cal. App. 156, 87 Pac. 286, broker cannot call upon his employer to come to place of business of vendor to make contract; *Colburn v. Seymour*, 32 Colo. 432, 76 Pac. 1058, broker must show that purchaser was not only willing but able to consummate sale; *Carter v. Owens*, 58 Fla. 206, 50 So. 641, evidence held to show that supposed purchaser was not ready and able to purchase; *Johnson Bros. v. Wright*, 124 Iowa, 63, 99 N. W. 103, broker not entitled to commissions unless telegram announcing sale reached owner before he signed contract to sell to third person; *Watters v. Dancey*, 23 S. D. 484, 139 Am. St. Rep. 1071, 122 N. W. 431, contract to purchase land from agent insufficient.

Distinguished in *Levey v. Wolf*, 2 Cal. App. 495, 84 Pac. 315, broker who gave name of purchaser to seller entitled to commission where offer accepted within time allowed.

Refusal of Owner to Consummate Sale does not entitle broker to commissions.

Distinguished in *Philbrook v. Moxey*, 191 Mass. 35, 77 N. E. 521, attorney employed to effect settlements may recover value of services where client repudiated contract before settlements were effected.

Unsupported Testimony of Single Witness as to conversation with person since deceased is weakest of evidence.

Approved in *Austin v. Wilcoxson*, 149 Cal. 29, 84 Pac. 419, trust in personal property held not established by evidence of decedent's declarations.

105 Cal. 526-558, 38 Pac. 94, 722, 28 L. R. A. 773, **ROBINSON v. SOUTHERN PACIFIC CO.**

Where Statute can Reasonably be Enforced according to its literal meaning, there is not room for construction.

Approved in *Capital City Bank v. Hilson*, 59 Fla. 220, 51 So. 855, contract to indemnify A. from obligations of "C. P. Company and himself personally" covers only joint debts of C. P. Company and A.; *Caster v. McClellan*, 132 Iowa, 506, 109 N. W. 1021, refusing to construe "or" to mean "and."

Implied Repeal of Statutes. See note, 88 Am. St. Rep. 294.

Who are Related by Affinity. See note, 79 Am. St. Rep. 202.

Miscellaneous.—Cited in *San Joaquin etc. Irr. Co. v. Merced Co.*, 2 Cal. App. 600, 84 Pac. 288, right to collect rates for water furnished is franchise distinct from corporate franchise.

105 Cal. 558-572, 38 Pac. 981, 27 L. R. A. 529, **IN RE FLAHERTY.**

Ordinance Forbidding Beating of Drums in streets, without permission from president of board of trustees, is valid.

Approved in *In re Thomas*, 10 Cal. App. 377, 102 Pac. 20, ordinance forbidding public assemblages in parks or streets in certain portion of city is valid; *Ex parte Luening*, 3 Cal. App. 78, 84 Pac. 446, county ordinance forbidding carrying of concealed weapons, except by permit from sheriff, is valid; *Trinity County v. Mendocino County*, 151 Cal. 286, 90 Pac. 687, upholding section 10 of act of 1872, declaring that line to be run by surveyor, when it was run, marked and defined, should be boundary line between Trinity, Humboldt and Mendocino counties; *Indianapolis v. Miller*, 168 Ind. 291, 80 N. E. 628, 8 L. R. A. (n. s.) 822, ordinance requiring all theater entrances for patrons to be on public street and not on alley is invalid; *Samuelson v. State*, 116 Tenn. 487, 115 Am. St. Rep. 805, 95 S. W. 1016, upholding law forbidding any person, other than agent of common carrier, to sell non-transferable tickets, issued and sold below standard schedule rate; *Pacific States Supply Co. v. San Francisco*, 171 Fed. 733, 734, 735, ordinance forbidding blasting in certain portions of city, except under permit from board of supervisors, is valid.

Municipal Power Over Nuisances affecting highways and waters. See note, 39 L. R. A. 673.

105 Cal. 572-575, 38 Pac. 973, 39 Pac. 207, **McLAUGHLIN v. MENOTTI.**

Enrolled Copy of Statute must prevail over printed volume.

Reaffirmed in *State v. Groves*, 80 Ohio St. 360, 88 N. E. 1098.

105 Cal. 576-600, 38 Pac. 905, **PEOPLE v. CENTRAL PACIFIC R. R. CO.**

Collection of Taxes not Mere Collection of debt, but sovereign act of state.

Approved in *Los Angeles v. Glassell*, 4 Cal. App. 46, 87 Pac. 242, act of 1880, relating to collection of taxes, prescribing form of complaint, etc., is valid; *Hughes v. Lazard*, 5 Ariz. 6, 7, 43 Pac. 423, upholding law providing that judgment for delinquent tax may be entered without service of summons, on published notice.

Legislation Operating Only upon Class is general if class requires peculiar legislation.

Approved in *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 323, 119 Am. St. Rep. 199, 88 Pac. 365, 8 L. R. A. (n. s.) 682, upholding law authorizing proceeding in rem to quiet title, where public records have been destroyed; *Ex parte Elam*, 6 Cal. App. 240, 91 Pac. 814, statute forbidding waste of water from artesian wells is valid; *Waite*

v. Santa Cruz, 89 Fed. 624, statute authorizing issuance of bonds by cities or towns, except those of the first class, is valid.

Franchise, Roadway, Roadbed, Rails and rolling stock constitute entirety incapable of division.

Distinguished in **Reinhart v. McDonald**, 76 Fed. 405, rolling stock used partly in state, but belonging to corporation of another state, is taxable.

Railroad Company Organized Under State Laws, which has subsequently received federal franchise, may be assessed upon state franchise.

Approved in **Western Union Tel. Co. v. Los Angeles**, 160 Cal. 127, 116 Pac. 566, state franchise of corporation, having also federal franchise, is taxable under assessment simply of "franchise"; **Chicago etc. Ry. Co. v. Babcock**, 204 U. S. 597, 27 Sup. Ct. 326, 51 L. Ed. 636, state may tax portion of railroad within its borders at its value as organic portion of entire road.

Taxation of Franchise. See notes, 131 Am. St. Rep. 882; 57 L. R. A. 56, 97, 105.

Where **Railroad** furnished to State board of equalization statement of value of its franchise and roadway within state, it is estopped to assert that franchise was not one capable of assessment.

Approved in **Inland Lumber etc. Co. v. Thompson**, 11 Idaho, 516, 114 Am. St. Rep. 274, 83 Pac. 935, corporation which had located scrip on public land estopped to deny that land was taxable, because applications not yet approved where lands were included in statement to assessor.

Conversations Among Members of State board of equalization are inadmissible to impeach their assessment.

Approved in **Chicago etc. Ry. Co. v. Babcock**, 204 U. S. 593, 27 Sup. Ct. 326, 51 L. Ed. 636, members of state board of equalization not subject to cross-examination as to operation of their minds in arriving at valuation of railroad property.

Implied Right to Interest on Taxes or Assessments. See note, 6 L. R. A. (n. s.) 694, 696.

Miscellaneous.—Cited in **People v. Southern Pac. Co. (Cal.)**, 38 Pac. 912, decided upon authority of cited case; **Hart v. Smith**, 159 Ind. 197, 95 Am. St. Rep. 280, 64 N. E. 666, 58 L. R. A. 949, proceedings of state board of tax commissioners, being summary and largely informal, may be attacked collaterally.

105 Cal. 600-620, 38 Pac. 965, 29 L. R. A. 811, **LEVY v. SUPERIOR COURT.**

Admissibility of Evidence Wrongfully Obtained. See note, 136 Am. St. Rep. 141, 144, 149, 163.

Admissibility in Evidence Against Accused of documents or other things taken from him. See note, 59 L. R. A. 465.

Summary Proceedings to Discover or Recover Property. See note, 115 Am. St. Rep. 210.

Refusal to Produce Books or Papers on Subpoena, upon ground that they contain private matter. See note, 29 L. R. A. (n. s.) 720.

Right of Officer to Refuse to Turn Over corporation's books to receiver, upon ground of tendency to incriminate him. See note, 30 L. R. A. (n. s.) 728.

Miscellaneous.—Cited in **Bell v. District Court**, 28 Nev. 293, 113 Am. St. Rep. 854, 81 Pac. 876, 1 L. R. A. (n. s.) 843, constitutionality of statute may be determined in prohibition proceeding.

105 Cal. 621-631, 45 Am. St. Rep. 96, 38 Pac. 941, 27 L. R. A. 203, **PEOPLE v. HECHT.**

Vacancy in Board of Freeholders, Caused by ineligibility or death or unwillingness to act, does not invalidate election or organization of board.

Approved in Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 415, 105 Pac. 284, assessment for reclamation purposes not invalid because one of commissioners interested person; Kitts v. Thornton, 5 Cal. App. 467, 90 Pac. 979, validity of indictment not affected by disqualification of certain grand jurors; Coffey v. Superior Court, 2 Cal. App. 459, 83 Pac. 582, accusation against municipal officer under section 758, Penal Code, may be presented by twelve grand jurors; Swedback v. Olson, 107 Minn. 423, 120 N. W. 754, four out of five county commissioners may act where remaining commissioner has failed to qualify.

Acts of De Facto Officers are valid and binding until their right to office has been judicially determined.

Approved in Matter of Danford, 157 Cal. 431, 108 Pac. 325, alienage of judge cannot be urged on motion to set aside his official acts; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 416, 105 Pac. 284, assessment commissioner of reclamation district, though disqualified by interest, held to be de facto officer.

105 Cal. 632-636, 39 Pac. 59, **PEOPLE v. AZOFF.**

Affidavit of Juror cannot be Received to impeach verdict, except in single case of resort to chance.

Approved in People v. Wong Loung, 159 Cal. 524, 114 Pac. 831, affidavit of juror as to misconduct outside of jury-room, inadmissible; Sutton v. Lowry, 39 Mont. 471, 104 Pac. 547, rejecting affidavit of one juror to show misconduct on part of another juror.

Affidavits of Jurors cannot, Admitting misconduct, be used to show that verdict was not influenced thereby.

Approved in State v. Strodemier, 41 Wash. 162, 111 Am. St. Rep. 1012, 83 Pac. 22, effect of juror's misconduct not avoided by affidavits of jurors that he was last to consent to verdict of guilty.

Statements of Jurors cannot be Used to impeach their verdict.

Approved in People v. Emmons, 7 Cal. App. 701, 95 Pac. 1039, that juror had stated, before being sworn, that accused was guilty and ought to be punished, not ground for new trial.

105 Cal. 636-641, 38 Pac. 1110, **PEOPLE v. BORDA.**

Where Objection to Evidence has Been Overruled, ruling is rendered harmless by subsequent order striking evidence out.

Reaffirmed in People v. Herges, 14 Cal. App. 275, 111 Pac. 624.

Statutory Protection of Municipal Water Supply. See note, 41 L. R. A. 177.

Protection from Pollution of Source of municipal water supply. See note, 11 L. R. A. (n. s.) 1166.

Pollution of Watercourse by Stock. See note, 26 L. R. A. (n. s.) 224.

105 Cal. 641-645, 39 Pac. 29, **PEOPLE v. NAPTHALY.**

Failure of Magistrate to Inform Accused of his right to counsel is ground for setting aside information.

Approved in *People v. Crowley*, 13 Cal. App. 324, 109 Pac. 494, but holding statute sufficiently complied with.

105 Cal. 646-647, 38 Pac. 941, *IN RE BATES*.

Burden of Showing Error is upon appellant.

Reaffirmed in *Estate of Bouyssou*, 3 Cal. App. 40, 84 Pac. 460.

105 Cal. 648-652, 38 Pac. 1105, *PEOPLE v. COLBURN*.

Unanswered Letter of Third Person to defendant, found in possession of latter when arrested, is hearsay and inadmissible.

Approved in *Sorenson v. United States*, 168 Fed. 796, 94 C. C. A. 181, letter written by codefendant to third person, while he and defendant were in jail, and obtained from possession of defendant's wife, inadmissible against defendant.

105 Cal. 652-660, 39 Pac. 33, *PEOPLE v. WARD*.

One Who Simply Trades for Stolen Property is not guilty of larceny.

Approved in *People v. Disperati*, 11 Cal. App. 481, 105 Pac. 621, and *People v. Disperati*, 15 Cal. App. 123, 113 Pac. 890, receiver of stolen property does not become guilty of larceny by afterward selling it with intent to defraud owner.

Stenographer's Notes as Evidence, and right to read them to jury. See note, 81 Am. St. Rep. 367.

Admissibility in Criminal Trial of Testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 892.

105 Cal. 660-665, 39 Pac. 32, *PEOPLE v. HERTZ*.

Value of Stolen Goods Received is material as bearing upon guilty knowledge of accused.

Approved in *State v. Richmond*, 186 Mo. 87, 84 S. W. 884, guilty knowledge held established by circumstances of sale; *State v. Pirkey*, 22 S. D. 555, 118 N. W. 1045, admitting evidence that property given in exchange for stolen property was itself stolen.

Argumentative Instruction Indicating Opinion of court as to defendant's guilt held erroneous.

Distinguished in *Hersperger v. Pac. Lumber Co.*, 4 Cal. App. 466, 88 Pac. 589, general instruction as to weighing of testimony held not error.

105 Cal. 666-669, 39 Pac. 36, *JOHNSTON v. SUPERIOR COURT*.

Where Court Recognizes Publication as giving notice to creditors, mandamus will lie to compel it to sign order to that effect.

Approved in *Inglin v. Hoppin*, 156 Cal. 490, 105 Pac. 585, granting mandamus to compel supervisors to establish independent reclamation district; *California Pine Box etc. Co. v. Superior Court*, 13 Cal. App. 70, 108 Pac. 884, granting mandamus to compel trial court to enter default of defendant, where it had set aside service of summons after defendant had appeared generally.

Mandamus as Proper Remedy Against Public Officers. See note, 98 Am. St. Rep. 902.

105 Cal. 676-680, 39 Pac. 38, *PEOPLE v. SMITH*.

Instruction is Presumably Injurious where there is no evidence of hypothetical facts upon which it is based.

Approved in *People v. Maughs*, 149 Cal. 261, 86 Pac. 191, instructions as to pursuit and declination of further combat, where there is no evidence of either, are ground for reversal.

105 Cal. 680-696, 39 Pac. 56, LAMB v. HARBAUGH.

Complaint Which Alleges Injury to person, character and property of plaintiff, shows misjoinder.

Approved in *Estate of Goodspeed*, 2 Cal. Prob. 151, charges of fraud and duress should be stated separately.

Distinguished in *Lanigan v. Neely*, 4 Cal. App. 765, 89 Pac. 444, in action for breach of promise of marriage, seduction may be pleaded as element of punitive damages.

Whether Injuries Both to Person and Property constitute but one, or more than one, cause of action. See note, 50 L. R. A. 165.

Damages for Personal Injury to Wife are community property.

Approved in *Basler v. Sacramento Gas etc. Co.*, 158 Cal. 518, 111 Pac. 531, negligence of husband is imputed to wife in his care.

Wife, Rightfully Living Apart from Her Husband, may bring action alone for her personal injuries.

Approved in *Duncan v. Duncan*, 6 Cal. App. 407, 92 Pac. 311, wife may sue alone for household goods wrongfully sold by husband.

Miscellaneous.—Cited in *Cargnani v. Cargnani*, 16 Cal. App. 99, 100, 116 Pac. 307, 308, failure to find upon material issue is error of law for which new trial may be had.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 106 CALIFORNIA.

106 Cal. 9-32, 39 Pac. 43, BILLS v. SILVER KING MINING CO.

Statute of Limitations cannot be Avoided on ground of fraud where there is gross laches in discovering the fraud.

Approved in Lewis v. Duncan, 66 Kan. 308, 71 Pac. 578, delay of twenty years in commencing action against surety on guardian's bond, for maladministration of estate by guardian was unreasonable.

Limitation of Actions on Obligations payable on or after demand. See note, 136 Am. St. Rep. 489.

106 Cal. 32-43, 39 Pac. 53, PEOPLE v. OLARK.

Instructions must be Either Contained in Bill of Exceptions or certified as required by law in order to be considered on appeal.

Approved in People v. Schultz, 14 Cal. App. 110, 111 Pac. 273, instruction neither contained in bill of exceptions nor indorsed or certified as required by section 1176, Penal Code, is no part of record on appeal.

Twenty Years' Imprisonment in State's Prison for robbery is not unusual punishment.

Approved in dissenting opinion in Weems v. United States, 217 U. S. 408, 30 Sup. Ct. 565, 54 L. Ed. 815, note, majority holding cruel and unusual punishment is inflicted by Philippine Penal Code for falsification by public official of public document.

Cruel and Unusual Punishments. See note, 35 L. R. A. 577.

It is not Necessary That Property taken should, in its entirety, be property of person robbed.

Approved in State v. Ireland, 9 Idaho, 690, 75 Pac. 257, where title to a horse was alleged to be in one person, and the evidence showed it belonged to firm of which such person was a member, the variance was not fatal; State v. Fair, 35 Wash. 135, 102 Am. St. Rep. 897, 76 Pac. 733, where evidence showed the person alleged in the indictment to be the owner of the property taken was member of a partnership to which it belonged, there was no variance.

Harmless Error not Affecting Substantial Rights is no ground for reversal.

Approved in People v. Matthews (Cal.), 58 Pac. 372, reaffirming rule; People v. Hutchings, 8 Cal. App. 558, 97 Pac. 328, applying rule where defendant, who was entitled to rebut evidence given in

rebuttal, was not prejudiced by the erroneous exclusion of such evidence; *People v. Stokes*, 5 Cal. App. 213, 89 Pac. 1000, applying rule where the testimony elicited by questions complained of as improper was of such a character as to be wholly immaterial and without weight; *Mendocino Co. v. Peters*, 2 Cal. App. 28, 82 Pac. 1124, where averments of complaint were insufficiently denied, assignments of error pertaining to rulings on such evidence need not be considered.

106 Cal. 43-48, 39 Pac. 211, BANK OF ESCONDIDO v. SUPERIOR COURT.

Where Determination of Trial Court is based on conflicting evidence, its finding will not be reviewed.

Approved in *Budd v. Superior Court*, 14 Cal. App. 258, 111 Pac. 629, applying rule where there were conflicting affidavits as to whether surety had appeared before justice's court for justification.

Justification of Sureties may be Waived by failure of party excepting to appear at time set for justification.

Reaffirmed in *Budd v. Superior Court*, 14 Cal. App. 258, 111 Pac. 629.

Oath of Sureties Attached to Appeal Bond is prima facie evidence of justification.

Approved in *Jeffries v. Superior Court*, 13 Cal. App. 198, 109 Pac. 148, original qualification is complete justification where party entitled to except waives his right; *La Dow v. National Bldg. etc. Co.*, 11 Cal. App. 309, 104 Pac. 839, applying rule where, after exception to sureties, one of them justified and the other failed to, and thereupon a new corporation surety was presented whose sufficiency was apparently unquestioned; *Snyder v. Wooden*, 11 Idaho, 156, 81 Pac. 378, where, after exception to sureties, new sureties were substituted who did not in fact justify, such justification was waived by acceptance of new bond.

106 Cal. 48-56, 39 Pac. 204, PEOPLE v. SCHMITT.

Competency of a Witness to Testify as to the sanity of another must be left to the discretion of the trial court.

Approved in *People v. Overacker*, 15 Cal. App. 630, 115 Pac. 759, upholding action of court in excluding opinion of witness as to sanity of defendant; *State v. Penna*, 35 Mont. 541, 90 Pac. 790, admission of testimony of two newspaper reporters who conversed with one accused of murder for half an hour shortly after the homicide was clearly unauthorized.

If Doubt Arises as to Sanity of a defendant during trial, a jury must be impaneled to determine such issue.

Approved in *Marshall v. Territory*, 2 Okl. Cr. 145, 101 Pac. 142, applying rule in prosecution for rape, where evidence showed defendant was not competent to make rational defense.

Defense of Insanity Involves Only the Issue of defendant's mental condition at time of commission of crime charged.

Approved in *People v. Kirby*, 15 Cal. App. 271, 114 Pac. 797, jury may consider defendant's insanity at time of trial for the limited purpose of determining as to his prior insanity.

Insanity After Commission of Criminal Act. See note, 38 L. R. A. 588, 589.

Presumption of Continuance of Insanity. See note, 35 L. R. A. 120.

Nonexpert Opinions as to Sanity or insanity. See note, 38 L. R. A. 733.

106 Cal. 56-62, 39 Pac. 209, **BRADY v. TIMES-MIRROR CO.**

Filing of Direction to Clerk to dismiss action does not effect a dismissal unless judgment of dismissal is entered.

Reaffirmed in *Truett v. Onderdonk* (Cal.), 50 Pac. 396.

Distinguished in *Miller v. Northern Pac. Ry. Co.*, 30 Mont. 292, 76 Pac. 692, where, after praecipe is filed with clerk and dismissal has been entered on register, case is beyond jurisdiction of court save to enter judgment for costs.

106 Cal. 62-63, 39 Pac. 16, **ROUNTREE v. I. X. L. LIME CO.**

Mere Error in Computation Appearing on Face of record may be corrected by trial court without vacating judgment.

Approved in *Erickson v. Stockton etc. R. R. Co.*, 148 Cal. 207, 82 Pac. 961, reaffirming rule.

106 Cal. 64-73, 39 Pac. 215, 27 L. R. A. 562, **CRANE v. PACIFIC BANK.**

The Bank Commissioners' Act is applicable to all cases of insolvency of banking corporations.

Approved in *People v. Bank of San Luis Obispo*, 154 Cal. 201, 97 Pac. 310, section 10 of Bank Commissioners' Act supersedes the general insolvency act so far as banking corporations are concerned.

Miscellaneous.—Cited in *Murphy v. Pacific Bank* (Cal.), 39 Pac. 218.

106 Cal. 73-83, 39 Pac. 40, **PEOPLE v. SMITH.**

Where Two Offenses are Committed at Same Time, so they constitute same transaction, evidence of crime not charged may be admitted to prove crime charged.

Approved in *People v. Manasse*, 153 Cal. 13, 94 Pac. 94, in prosecution for the murder of one man, where evidence of the contemporaneous shooting of another was relevant, it was not inadmissible as proving a crime other than that charged; *People v. Taylor* (Cal.), 69 Pac. 292, in prosecution for grand larceny of a watch, evidence that a few minutes after the taking defendant was seen with the cane of the person robbed was properly admitted; *People v. Cahill*, 11 Cal. App. 690, 106 Pac. 117, in prosecution of one charged with stealing an automobile, evidence that gloves left in machine by owner were found in possession of defendant when arrested was admissible.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 984; 62 L. R. A. 308.

A Conviction may be had upon Circumstantial Evidence where circumstances uphold the verdict.

Approved in *Stokes v. State*, 71 Ark. 117, 71 S. W. 250, in prosecution of one for killing another so as to enjoy closer relations with latter's wife, letters from wife to defendant were admissible to prove motive.

Refusal to Instruct Jury to Exercise Caution in accepting expert evidence is not error.

Approved in *People v. Wilkins*, 158 Cal. 537, 111 Pac. 615, upholding refusal to give instruction admonishing jury "to scrutinize opinion evidence or expert evidence with the utmost care."

106 Cal. 83-89, 99 Pac. 12, PEOPLE v. UN DONG.

Where There is a Substantial Conflict in the evidence, action of trial court will not be disturbed.

Approved in *State v. Rathbone*, 8 Idaho, 172, 67 Pac. 189, reaffirming rule; *Showers v. Zanone* (Cal. App.), 85 Pac. 858, upholding findings of court based on conflicting evidence where there was evidence in the record to uphold them.

Improper Cross-examination of Defendant for purpose of degrading him is prejudicial error.

Approved in *State v. Rogers*, 31 Mont. 8, 77 Pac. 296, in prosecution for burglary, questions to show that a fishing trip taken about the time of the burglary was for purpose of committing robbery were improper; *State v. Shockley*, 29 Utah, 53, 110 Am. St. Rep. 639, 80 Pac. 875, action of court in permitting questions concerning the commission of other crimes by defendant not connected with the one for which he was being tried was error.

106 Cal. 95-98, 39 Pac. 214, HIHN COMPANY v. FLECKNER.

In Action in Ejectment the Essential Allegations are the estate of plaintiff, possession by defendants, and their wrongful withholding of same.

Reaffirmed in *Victor Power etc. Co. v. Cole*, 11 Cal. App. 500, 105 Pac. 759, and *McFarland v. Matthai*, 7 Cal. App. 600, 95 Pac. 180.

Judgment will not be Reversed for Failure to find on material issue if omitted finding must have been adverse to appellant.

Approved in *Gerth v. Gerth*, 7 Cal. App. 737, 95 Pac. 905, in action for the possession of certain promissory notes, no finding was required on certain issues raised by answer where there was no evidence to sustain it.

Denial of a Legal Conclusion Raises no issue of fact.

Approved in *McRae v. Blakeley*, 3 Cal. App. 174, 84 Pac. 681, in action to enjoin maintenance of ditch, allegation that acts complained of were "wrongful and unlawful" was a statement of a conclusion of law.

Distinguished in *Gervaise v. Brookins*, 156 Cal. 112, 103 Pac. 333, where it appeared from finding in the record that case was tried upon theory that value of rents and profits was put in issue by the answer, contrary cannot be urged on appeal.

106 Cal. 98-103, 39 Pac. 213, KRUGER v. LIFE & ANNUITY ASSN.

One Having Lien on Securities in Hands of state treasurer for payment of amount due him on insurance contract can enforce such lien.

Distinguished in *Engwicht v. Pacific States etc. Co.*, 153 Cal. 189, 96 Pac. 9, in action by policy-holder to have amount due him declared lien on fund in hands of state treasurer, all persons interested in the distribution of such fund are necessary parties to the action.

Beneficiary of Insured has Lien on property of insurer for payment of amount of policy.

Reaffirmed in *San Francisco Sav. Union v. Long* (Cal.), 53 Pac. 911.

106 Cal. 107-112, 39 Pac. 323, **FIELD v. ANDRADA.**

Administrator may Bring Action to set aside conveyance by decedent in order to recover means to pay adjudicated claims.

Distinguished in *Farrell v. Puthoff*, 13 Okl. 161, 74 Pac. 97, in action to recover property for heirs of deceased, it was not error to substitute heirs at law as plaintiffs in lieu of administrator.

Relief from Fraudulent Conveyance after death of grantor. See note, 135 Am. St. Rep. 338.

Creditor of Estate has No Lien on Its Assets until his claim has been adjudicated and allowed.

Approved in *Folsom v. Peru Plow etc. Co.*, 69 Neb. 320, 111 Am. St. Rep. 537, 95 N. W. 636, applying rule in action by mortgagee against administrator of deceased mortgagor for possession of chattels mortgaged.

Creditor cannot Maintain Action to Set Aside a fraudulent transfer until his debt has been established by recovery of judgment.

Approved in *Lyden v. Spohn-Patrick Co.*, 155 Cal. 183, 100 Pac. 238, complaint in action to set aside transfer of property by one company to another company, which merely alleged commencement of action against debtor and attachment of the property involved, was insufficient.

106 Cal. 113-129, 46 Am. St. Rep. 221, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, **INGRAM v. COLGAN.**

The State has Inherent Power to Prohibit all things hurtful to the comfort and welfare of society.

Approved in *Matter of Yun Quong*, 159 Cal. 512, 114 Pac. 836, upholding restrictions upon right to use opium and other poisonous drugs named in act to regulate sale and use of poisons, as reasonable and necessary.

Money can be Paid Out of state treasury only in pursuance of express appropriation made by law.

Approved in *State v. Eggers*, 29 Nev. 484, 91 Pac. 824, 16 L. R. A. (n. s.) 630, act fixing amount of salary for chairman of state industrial and publicity commission, which failed to prescribe a maximum expenditure for traveling expenses, was void so far as it authorized such expenses.

Distinguished in *Sweeney v. Commonwealth*, 118 Ky. 919, 82 S. W. 641, expenses of militia when called into active service were payable out of treasury without any special appropriation.

106 Cal. 129-137, 39 Pac. 439, **SAN FRANCISCO & FRESNO LAND CO. v. BANBURY.**

Penalties to be Paid on Redemption of Property from state have nothing to do with delinquency in payment of taxes.

Approved in *Honeycutt v. Colgan*, 3 Cal. App. 355, 85 Pac. 168, applying rule in discussing apportionment between state and county of the graduated penalties or percentages imposed for delinquency in redemption.

Requirement of Giving Notice of Application for deed applies to state as well as private purchaser.

Approved in *Johnson v. Taylor*, 150 Cal. 203, 119 Am. St. Rep. 181, 88 Pac. 904, 10 L. R. A. (n. s.) 818, where law in force at time of tax sale required notice to owner of application for deed, but prior

to tax deed the law was changed dispensing with notice, deed to state without notice passed no title; *Wetherbee v. Johnston*, 10 Cal. App. 266, 101 Pac. 803, deed to state without giving owner notice to redeem before its execution was void.

106 Cal. 137-139, 39 Pac. 436, ALLEN v. ALLEN.

Deed Intended as Security Made at Time when such a deed passed legal title vests absolute title in grantee when debt is barred by limitations.

Reaffirmed in *Green v. Thornton*, 8 Cal. App. 166, 96 Pac. 385.

106 Cal. 142-149, 39 Pac. 599, HENRY v. MERGUIRE.

Delay Beyond Prescribed Time in presenting statement on motion for new trial to judge for settlement is fatal.

Reaffirmed in *Hoehnan v. New York Drygoods Co.*, 8 Idaho, 73, 67 Pac. 798, and *Van Why v. Southern Pacific Co.*, 31 Utah, 19, 86 Pac. 486.

Objection to Settlement must be Urged at time of settlement in order to be available thereafter.

Approved in *Grubb v. Chase*, 158 Cal. 354, 111 Pac. 91, objection interposed to settlement of a statement on ground same had not been presented in time was available when motion for new trial came on for hearing; *Curtin v. Ingle*, 155 Cal. 57, 59, 99 Pac. 481, 482, upholding rule on motion to dismiss appeal because of laches in securing settlement of statement on motion for new trial; *Dernham v. Bagley*, 151 Cal. 219, 90 Pac. 544, question whether requirements of law have been complied with in regard to settlement is primarily for trial court.

Provision for Five Days' Notice of Settlement is only applicable when statement is presented directly to judge.

Reaffirmed in *Curtin v. Ingle*, 155 Cal. 56, 99 Pac. 481.

106 Cal. 156-163, 39 Pac. 535, LOS ANGELES LIGHTING CO. v. LOS ANGELES.

Authority of Agent to Sign Protest need not accompany the protest.

Reaffirmed in *Sedalia v. Scott*, 104 Mo. App. 608, 78 S. W. 279.

Executors are Authorized to Sign Protest against street improvement as "owner."

Approved in *Chan v. South Omaha*, 85 Neb. 438, 133 Am. St. Rep. 670, 123 N. W. 466, executor is an "owner" within meaning of statute authorizing owners, by remonstrating, to deprive city of power to do street work at expense of real property within improvement district.

Protest may be Made Against Part of an improvement.

Distinguished in *Stimson v. Hanley*, 151 Cal. 381, 90 Pac. 946, lowest bidder for entire work to be done is entitled to contract notwithstanding there are lower bidders for particular parts of the work.

106 Cal. 167-170, 39 Pac. 529, 935, GUTIERREZ v. HEBBERD.

Bill of Exceptions on Appeal must be Served on adverse parties.

Approved in *Estate of Young*, 149 Cal. 176, 177, 85 Pac. 146, bill of exceptions to order refusing partial distribution which was not

served on devisees who resisted same in lower court cannot be considered on appeal.

Mandamus as Proper Remedy against public officers. See note, 98 Am. St. Rep. 902.

106 Cal. 173-190, 37 Pac. 630, 39 Pac. 524, **PEOPLE v. ROYCE**.

Mere Depositing of Moneys to His Personal Account by officer of corporation is not embezzlement.

Approved in *State v. Weber*, 31 Nev. 395, 103 Pac. 414, applying rule in prosecution of president of corporation for misappropriating proceeds of treasury stock, where there was no showing he applied the money to his own use or refused to account for same.

Embezzlement. See note, 87 Am. St. Rep. 41.

One Charged With Embezzlement of Money as agent is estopped from denying his principal's right to same.

Approved in *People v. Robertson*, 6 Cal. App. 517, 92 Pac. 499, deputy assessor accused of embezzling money irregularly received in part payment of taxes is estopped from denying he was agent of the county in the transaction.

Estoppel of Public Officer Charged with embezzlement to deny authority to receive money. See note, 23 L. R. A. (n.s.) 761.

Embezzlement is Completed When Trustee fraudulently converts to his own use property of his cestui que trust.

Approved in *Ex parte Vice*, 5 Cal. App. 157, 89 Pac. 984, crime of embezzlement by passenger agent of railroad company had become barred before prisoner was arrested; *Commonwealth v. Kelley*, 125 Ky. 253, 101 S. W. 316, indictment need not allege demand for trust fund or refusal to pay over.

106 Cal. 194-198, 39 Pac. 538, **McDERMOT v. BARTON**.

Commissioners, When Appointed to Sell mortgaged property, possess same powers as sheriffs.

Approved in *Taylor v. Ellenberger* (Cal.), 65 Pac. 833, where decree of foreclosure directed sale to be made by a commissioner, direction of order of sale to the sheriff was a harmless irregularity.

106 Cal. 211-215, 46 Am. St. Rep. 221, 39 Pac. 607, **PEOPLE v. VERDEGREEN**.

Female Under Statutory Age is Incapable of consenting to assault with intent to commit rape.

Approved in *People v. Babcock*, 160 Cal. 540, 117 Pac. 550, offense was complete when accused laid hands upon such a female with the intention of committing rape, though purpose was not accomplished; *People v. Collins*, 5 Cal. App. 655, 91 Pac. 159, upholding information charging assault on child under six years of age; *State v. Jones*, 32 Mont. 447, 80 Pac. 1097, in information charging rape of female under sixteen years, allegation that crime was committed against her consent was mere surplusage; *Ross v. State*, 16 Wyo. 300, 93 Pac. 303, applying rule in prosecution of a man for assault with intent to commit rape on child under six years of age.

Crime of Rape. See note, 96 Am. St. Rep. 789.

106 Cal. 220-223, 39 Pac. 537, **SHAMP v. WHITE**.

Lessee Intending to Exercise Option of renewal must give notice of election before expiration of original term.

Approved in *Loeffler v. Wright*, 13 Cal. App. 229, 109 Pac. 271, in action to have lease with options to renew or purchase declared valid, and to recover damages for withholding possession, complaint failed to show plaintiff was in position to exact performance; *San Pedro Salt Co. v. Hauser Packing Co.*, 13 Cal. App. 3, 108 Pac. 728, under contract to furnish salt for one year with option to renew exercise of option thirty days after expiration of year was not effective; *Wiener v. Graff*, 7 Cal. App. 583, 95 Pac. 168, upon giving notice of exercise of option of renewal, lessee holds for additional term under original lease and not under the notice; *Gray v. Maier & Zobelien Brewery*, 2 Cal. App. 658, 84 Pac. 282, under lease expiring at midnight of September 30th, which provided for renewal at termination thereof, notice of exercise of option to renew given on October 1st was effective; *I. X. L. Carpet Installment House v. Berets*, 32 Utah, 465, 91 Pac. 282, applying rule to lease providing that upon lessee's election "at expiration of the term" lessors would renew.

Holding Over After Expiration of Lease, without formally exercising option for extension or renewal. See note, 29 L. R. A. (n.s.) 175, 176.

Self-serving Declaration Made in Favor of party relying on it without presence of other party is inadmissible.

Approved in *Batcheller v. Whittier*, 12 Cal. App. 267, 107 Pac. 143, statement made by attorney to a mortgagee from whom he was negotiating loan for his client that he had a half interest in the property was inadmissible to prove contingent fee.

106 Cal. 224-237, 39 Pac. 758, PACIFIC MUTUAL LIFE INS. CO. v. FISHER.

Liens for Furnishing Materials Relate to date of beginning to furnish them.

Approved in *Purser v. Cady* (Cal.), 49 Pac. 181, deeds executed in pursuance of sale under judgment foreclosing liens for labor took effect by relation to the time the liens attached; *Farnham v. California etc. Trust Co.*, 8 Cal. App. 270, 96 Pac. 790, where work was commenced and a portion of the materials furnished before deed of trust was executed, liens for same were prior to such deed of trust; *Pacific States Savings etc. Co. v. Dubois*, 11 Idaho, 328, 83 Pac. 515, where mortgage lien attached prior to time laborers commenced work on building, lien of mortgage was prior to liens of such laborers.

Distinguished in dissenting opinion in *Pacific States Savings etc. Co. v. Dubois*, 11 Idaho, 334, 83 Pac. 517, majority holding mortgage lien which attached prior to time lien claimants for labor commenced work was prior to lien of such laborers.

Where Only Part of a Judgment is appealed from, appellate court will not review whole judgment.

Approved in *Allen v. Maxwell*, 56 W. Va. 243, 49 S. E. 249, upholding rule where appeal was taken from specified part of decree set out in notice.

Court has Discretion to Allow reasonable attorneys' fees to each claimant whose lien is established.

Approved in *Hampton v. Christensen* (Cal.), 84 Pac. 204, reaffirming rule; *Pearce v. Albright*, 12 N. M. 210, 76 Pac. 287, upholding finding of court as to reasonable attorney's fee in absence of evidence on the point; *Armijo v. Mountain Elec. Co.*, 11 N. M. 249,

250, 67 Pac. 730, court was not obliged to be governed by amount mentioned in complaint or sworn to by attorneys.

Statute Providing for Forfeiture of Lien by one who willfully makes false claim is penal in character and must be strictly construed.

Approved in California etc. Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 704, 118 Pac. 108, failure of lien claimant to offset against contract price small credit for unused materials was not fatal to lien in absence of proof of willful intent.

Effect of Filing Excessive Mechanic's Lien. See note, 29 L. R. A. (n. s.) 317, 318.

Parties Affected by Judgment must be Served with notice of appeal therefrom.

Approved in Mannix v. Tryon, 152 Cal. 34, 91 Pac. 984, in action against original contractor and owner to foreclose mechanic's lien, on appeal by owner from judgment decreeing lien, original contractor was not adverse party entitled to notice.

Where No Time of Payment is Prescribed by contract, interest must be allowed from time of commencing action.

Approved in Burnett v. Glas, 154 Cal. 260, 97 Pac. 427, upholding allowance of interest prior to judgment where amount due lien claimant was fixed by agreement; Grangers' Union v. Ashe, 12 Cal. App. 759, 108 Pac. 534, in action on open account for goods sold and delivered, allowance of interest on amount of claim from date it was due was error; Farnham v. California etc. Trust Co., 8 Cal. App. 273, 96 Pac. 791, upholding right of lienholders to interest from time of commencing action to foreclose lien.

Miscellaneous.—Cited in Pacific Mut. Life Ins. Co. v. Fisher (Cal.), 39 Pac. 762.

106 Cal. 237-257, 39 Pac. 762, VERNON IRR. CO. v. LOS ANGELES.

Improper Diversion of Water may be Enjoined without a showing of actual damage.

Approved in Anaheim Union Water Co. v. Fuller, 150 Cal. 333, 334, 88 Pac. 981, 11 L. R. A. (n. s.) 1062, reaffirming rule.

The Law Does not Give to Any Riparian Owner a property in the corpus of the water.

Approved in Meng v. Coffee, 67 Neb. 504, 108 Am. St. Rep. 697, 93 N. W. 714, 60 L. R. A. 910, discussing what is a reasonable use of waters of stream for irrigation purposes by one of the owners riparian thereto; Crawford Co. v. Hathaway, 67 Neb. 352, 108 Am. St. Rep. 647, 93 N. W. 790, 60 L. R. A. 889, use of water for irrigation purposes must be reasonable in view of equal rights to such use in other riparian owners.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 741.

Rights of City as Successor of Mexican Pueblo are confined to rights of the pueblo and subsequent confirmation under federal law.

Approved in Los Angeles v. Hunter, 156 Cal. 608, 609, 105 Pac. 757, 758, city of Los Angeles has paramount right to use water of stream upon annexed territory not within limits of original pueblo; Los Angeles v. Los Angeles etc. Milling Co., 152 Cal. 648, 651, 654, 93 Pac. 870, 871, 1135, rights of riparian owners on Los Angeles river are subordinate to rights of city of Los Angeles therein as

successors of old pueblo; *Fellows v. Los Angeles*, 151 Cal. 62, 63, 90 Pac. 140, city of Los Angeles is not exempt from obligation of its predecessor in interest to furnish water taken from Los Angeles river for use in locality outside of such city; *Los Angeles Farming etc. Co. v. Los Angeles*, 217 U. S. 226, 30 Sup. Ct. 456, 54 L. Ed. 744, judgment awarding municipality, as successor of pueblo, rights in stream paramount to those of riparian owners does not interfere with disposition of public lands by United States.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 725.

Liability of Water Companies. See note, 81 Am. St. Rep. 487, 494, 495.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 671.

106 Cal. 257-286, 46 Am. St. Rep. 237, 39 Pac. 610, DE BAKER v. SOUTHERN RY. CO.

Court will Take Judicial Notice of boundaries of city and relative situation of land thereto.

Approved in *State v. Southern Ry. Co.*, 141 N. C. 851, 54 S. E. 296, in prosecution for shipping cattle in violation of quarantine, court judicially noticed line fixed as quarantine line by statute.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 445, 446.

City Alone is Liable for Damages to private property owners resulting from the exercise of municipal power.

Approved in *Engebretson v. Gay*, 158 Cal. 29, 109 Pac. 880, liability for damage resulting from raising grade of street cannot be imposed upon contractor under street improvement contract.

Owner may Erect Levee to Protect His Land from overflow without incurring liability for effect on neighboring land.

Reaffirmed in *Sanguinetti v. Pock*, 136 Cal. 472, 69 Pac. 100.

City has Right to Make Needful and reasonable regulations for the protection of its lands.

Approved in *Merced Falls Gas etc. Co. v. Turner*, 2 Cal. App. 722, 84 Pac. 240, upholding right of city authorities to compel electric lighting company to change the position of its electric lighting poles.

Right to Deflect Stream. See note, 7 L. R. A. (n. s.) 345.

106 Cal. 289-295, 39 Pac. 622, PEOPLE v. JOHNSON.

Where Prosecutrix is Under Age of consent, evidence of her reputation for unchastity is not admissible.

Approved in *People v. Wilmot* (Cal.), 72 Pac. 840, *State v. Hammock*, 18 Idaho, 426, 110 Pac. 169, and *State v. Smith*, 18 S. D. 343, 100 N. W. 741, all reaffirming rule; *Knowles v. State*, 44 Tex. Cr. 327, 72 S. W. 400, applying rule where defendant, who was charged with being father of child of prosecutrix, sought to show another could have been father of such child.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 723.

Court has No Right to Put State of Facts to jury which would bar them from finding intent to be other than as charged.

Approved in *People v. Fernandez*, 4 Cal. App. 325, 87 Pac. 1115, applying rule to instruction that the uncorroborated testimony of female on whom assault was made, "if you believe her testimony to be true, is sufficient to establish charge."

When a Specific Intent is an Element of an offense, it is a fact to be shown like any other fact.

Distinguished in *People v. Jones*, 160 Cal. 370, 117 Pac. 181, in case of murder, proof of the homicide alone establishes the crime with its necessary ingredient of malice.

106 Cal. 302-320, 39 Pac. 617, **PEOPLE v. LEONARD.**

Term of Service of Grand Jurors continues until other jurors are selected and returned.

Approved in *Halsey v. Superior Court*, 152 Cal. 76, 85, 91 Pac. 990, 993, there is no express limitation on the life of a jury, either grand or trial, once regularly drawn and impaneled; *State v. District Court*, 31 Mont. 437, 78 Pac. 772, grand jury organized for year 1903 could return valid indictment in 1904 though jury list for that year had been made and filed before date of indictment.

Though Grand Jury be not Regularly Impaneled, it is not invalid body so as to make indictment found by it void.

Approved in *In re Hatch*, 9 Cal. App. 336, 337, 99 Pac. 399, 400, on application for writ of prohibition, supreme court will not review validity of grand jury which found indictment; *Kitts v. Superior Court*, 5 Cal. App. 469, 90 Pac. 980, where requisite number of jurors regularly summoned were sworn and impaneled, fact that two may not have been assessed on last assessment-roll of county will not operate to invalidate indictment.

Entries in Cash-book Made Under Direction of manager of institution are prima facie evidence of cash on hand.

Approved in *Foster v. United States*, 178 Fed. 175, 101 C. C. A. 485, upholding introduction in evidence of contents of books in prosecution for using mails in furtherance of scheme to defraud; *Busby v. State*, 51 Tex. Cr. 299, 103 S. W. 643, applying rule in prosecution of assistant financial agent of penitentiary for embezzlement of public funds.

Use of Person's Books of Account as evidence upon issues between other parties. See note, 53 L. R. A. 536.

It is the Duty of the Jury to consider the entire charge.

Approved in *State v. Bond*, 12 Idaho, 443, 86 Pac. 49, reaffirming rule; *People v. Besold*, 154 Cal. 370, 97 Pac. 874, in determining whether law was properly declared to jury, court must consider charge as a whole; *People v. Garnett*, 9 Cal. App. 205, 98 Pac. 252, refusing to set aside verdict of guilty because of too general statements in vague and meaningless instruction.

Crime of Embezzlement. See note, 87 Am. St. Rep. 45, 46.

106 Cal. 320-324, 39 Pac. 605, **PEOPLE v. MILLAN.**

Averment of Amount of Money Taken cannot be rendered more definite by averment of its value.

Approved in *Griggs v. United States*, 158 Fed. 574, 85 C. C. A. 596, and *State v. Ryan*, 34 Wash. 604, 76 Pac. 93, both reaffirming rule; *People v. Howard*, 3 Cal. App. 38, 84 Pac. 462, where information alleged money taken was lawful money of the United States, it was not necessary to allege it was gold coin; *State v. Tatum*, 96 Miss. 433, 50 So. 490, allegation that defendant obtained from prosecutor six hundred dollars in money was sufficient.

Verdict Should be so Construed as to Give It effect intended by jury.

Approved in *People v. Morley*, 8 Cal. App. 374, 97 Pac. 85, verdict finding property named in information was burned with intent to

defraud insurance company as charged in the information, was sufficient; *People v. Hines*, 5 Cal. App. 125, 89 Pac. 859, verdict finding defendant guilty as charged would have been sufficient without finding amount of property obtained.

Complaint must Allege Knowledge of Falsity of representations made by defendant in obtaining property.

Approved in *People v. Hines*, 5 Cal. App. 124, 89 Pac. 859, upholding information charging obtaining money under false pretenses with intent to cheat and defraud.

106 Cal. 324-327, 39 Pac. 604, GRANT v. SUPERIOR COURT.

Writ of Prohibition will not Issue to arrest proceedings in inferior court if there be a plain, speedy and adequate remedy at law.

Approved in *Anglo-Californian Bank v. Superior Court*, 153 Cal. 756, 96 Pac. 804, order directing payment of money to receiver of insolvent bank notwithstanding claims of interveners to part of the funds is not reviewable in certiorari proceedings; *Hamberger v. Police Court*, 12 Cal. App. 154, 155, 106 Pac. 895, upholding action of superior court in refusing to issue writ to police court where judgment sought was an ordinary money judgment for goods sold; *Burge v. Justice's Court*, 11 Cal. App. 215, 104 Pac. 582, superior court improperly issued writ of prohibition to justice's court for want of jurisdiction because of service of summons out of county; *California etc. Assn. v. Superior Court*, 8 Cal. App. 713, 97 Pac. 770, prohibition will not lie to restrain proceedings under order of court appointing receiver to preserve assets of corporation.

Writ of Prohibition. See note, 111 Am. St. Rep. 957.

Order Fixing Compensation of Receiver and directing it paid out of fund in receiver's hands is appealable.

Approved in *Nutter v. Brown*, 58 W. Va. 244, 52 S. E. 91, 1 L. R. A. (n. s.) 1083, reaffirming rule; *Title Ins. etc. Co. v. California Dev. Co.*, 159 Cal. 490, 491, 493, 114 Pac. 841, 842, orders authorizing issuance of receiver's certificates, to dispose of same and expend proceeds, are not final judgments reviewable on appeal from such orders; *Canadian Bank of Commerce v. Wood*, 13 Idaho, 802, 93 Pac. 259, order allowing and disallowing claims against an estate, and directing receiver to pay claims allowed and distribute balance of fund in his hands, is appealable; *Bennett v. Thorne*, 36 Wash. 262, 78 Pac. 939, 68 L. R. A. 113, in proceeding by receiver to assess stockholders of insolvent bank for benefit of creditors, appeal lies from decree fixing amount of debts and determining creditors' right to assessment.

106 Cal. 327-328, 39 Pac. 602, WICKERSHAM v. CRITTENDEN.

Majority of Directors cannot Bind Corporation to uphold wrongful acts of such majority.

Approved in dissenting opinion in *Kanneberg v. Evangelical Creed Congregation*, 146 Wis. 620, 131 N. W. 357, majority holding corporation liable for fees of attorneys employed by majority of its members to defend litigation in which minority were successful.

Salary Voted by Trustees to One of their number as president is unlawful.

Approved in *Schaffhauser v. Arnholt & Schaefer Brewing Co.*, 218 Pa. 301, 67 Atl. 418, reaffirming rule; *McConnell v. Combination Min. etc. Co.*, 30 Mont. 257, 258, 104 Am. St. Rep. 703, 76 Pac. 200, resolu-

tion of four directors of corporation voting three of their number salaries and back pay was void.

106 Cal. 332-337, 39 Pac. 628, RAGSDALE v. NAGLE.

Contracts, Consideration for Which has partly failed or is partly illegal. See note, 117 Am. St. Rep. 498.

Effect of Incorporation by Covenantees on contract not to compete in certain business. See note, 9 L. R. A. (n. s.) 979.

Validity of Agreement in Restraint of Trade, ancillary to sale of business or profession, as affected by territorial scope. See note, 24 L. R. A. (n. s.) 932.

Divisibility in Respect of Time or territorial extent of contracts in restraint of trade. See note, 24 L. R. A. (n. s.) 943.

106 Cal. 337-342, 39 Pac. 609, HAWLEY v. GRAY BROS. ETC. PAVING CO.

Miscellaneous.—Cited in *Hawley v. Gray Bros. etc. Paving Co.* (Cal.), 48 Pac. 1114, and *Hawley v. Gray Bros. etc. Co.* (Cal.), 42 Pac. 457.

106 Cal. 343-351, 39 Pac. 624, ESTATE OF WAX.

Attorney Signing Will as Attesting Witness may be required to testify concerning any facts connected therewith.

Approved in *Estate of Dominici*, 151 Cal. 187, 90 Pac. 451, testimony of attorney who drew will, for purpose of explaining latent ambiguity as to identity of a beneficiary, was not the disclosure of a privileged communication.

Distinguished in *Hardy v. Martin*, 150 Cal. 344, 345, 89 Pac. 113, in action to set aside a deed as fraudulent, letters of attorney who had witnessed contemporaneous agreement stating terms on which deed was made, though written long prior to the transaction, were inadmissible.

Privilege of Communications to Attorney during preparation of will. See note, 17 L. R. A. (n. s.) 110.

Nonexpert Opinions as to Sanity or Insanity. See note, 38 L. R. A. 727, 733.

106 Cal. 352-355, 39 Pac. 781, WARREN v. RIDDELL.

Objection to Approval and Acceptance of street work must first be made by appeal to board of supervisors.

Approved in *Oak Hill Water Co. v. Gillette*, 13 Cal. App. 608, 110 Pac. 318, order of court foreclosing lien asserted by street contractors will not be disturbed because of errors in levy of assessment which could have been corrected by appeal to city council; *Bates v. Hadamson*, 2 Cal. App. 577, 84 Pac. 53, owners who fail to appeal to city council to correct error in amount of street assessment cannot complain of such error in action to foreclose lien of assessment; *Blackwell v. Coeur D'Alene*, 13 Idaho, 369, 90 Pac. 356, property owner objecting to assessment by sewer improvement district must make his protest within the time designated by statute.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 908.

106 Cal. 355-365, 39 Pac. 794, DIRECTORS FALLBROOK IRR. DISTRICT v. ABILA.

Decree of Superior Court Approving organization of irrigation district is conclusive against attack thereon.

Reaffirmed in *Miller v. Perris Irr. District*, 85 Fed. 701.

"Owner" Means One Having Full Proprietorship over property

Approved in *Williams v. San Pedro*, 153 Cal. 52, 94 Pac. 237, plaintiff, in action to quiet title to tide lands, who failed to show title in himself, could not prevail; *Hyde v. Shine*, 199 U. S. 82, 25 Sup. Ct. 760, 50 L. Ed. 90, defining "owner" as used in act of June 4, 1897, providing that owner of tract included in forest reservation may relinquish same to government.

Wife is not Owner of Community Property in any legal sense.

Approved in *Estate of Moffitt*, 153 Cal. 363, 95 Pac. 1026, 20 L. R. A. (n. s.) 207, upholding inheritance tax upon interest of widow in community property of herself and husband; *Hall v. Johns*, 17 Idaho, 228, 105 Pac. 72, interest of wife is so vested husband cannot deprive her of it by alienation for that purpose.

Miscellaneous.—Cited in *Blackburn v. Abila* (Cal.), 39 Pac. 797.

106 Cal. 365-372, 39 Pac. 793, FALLBROOK IRR. DISTRICT v. ABILA.

Burden of Proving Issues upon Which Corporation asks judgment is upon the corporation.

Approved in *Ahern v. High Line Irr. Dist.*, 39 Colo. 418, 89 Pac. 965, upholding rule in special proceeding by directors of irrigation district to have validity of its organization and bond issue determined.

106 Cal. 373-377, 39 Pac. 797, SHERMAN v. SANDELL.

Errors in Findings or Admission of Evidence on irrelevant issues are immaterial.

Reaffirmed in *Collins v. Gray*, 154 Cal. 135, 97 Pac. 144.

Where Evidence on Material Issue is Conflicting finding of trial court is conclusive on appellate court.

Approved in *Wadleigh v. Phelps*, 149 Cal. 638, 87 Pac. 98, refusing to disturb finding of trial court on conflicting evidence that deed was a mortgage.

Whether the Evidence is Sufficient to Change Character of deed is a question largely for trial court.

Approved in *Fagan v. Lentz*, 156 Cal. 686, 105 Pac. 953, refusing to disturb finding of trial court, in action to obtain reconveyance of land deeded by brother to sister without consideration, that such conveyance was not intended as a gift; *Bollinger v. Bollinger*, 154 Cal. 703, 99 Pac. 200, evidence was sufficient to establish a trust by parol under conveyance absolute in its terms; *Couts v. Winston*, 153 Cal. 688, 96 Pac. 358, finding of court that deed was in fact a mortgage cannot be overthrown merely because numerous witnesses testified to the contrary.

Equity will Grant Relief Where an Advantage has been taken through the influence of confidential relations.

Approved in *Cardiff v. Marquis*, 17 N. D. 119, 114 N. W. 1091, upholding rule where daughter conveyed property to her father under oral agreement that it was given in trust for her.

Absolute Conveyance cannot be Turned into trust by subsequent oral declarations of the parties.

Reaffirmed in *Gaines v. Chew*, 167 Fed. 635.

106 Cal. 377-381, 39 Pac. 779, YOUNGER v. YOUNGER.

Adoption Regularly had Changes Status of Child and its relation to its natural parents ceases.

Distinguished in *Evans v. Evans*, 154 Cal. 646, 98 Pac. 1045, divorce court did not lose jurisdiction to modify its decree as to custody of children by fact that at time of modification an application for letters of guardianship of the children was pending in another county; *Miller v. Higgins*, 14 Cal. App. 163, 111 Pac. 406, jurisdiction of divorce court to make order for custody of child cannot be defeated by removal of child to another jurisdiction for the purpose of there invoking adoption proceedings.

Validity of Adoption Without Consent of parents. See note, 30 L. R. A. (n. s.) 151.

106 Cal. 381-385, 39 Pac. 778, LEWIS v. BURNS.

Evidence of Declarations of Parties Made contemporaneously with transaction, if explanatory of same, are admissible as part of the res gestae.

Approved in *Smith v. Glenn* (Cal.), 62 Pac. 183, declarations of owner of land at time he was having survey made were admissible in action against his grantee to abate nuisance consisting of a fence on strip in dispute; *Northwestern Redwood Co. v. Dicken*, 13 Cal. App. 698, 110 Pac. 594, fact that a formal transfer had not taken place at time declarations were made would not extend the transaction so as to make such declarations admissible under the rule of res gestae.

106 Cal. 385-392, 39 Pac. 786, HENDERSON v. O'CONOR.

Trust in Proceeds of Collection by Bank when insolvent. See note, 32 L. R. A. 717.

106 Cal. 392-399, 39 Pac. 807, UTT v. FREY.

Right Acquired by Peaceable Possession of Land and appropriation of water dates from time of possession and appropriation.

Approved in *Evans Ditch Co. v. Lakeside Ditch Co.*, 13 Cal. App. 132, 108 Pac. 1032, reaffirming rule; *Head v. Hale*, 38 Mont. 309, 100 Pac. 224, applying rule where there was no proof of contractual relation between owner and original appropriator of the water.

Gain or Loss of Title by Abandonment, not including questions under abandonment. See note, 135 Am. St. Rep. 892.

Abandonment or Loss of Rights of Prior Appropriators of water. See note, 30 L. R. A. 265, 267.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 675.

106 Cal. 400-409, 39 Pac. 775, EX PARTE MANSFIELD.

Supervisors have the Power to Require Licenses of those engaged in the business of selling or giving away liquor.

Approved in *Cuzner v. The California Club*, 155 Cal. 310, 100 Pac. 871, 20 L. R. A. (n. s.) 1095, bona fide social club engaged in selling, serving or giving away liquors to its members is not within purview

of ordinance imposing license tax on business of selling liquor; In re Pierce, 12 Cal. App. 326, 107 Pac. 589, construing general county ordinance as imposing license tax upon the business of selling liquor and not upon individual sales.

Violation of Municipal Ordinance Imposing License is a crime against the general law.

Approved in Ex parte Bagshaw, 152 Cal. 703, 93 Pac. 865, town ordinance requiring taking out of license to conduct liquor business is a "law of this state" within meaning of section 435 of the Penal Code; County of Plumas v. Wheeler, 149 Cal. 768, 87 Pac. 913, upholding ordinance requiring payment of license fee without making it illegal to carry on business without such license; In re Miller, 13 Cal. App. 566, 110 Pac. 139, under county ordinance imposing tax on business of herding cattle without denouncing nonpayment as a crime, one charged with nonpayment cannot be released on habeas corpus; Ex parte Sweetman, 5 Cal. App. 578, 579, 580, 90 Pac. 1070, where conviction was had for selling liquor without a license under town ordinance containing void penal clause, penalty fixed by general law was properly imposed.

Power of Municipality to Punish Acts already covered by statute. See notes, 110 Am. St. Rep. 151; 17 L. R. A. (n. s.) 63.

106 Cal. 409-419, 39 Pac. 802, SHENANDOAH MINING ETC. CO. v. MORGAN.

Recovery must be had, if at All, upon Cause of action alleged in complaint.

Approved in Eidinger v. Sigwart, 13 Cal. App. 674, 110 Pac. 524, where complaint was declared upon a quantum meruit and proof showed claim was based upon an express contract, variance was clearly shown; Bailey v. Brown, 4 Cal. App. 517, 88 Pac. 519, upholding nonsuit granted on ground of variance in action for breach of promise to marry, where complaint alleged agreement to marry at any time and proof showed he agreed to marry her after her mother's death.

106 Cal. 420-426, 39 Pac. 790, HOLLEY v. ORANGE COUNTY.

Only Duties of a Ministerial Character, not involving the exercise of discretion, may be delegated.

Approved in Trinity County v. Mendocino County, 151 Cal. 285, 90 Pac. 687, applying rule to statute establishing boundary lines of counties which provided for employment of surveyor to mark the line; Moore v. Wilson, 84 Kan. 749, 115 Pac. 550, duties devolving on livestock sanitary commissioner could not be intrusted to a deputy.

Legislature may Provide for and Compel local improvements.

Approved in Billings Sugar Co. v. Fish, 40 Mont. 278, 106 Pac. 573, 26 L. R. A. (n. s.) 973, upholding special assessments for the construction of a drainage system levied on the land specially benefited.

Charge Imposed by Law upon Assessed Value of all property in a district is a tax.

Reaffirmed in Potter v. Santa Barbara, 160 Cal. 355, 116 Pac. 1103.

Judicial Power Over Eminent Domain. See note, 22 L. R. A. (n. s.) 164.

Local Assessments for Benefits on Property exempt from general taxation. See note, 35 L. R. A. 34.

106 Cal. 427-434, 39 Pac. 805, IN RE WELOH.

Executor cannot Appeal from Final Decree on ground property is improperly distributed.

Reaffirmed in *In re Coursens' Estate* (Cal.), 65 Pac. 967.

Right to Family Allowance is Absolute and not dependent upon a showing of necessity.

Approved in *In re Pugsley*, 27 Utah, 495, 76 Pac. 562, upholding right of widow to allowance though portion of real estate of deceased has been set aside to her as her share.

Widow Does not Forfeit Her Right to family allowance by delay in demanding it.

Approved in *Estate of Fretwell*, 154 Cal. 638, 98 Pac. 1059, upholding rule where allowance was not asked for until letters of administration had been granted more than three years.

Distinguished in *German v. Heath*, 139 Iowa, 56, 116 N. W. 1053, claim of wife against estate of husband for support during period while he was insane was barred by statute of limitations.

Partial Distribution of an Estate cannot be had while in the hands of a special administrator.

Reaffirmed in *In re Welch's Estate* (Cal.), 41 Pac. 791.

106 Cal. 434-440, 39 Pac. 788, IN RE HEYDENFELDT.

Mortgage Debt on Property Previously Deeded to child is not charge on estate unless authorized by will.

Approved in *Estate of Wells*, 7 Cal. App. 517, 518, 94 Pac. 857, where will contained no direction for payment of debts except funeral expenses and expenses of last illness, payment by executor of note securing mortgage on land conveyed by gift deed to wife of testator was improper.

Miscellaneous.—Cited in *Ashton v. Zeila Mining Co.*, 134 Cal. 409, 66 Pac. 494.

106 Cal. 441-451, 39 Pac. 853, HEWES v. GERMAIN FRUIT CO.

Measure of Damages for Breach of Contract by buyer is difference between contract price and value of the property.

Approved in *Welch v. Nichols*, 41 Mont. 441, 110 Pac. 91, estimating damages where, on breach by buyer, seller exercised his option to sell the property as his own.

Measure of Damages for Breach of contract to buy or sell does not include interest.

Approved in *Krasilnikoff v. Dundon*, 8 Cal. App. 412, 97 Pac. 174, reaffirming rule; *Morrell v. San Tomas Drying etc. Co.*, 13 Cal. App. 313, 109 Pac. 635, interest on damages sustained by reason of breach of contract to purchase was not allowable; *Ellsworth v. Knowles*, 8 Cal. App. 635, 97 Pac. 692, interest should not have been allowed on damages for seller's breach of contract.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 48, 49.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 335.

106 Cal. 451-453, 39 Pac. 756, HALL v. KAUFFMAN.

Acceptance of Land as Public Highway may be established by evidence of its user by public.

Approved in *Smith v. Glenn* (Cal.), 62 Pac. 183, evidence was insufficient to show dedication of strip shown on map for use as highway.

Road Commissioner is Proper Party to bring action for abatement of obstruction of highway.

Distinguished in *Lincoln County v. Fish*, 38 Wash. 107, 80 Pac. 435, actions to enjoin obstruction of highway should be brought in name of county.

106 Cal. 453-457, 39 Pac. 756, ESTATE OF DAVIS.

Surviving Wife Who has Relinquished Her Right of inheritance by signing articles of separation cannot succeed to any portion of estate of husband.

Approved in *Estate of Edelman*, 148 Cal. 236, 238, 113 Am. St. Rep. 231, 82 Pac. 963, where agreement between husband and wife to separate and relinquish property rights was lived up to during wife's lifetime, question of its fairness could not be raised by husband after her death; *Estate of Warner*, 6 Cal. App. 364, 92 Pac. 192, by relinquishing her rights as heir, wife relinquished her right to a part of the community property; *Estate of O'Keeffe*, 3 Cof. Prob. 455, 456, construing stipulation signed by wife in her divorce proceeding, as not constituting a waiver of her right to inherit.

The Right to Administer Follows the Right to the personal property.

Approved in *Estate of Crites*, 155 Cal. 393, 101 Pac. 316, granting letters to child of testator taking under will, in preference to widow who was to take nothing under the will; *Cooper v. Cooper*, 43 Ind. App. 622, 88 N. E. 342, creditor is entitled to preference over relative who has no interest in estate; *Estate of Crockett*, 4 Cof. Prob. 333, sister of testatrix who is contesting probate of will and who is sole heir was entitled to special letters as against public administrator.

Husband and Wife may Enter into Contract regarding their property rights, both present and future.

Approved in *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 719, 103 Pac. 194, reaffirming rule.

Validity and Effect of Separation Agreements. See note, 83 Am. St. Rep. 875, 880.

106 Cal. 458-476, 39 Pac. 864, PEOPLE v. GIBSON.

Rulings Referred to but not Argued in brief will not be examined by supreme court.

Approved in *People v. Pembroke*, 6 Cal. App. 594, 92 Pac. 671, and *Patterson v. Rubenstein*, 6 Cal. App. 444, 92 Pac. 402, both reaffirming rule; *Bell v. Staacke*, 151 Cal. 548, 91 Pac. 324, applying rule where there was no reference in transcript or brief to page or folio of seven hundred and twenty-three page transcript, where ruling complained of could be found.

Distinguished in *Hill v. Barner*, 8 Cal. App. 68, 96 Pac. 116, where it was apparent from necessary examination of record that alleged error was prejudicial, rule did not preclude considering same.

Charge of Court must be Taken as a whole.

Approved in *Hayden v. Consolidated Min. etc. Co.*, 3 Cal. App. 139, 84 Pac. 423, instructions given in action by owner for injuries to irrigation ditch in possession of tenant who had agreed to repair were not contradictory; *People v. Davis*, 1 Cal. App. 14, 81 Pac. 718, in prosecution for burglary, instruction was not objectionable because of omitted elements stated in other instructions.

All Intendments of Law are in Favor of regularity of proceedings in court below.

Approved in dissenting opinion in *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 711, 87 Pac. 379, majority holding where court ruled on merits of objection made immediately after answer, and no point was made as to timeliness of objection, such point was barred.

106 Cal. 483-485, 39 Pac. 863, **SHEARMAN v. JORGENSEN.**

Receipt of Notice Served by Mail is equivalent to personal service.

Distinguished in *Prefumo v. Russell*, 148 Cal. 454, 83 Pac. 811, where proposed amendments to bill of exceptions were served by mail, fact that receipt of same was acknowledged did not make the service equivalent to a personal service.

Judgment of Default cannot be Set Aside upon mere abstract allegation of inadvertence.

Approved in *Victor Power etc. Co. v. Cole*, 11 Cal. App. 502, 105 Pac. 760, upholding refusal to vacate default judgment for failure to answer, where one member of firm failed to note extension of time on office calendar and left town without notifying his partner thereof; *Lunnun v. Morris*, 7 Cal. App. 715, 95 Pac. 909, on application for relief from mistake of counsel, character of mistake must be ascertained by court from facts before it; *People v. Simmons*, 7 Cal. App. 564, 95 Pac. 49, affidavit on motion to be relieved from failure to present proposed bill of exceptions in time must present facts showing excusable mistake.

Neglect of Counsel as Imputable to Party, under statute providing for relief from surprise judgment. See note, 27 L. R. A. (n. s.) 858.

106 Cal. 486-493, 39 Pac. 941, **McCABE v. GOODWIN.**

Patent cannot be Attacked Collaterally by parties showing no color of title in themselves.

Approved in dissenting opinion in *Williams v. San Pedro*, 153 Cal. 52, 94 Pac. 237, majority holding, in action to quiet title, persons not in privity with paramount source of title were not precluded from questioning validity of certificate of purchase of state tide lands.

Property Evidenced by Certificate of purchase, as between the parties, is an interest in real property.

Reaffirmed in *Albert v. Albert*, 12 Cal. App. 273, 107 Pac. 159.

Designation of Land on Official township plat is determinative of its character.

Approved in *Foss v. Johnstone*, 158 Cal. 133, 110 Pac. 300, parol evidence was inadmissible to prove land was in fact swamp land which was not so designated on approved township plat.

Certificate of Purchase of Public Land is prima facie evidence of title.

Approved in *Blakely v. Kingsbury*, 6 Cal. App. 713, 93 Pac. 132, by making full payment, applicant to purchase public land cannot prevent a contest or render state a mere trustee of the legal title; *Miller v. Engle*, 3 Cal. App. 329, 85 Pac. 160, the state is not precluded from entertaining a contest because one of the applicants paid in full at the time he made application; *Pardee v. Schanzlin*, 3 Cal. App. 601, 86 Pac. 814, *arguendo*.

106 Cal. 493-498, 39 Pac. 862, ESTATE OF ROBINSON.

Mere Filing of Opposition to Probate which is abandoned before issues of fact are raised thereon does not constitute a "contest."

Approved in *Estate of Hite*, 155 Cal. 442, 101 Pac. 445, 21 L. R. A. (n. s.) 953, action of legatee in filing opposition to probate and moving to strike out proponent's answer thereto amounted to a contest by which she forfeited her legacy under will.

Trial by Jury may be had in Contest after probate, where probate had been granted without previous contest.

Approved in *Estate of Dolbeer*, 153 Cal. 659, 96 Pac. 269, one contesting a will after trial by jury on issues raised in probate proceedings is not entitled to trial by jury.

After Demand Therefor has Been Denied, right to jury trial is not waived by going to trial before the court.

Approved in *Buckley v. Hammond*, 29 B. L. 448, 72 Atl. 391, upholding rule where exception to court's action in refusing jury trial was reserved; *Cleveland v. Smith*, 102 Tex. 492, 119 S. W. 843, in action of trespass to try title, error of court in refusing jury trial cannot be considered harmless.

Who may Contest a Will. See note, 130 Am. St. Rep. 203.

106 Cal. 498-500, 39 Pac. 859, SAN JOSE IMPROVEMENT CO. v. AUZERAIS.

Resolution of Intention Which Falls to describe the work is void.

Approved in *Crouse v. Barrows*, 156 Cal. 155, 103 Pac. 895, resolution which failed to specify character of materials to be used in laying sidewalk and constructing curb was fatally defective; *Pacific Paving Co. v. Verso*, 12 Cal. App. 367, 107 Pac. 592, assessment levied for street work was void where limits of district to be improved was not described with common certainty in notice of intention; *Lambert v. Cummings*, 2 Cal. App. 645, 84 Pac. 267, resolution of intention declaring street should be macadamized with class C macadam, when no class C rock had been approved by trustees, was fatally defective.

Miscellaneous.—Cited in *San Jose Imp. Co. v. De Saisset* (Cal.), 39 Pac. 860, and *San Jose Imp. Co. v. Palomares* (Cal.), 39 Pac. 860.

106 Cal. 500-505, 39 Pac. 937, PEOPLE ex rel. BEASLEY v. SAUSALITO.

Intention of Voter must be Expressed in the manner prescribed by law.

Approved in *Murphy v. San Luis Obispo* (Cal.), 48 Pac. 977, where ordinance required voter to write or print "Yes" or "No" after proposition to be voted on, stamping a cross opposite printed word "Yes" or "No" invalidated ballots; *Cross v. Keathley*, 119 Tenn. 579, 105 S. W. 857, ballots containing, in addition to the matter prescribed by

law, the word "for" preceding name of office, and other additional printed matter, were improperly counted.

Marking Official Ballot. See note, 47 L. R. A. 814, 820, 823, 827.

106 Cal. 506-509, 39 Pac. 857, **DIXON v. CARDOZO.**

Judgments for or Against Insane Persons. See note, 130 Am. St. Rep. 844.

106 Cal. 509-514, 39 Pac. 801, **LOVEREN v. LOVEREN.**

Collusive Agreement Between Parties to divorce action is against public policy and void.

Approved in *Pereira v. Pereira*, 156 Cal. 5, 134 Am. St. Rep. 107, 103 Pac. 490, 23 L. R. A. (n. s.) 880, contract between husband and wife who had made up their former differences, but which was intended to facilitate dissolution of marriage tie, was void.

Validity of Contract to Compromise pending or contemplated divorce suit. See note, 60 L. R. A. 409, 417.

Contracts, Consideration for Which has partly failed or is partly illegal. See note, 117 Am. St. Rep. 524.

106 Cal. 514-540, 39 Pac. 922, **SAVINGS & LOAN SOCIETY v. BURNETT.**

Conclusion of Law cannot Stand if specific facts found do not support it.

Approved in *Emerson v. Yosemite Gold Min. etc. Co.*, 149 Cal. 59, 85 Pac. 125, reaffirming rule; *Dorris v. McManus*, 4 Cal. App. 153, 87 Pac. 289, in suit to quiet title, where court found specific facts showing ownership, and also found generally who was the owner, the evidence was sufficient to support the specific facts found.

Conclusion of Law Does not Lose its character by reason of being placed among the findings of fact.

Approved in *Lange v. Waters*, 156 Cal. 144, 103 Pac. 890, where so-called conclusions of law were essentially findings of fact, their sufficiency to support the judgment could be attacked on appeal; *People v. McCue*, 150 Cal. 198, 88 Pac. 900, in action to abate obstruction of highway, finding of court that street was a public highway could not be treated as a conclusion of law; *Adams v. Hopkins* (Cal.), 69 Pac. 235, findings (in the conclusions of law) as to ownership and that the action is barred by statute of limitations are to be regarded as findings of ultimate facts; *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 110, 93 Pac. 902, where question of ownership of easement in stairway was determined by construction of a deed, it was a question of law to be determined from judgment-roll alone; *Towle v. Sweeney*, 2 Cal. App. 32, 83 Pac. 75, applying rule to finding upon defense of statute of limitations set up in answer.

Taking of Note for Pre-existing Debt is not payment, unless it be so agreed.

Approved in *Grangers' Bank of California v. Shuey* (Cal.), 55 Pac. 683, where bank took mortgage as security for an overdraft, and later a note for amount due on the draft, such note was not given in final payment; *Menzel v. Primm*, 6 Cal. App. 211, 91 Pac. 757, note accepted "in lieu of the sum of \$2,500," due under contract of sale of mine, was merely given as evidence of the indebtedness payable at maturity.

Lien for Optional Advances Made under deed of trust without actual knowledge of later encumbrance is superior to lien of later encumbrancer.

Approved in *Valley Lumber Co. v. Wright*, 2 Cal. App. 291, 84 Pac. 59, where it was obligatory upon lender under deed of trust on land to make advances for labor and materials to be used in erecting building, lien of such deed was superior to mechanics' liens on the property; *The Seattle*, 170 Fed. 288, 95 C. C. A. 480, where by terms of first mortgage it was made optional with mortgagee to make or refuse future advances, advancements made after date of junior lien were prior thereto.

Mortgages to Secure Future Advances. See note, 116 Am. St. Rep. 692.

Deed Executed to Trustees to secure indebtedness to third party conveys the title for the purposes of the trust.

Disapproved in *Sacramento Bank v. Murphy*, 158 Cal. 396, 115 Pac. 235, action brought to construe trust deed and direct its enforcement is not subject to plea of statute of limitations; *Travelli v. Bowman*, 150 Cal. 590, 89 Pac. 348, fact that debt secured has outlawed does not affect the title of trustee and will not prevent court from reforming such deed; *Brown v. Commonow*, 17 N. D. 88, 114 N. W. 729, questioning whether such an instrument will operate to transfer the legal title to the trustee.

Against a Fact Proved to the Contrary, a disputable presumption has no weight.

Approved in *Ruth v. Krone*, 10 Cal. App. 773, 103 Pac. 961, and *Keating v. Morrissey*, 6 Cal. App. 168, 91 Pac. 679, both holding it was within exclusive province of jury to decide whether evidence offered was sufficient to overcome presumption of consideration for note.

Burden of Proving Want of Consideration. See note, 135 Am. St. Rep. 774.

Sales Under Powers in Mortgages and trust deeds. See note, 92 Am. St. Rep. 583.

106 Cal. 541-547, 39 Pac. 931, **SARGENT v. SARGENT.**

Court has Power to Vary or Modify its decree in divorce proceedings as to care and custody of minor children.

Approved in *Black v. Black*, 149 Cal. 225, 86 Pac. 506, because court adopted agreement of parties as to disposition of children, its power to subsequently modify such decree was not abridged.

Validity and Effect of Separation Agreements. See note, 83 Am. St. Rep. 881.

106 Cal. 554-562, 39 Pac. 944, **PEOPLE v. FREDERICKS.**

Failure to Renew Motion for Change of venue, which has been temporarily denied only, is an abandonment and waiver of it.

Reaffirmed in *People v. Staples*, 149 Cal. 412, 86 Pac. 888.

Evidence is Admissible as to Pursuit and capture of defendant immediately after homicide.

Approved in *State v. Spaugh*, 200 Mo. 600, 98 S. W. 63, in prosecution for murder, evidence that immediately after the killing defendants armed themselves, fled to the mountains and evaded arrest, was admissible.

Order Denying Challenge to Juror on ground of actual bias will not be reviewed, unless palpable abuse of discretion is shown.

Approved in *People v. Loper*, 159 Cal. 11, 112 Pac. 722, and *People v. Maughs*, 8 Cal. App. 113, 96 Pac. 410, both reaffirming rule; *People v. Riggins*, 159 Cal. 117, 112 Pac. 864, inquiry into juror's ability to disregard actual bias is not proper where the prejudice consisted of an opinion that defendant was guilty of a murder of which he had been acquitted; *People v. Ryan*, 152 Cal. 371, 92 Pac. 856, where juror's answers as to his competency were contradictory, decision of trial court was conclusive; *People v. Ruef*, 14 Cal. App. 592, 114 Pac. 61, the reading in a newspaper of evidence given before grand jury did not disqualify juror from acting.

106 Cal. 562-566, 39 Pac. 860, IN RE EVANS.

Judicial Proceedings Should be so Construed as to preserve and protect the rights and interests affected thereby.

Approved in *Cubitt v. Cubitt*, 74 Kan. 357, 86 Pac. 477, clerical error by which name of mother was written in order of adoption, where name of adopting parent should have been written, should be disregarded.

Right of Adopted Children to Inherit. See notes, 118 Am. St. Rep. 686; 3 Cof. Prob. 535.

106 Cal. 566-573, 39 Pac. 933, HOPKINS v. CONTRA COSTA CO.

Statements in One Count cannot Aid Another, unless they are expressly referred to and adopted as part of it.

Reaffirmed in *Cameron v. Ah Suong*, 8 Cal. App. 316, 96 Pac. 1027, and *Schoner v. Allen*, 25 Okl. 24, 105 Pac. 192.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 65.

106 Cal. 580-586, 39 Pac. 929, CHEVALIER v. CUMMINGS.

Effect of Insolvency Statutes upon Mortgage or sale preferring creditors. See note, 37 L. R. A. 466.

Participation in Fraud of Vendor which will invalidate transfer for good consideration as against creditors. See note, 32 L. R. A. 58.

106 Cal. 589-594, 39 Pac. 936, HOLBROOK, MERRILL & STETSON v. SUPERIOR COURT.

On Appeal from Justice's Court on questions of law and fact, superior court has jurisdiction for all purposes.

Approved in *Armantage v. Superior Court*, 1 Cal. App. 134, 136, 81 Pac. 1034, 1035, where judgment was rendered by justice without having given notice of trial, superior court nevertheless had jurisdiction on appeal.

Writ of Prohibition will not Issue unless there be no plain, speedy and adequate remedy at law.

Approved in *Hamberger v. Police Court*, 12 Cal. App. 155, 106 Pac. 895, upholding denial of application for writ where judgment sought in police court was ordinary money judgment for goods sold.

Writ of Review will not Lie where there is no excess of jurisdiction.

Approved in *Wetzel v. Superior Court*, 3 Cal. App. 409, 85 Pac. 859, judgment will not be reversed, on certiorari, for errors on rulings occurring at the trial.

106 Cal. 594-602, 39 Pac. 946, **BORDERRE v. DEN.**

Agency to Sell Land must be Proved by written instrument subscribed by owner.

Reaffirmed in *Thompson v. Burns*, 15 Idaho, 601, 99 Pac. 121.

106 Cal. 602-608, 46 Am. St. Rep. 255, 39 Pac. 950, **COTTER v. LINDGREN.**

Liability for Act of Servant Does not Depend upon whether or not servant was in general employ of third person.

Approved in *Stewart v. California Imp. Co.* (Cal.), 61 Pac. 281, city was liable for injury to horse frightened by act of engineer in operating steam roller which had been hired by city from an improvement company; *Parkhurst v. Swift*, 31 Ind. App. 533, 68 N. E. 624, elevator company was liable for negligent act of conductor of elevator, though such servant was in general employ of owner of building.

Which of Two or More Persons is Master of another conceded to be servant of one. See note, 37 L. R. A. 39.

106 Cal. 616-620, 39 Pac. 1064, **LOFTUS v. FISCHER.**

Relief from Mistake of Law as to Effect of instrument. See note, 28 L. R. A. (n.s.) 849, 897.

106 Cal. 623-627, 40 Pac. 12, **LION v. McCLORY.**

Expression of Opinion as Fraud. See note, 35 L. R. A. 419.

106 Cal. 628-638, 46 Am. St. Rep. 259, 39 Pac. 1073, 28 L. R. A. 591, **PEOPLE v. BUTTON.**

Withdrawal of Assailant must be Known to adversary before he can claim right of self-defense.

Approved in *State v. Shockley*, 29 Utah, 39, 110 Am. St. Rep. 639, 80 Pac. 869, so long as man who had entered car for purpose of robbery kept his gun in his hand, any statement of his as to intent to discontinue assault need not be accepted; dissenting opinion in *State v. Shockley*, 29 Utah, 87, 88, 80 Pac. 886, 887, majority holding statement of one who had entered car for purpose of robbery as to his intent to discontinue assault need not be accepted so long as he held his gun in his hand.

Right of Self-defense by original aggressor. See notes, 109 Am. St. Rep. 810, 822; 45 L. R. A. 707, 708, 712.

106 Cal. 638-643, 39 Pac. 1077, **PEOPLE v. JOOLINSKY.**

Surplusage in General Verdict of Guilty is not prejudicial to defendant if intent to convict of crime charged is clear.

Approved in *Kimball v. Territory*, 13 Ariz. 314, 115 Pac. 71, in prosecution for obtaining money by false pretenses, verdict of guilty "of obtaining money by false representations as charged in the indictment" was insufficient.

Possession of Stolen Property as Evidence of Guilt. See note, 101 Am. St. Rep. 497.

106 Cal. 648-651, 40 Pac. 13, **PEOPLE v. REILLY.**

On Satisfactory Showing That Witness produced on preliminary hearing is absent from state his deposition is admissible in evidence.

Approved in *People v. Grill*, 151 Cal. 599, 91 Pac. 518, evidence was sufficient to sustain finding that witness was out of state at time of trial; *People v. Edwards*, 14 Cal. App. 130, 111 Pac. 264, determination of trial court as to absence of witness will not be disturbed where there is substantial evidence to support it.

Admissibility in Criminal Trial of Testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 876, 881.

106 Cal. 651-660, 40 Pac. 8, **GISELMAN v. STARR.**

Defendant's Right to Have Action prosecuted by real party in interest is satisfied when he can urge any defenses he could make against real owner.

Approved in *Russ v. Tuttle*, 158 Cal. 231, 110 Pac. 814, applying rule in suit for damages for refusal to sell certain stock, according to option to purchase where plaintiff had assigned his option to purchase without the knowledge of defendant; *Tandy v. Walsch*, 154 Cal. 110, 97 Pac. 70, one making in his own name for benefit of another contract to purchase real estate is trustee of an express trust authorized to sue for money paid on failure of vendor to convey; *Kettner v. Shippey*, 8 Cal. App. 343, 96 Pac. 913, in action on note transferred before suit, for valuable consideration, failure to find on character or extent of consideration was immaterial; *Simpson v. Miller*, 7 Cal. App. 254, 255, 94 Pac. 255, in action to recover property which had vested in plaintiff's trustee in bankruptcy prior to suit, a judgment for plaintiff, if satisfied by defendant, would not protect defendant from further loss and annoyance; *Illinois Central Ry. Co. v. Hicklin*, 131 Ky. 630, 115 S. W. 753, 23 L. R. A. (n. s.) 870, applying rule in action by owners of insured property against railroad company for burning it, where it was claimed insurer was real party in interest.

To Constitute a Gift Causa Mortis, there must be an actual or symbolic delivery of the article mentioned.

Approved in *Foley v. Harrison*, 233 Mo. 545, 136 S. W. 380, applying rule where donor of gift causa mortis of contents of safe deposit box, consisting of notes and money, delivered to donee the keys to the box.

Sufficiency of Answers Denying Ownership of plaintiff in actions on negotiable instruments. See note, 66 L. R. A. 536, 537.

Who is Real Party in Interest within statutes defining parties by whom action must be brought. See note, 64 L. R. A. 611.

106 Cal. 660-673, 39 Pac. 1060, 30 L. R. A. 384, **McGUIRE v. BROWN.**

Water Diverted into Ditches and Reservoirs is, when so contained, personal property of the owners.

Approved in *Hesperia Land etc. Co. v. Gardner*, 4 Cal. App. 358, 88 Pac. 287, action by owner of water system to recover for water furnished therefrom does not involve title to real property.

Method Prescribed in Code for acquiring right to use of waters of a stream is not exclusive.

Approved in *Lower Tule River Ditch Co. v. Angiola Water Co.*, 149 Cal. 499, 86 Pac. 1082, prior appropriator of water, without

proceeding under code, acquired superior title to one making subsequent appropriation in manner provided by statute.

Appropriator has No Title or Ownership in waters of a stream before it reaches his point of diversion.

Approved in *Duckworth v. Watsonville Water etc. Co.*, 150 Cal. 525, 89 Pac. 341, grantee of riparian owner of land on outlet of a lake acquired no title to the waters of the lake.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

Appropriator of Water on Public Land may not interfere with rights of homestead settler after entry but before final proof.

Approved in *Snyder v. Colorado Gold Dredging Co.*, 181 Fed. 70, easement for a ditch used for diverting water covered by existing appropriation did not give right to alter or enlarge the ditch; *Atkinson v. Washington Irr. Co.*, 44 Wash. 78, 120 Am. St. Rep. 978, 86 Pac. 1124, upholding rule where irrigation company built its canal on government land after homestead entry had been filed but before patent issued.

Right of Homesteader, Before Receiving Patent, to recover for injury to premises, and measure of damages therefor. See note, 17 L. R. A. (n.s.) 959.

Abandonment or Loss of Rights of Prior Appropriators of water. See note, 30 L. R. A. 266.

Transfer of Right to Use Water for Irrigation. See note, 65 L. R. A. 408.

106 Cal. 673-682, 39 Pac. 1071, BANK OF UKIAH v. MOORE.

Chattel Mortgage is Valid Between the Parties, though articles mortgaged are not such as may be mortgaged under statute.

Reaffirmed in *McRae v. Lackman*, 8 Cal. App. 243, 96 Pac. 506.

Chattel Mortgage Does not Transfer Title from mortgagor to mortgagee.

Approved in *Demers v. Graham*, 36 Mont. 406, 122 Am. St. Rep. 384, 93 Pac. 269, 14 L. R. A. (n.s.) 431, lien of chattel mortgage on cattle does not extend to the natural increase thereof.

106 Cal. 682-689, 46 Am. St. Rep. 268, 39 Pac. 1078, JAMESON v. HAYWARD.

Equity will Prevent or Permit a Merger of estates as will best subserve purposes of justice.

Approved in *Keir v. Keir*, 155 Cal. 101, 99 Pac. 489, reaffirming rule; *Chrisman v. Linderman*, 202 Mo. 620, 119 Am. St. Rep. 822, 100 S. W. 1094, law will not force merger of widow's dower and her homestead estate against interest of widow.

Merger of Estates. See note, 99 Am. St. Rep. 155.

Rights of Adverse Occupants Sought to be partitioned may be determined in partition suit.

Approved in *Adams v. Hopkins (Cal.)*, 69 Pac. 230, reaffirming rule; *Field v. Leiter*, 16 Wyo. 39, 125 Am. St. Rep. 297, 90 Pac. 387, partition may be had between life tenant of an undivided part and owner in fee of other part.

106 Cal. 690-697, 40 Pac. 18, GOODWIN v. SCHEERER.

Possession of Land is Itself Prima Facie Evidence of ownership.

Approved in *Gurnsey v. Antelope Creek etc. Water Co.*, 6 Cal. App. 392, 92 Pac. 328, applying rule in action to restrain defendant

from interfering with plaintiff's use of water, where plaintiff had established prescriptive right to such use.

When Plaintiff has Established Title by prescription, burden is on defendant to show right to possession.

Reaffirmed in *Orack v. Powelson*, 3 Cal. App. 285, 85 Pac. 130.

Courts cannot Take Judicial Notice of exact location of boundary lines of land.

Approved in *Hill v. Barner*, 8 Cal. App. 64, 96 Pac. 114, applying rule in suit to quiet title where land claimed was obtained by sheriff's deed wherein a portion of the land was reserved.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 440.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 107 CALIFORNIA.

107 Cal. 1-8, 40 Pac. 15, 28 L. R. A. 414, IN RE COMASSI.

Section 1300 of Civil Code Only Applies to will executed by woman unmarried at time of its execution.

Approved in Hibberd v. Trask, 160 Ind. 504, 67 N. E. 180, statute providing that, after making of will by unmarried woman, if she shall remarry, will is revoked, does not apply where married woman makes will, and then is divorced, and later remarries.

Effect of Subsequent Marriage, Followed by birth of child, to revoke woman's will. See note, 5 L. R. A. (n. s.) 1085.

Effect of Section 1292 of Civil Code and section 1970 of Code of Civil Procedure is to do away with doctrine of implied revocation.

Approved in Jones' Estate, 211 Pa. 386, 107 Am. St. Rep. 581, 60 Atl. 923, 69 L. R. A. 940, bequest "to my wife" is not revoked by her subsequently obtaining absolute divorce at her own instance from testator.

Distinguished in Hoy v. Hoy, 93 Miss. 753, 136 Am. St. Rep. 548, 48 So. 904, implied revocations of wills are still possible in Mississippi, in spite of statutes on subject of revocation.

Implied Revocation of Will from change in condition and circumstances of testator other than marriage or birth of issue. See note, 130 Am. St. Rep. 630, 632.

Whether Terms "Child," "Children," "issue," etc., in statutes of distribution include adopted children. See note, 30 L. R. A. (n. s.) 917.

107 Cal. 8-26, 48 Am. St. Rep. 98, 40 Pac. 29, PAULY v. PAULY.

If Bank Furnished Moneys, so far as same were applied to proper use of recipient, they may be recovered by bank's receiver, to extent to which they were not repaid.

Approved in Laidlaw v. Pacific Bank (Cal.), 67 Pac. 899, where debt of bank's creditor is for money expended for its benefit and at its request, in action to recover same it cannot plead ultra vires.

Although Notes Executed by Secretary of cable company without proper authority are not evidence of liability of express contract appearing on face, yet if money was received and applied to proper use of company, notes are admissible for purpose of showing that money represented by them was furnished.

Approved in *Union Nat. Bank of Kansas City v. Lyons*, 220 Mo. 566, 119 S. W. 548, where bank had full power to borrow money, and cashier borrowed money, which was deposited to bank's credit and used in ordinary course of business, fact that note was unenforceable because executed by cashier without written authority from directors, as required by statute, did not prevent recovery in action for money received.

Implied Power of Corporations to Borrow Money and give evidence of indebtedness and security therefor. See note, 11 Am. St. Rep. 325.

Books of Bank are Properly Admissible as prima facie evidence of way accounts stood at date of last balance.

Approved in *Blinn Lumber Co. v. McArthur*, 150 Cal. 614, 89 Pac. 438, books of bank are admissible to show state of account of one of its customers.

Use of Person's Books of Account as Evidence upon issues between other parties. See note, 53 L. R. A. 520.

Party's Books of Account as Evidence in own favor. See note, 52 L. R. A. 603.

Declarations and Acts of Agents. See note, 131 Am. St. Rep. 331.

Effect of Retaining Statement of Account to render it an account stated. See note, 29 L. R. A. (n. s.) 339.

Contracts Between Corporations Having Common directors or officers. See note, 33 L. R. A. 788.

107 Cal. 27-32, 40 Pac. 22, HORGAN v. ZANETTA.

Lien of Chattel Mortgage on Growing Crop continues only as long as same remains on land of mortgagor.

Approved in *Gates v. Tom Suong*, 3 Cal. App. 446, 85 Pac. 663, under lease of orchard giving lessor right to remove and sell crop and pay rent from proceeds, delivering remainder to lessee, lien ceased upon removal and sale of crop, under authority of lease; *Brande v. Babcock Hardware Co.*, 35 Mont. 261, 119 Am. St. Rep. 858, 88 Pac. 951, if mortgaged grain has been removed from mortgagor's land, buyer may presume that mortgage lien has been extinguished.

107 Cal. 33-36, 40 Pac. 20, RANDALL v. DUFF.

Subrogation is Allowed in Equity where one has paid debt which someone else should have paid.

Approved in dissenting opinion in *Austin v. Pulschen* (Cal.), 42 Pac. 307, majority holding where plaintiff, in possession of land under recorded contract of sale, agreed to sell in consideration that vendee discharge vendor's lien and give his notes for balance, and vendee borrowed money, giving mortgage on land therefor, and such money was paid to holder of first lien, who conveyed directly to vendee, mortgage must be postponed to plaintiff's lien.

Distinguished in *Carstenbrook v. Wedderien*, 7 Cal. App. 469, 470, 94 Pac. 374, where respondents attached property secured by chattel mortgage, and were compelled to pay mortgage debt, and mortgagee thereupon released mortgage, their exclusive remedy is for reimbursement, under Civil Code, section 2970.

Party to Whom Subrogation is Allowed will not be permitted to make speculation out of it.

Approved in *Phoenix Ins. Co. v. Pacific Lumber Co.*, 1 Cal. App. 159, 81 Pac. 976, where fire insurance company receives assignment of loss resulting from negligence, action is barred by section 339 of Code of Civil Procedure if not brought within two years.

Judgment Entered in Court Below under direction of appellate court, upon former appeal, is appealable.

Reaffirmed in *Lambert v. Bates*, 148 Cal. 148, 82 Pac. 768.

107 Cal. 42-49, 48 Am. St. Rep. 110, 40 Pac. 24, **EICHHOFF v. EICHHOFF**.

It is Presumed, in Support of court's action, that proper service on defendant was shown to it, although it has preserved no record thereof.

Approved in *Seaboard National Bank v. Ackerman*, 16 Cal. App. 59, 116 Pac. 93, following rule; *Segerstrom v. Scott*, 16 Cal. App. 261, 116 Pac. 692, extrajudicial statement of counsel for appellant that amended answer was filed without permission to file it cannot be considered as against presumptions in favor of judgment; *Welsh v. Koch*, 4 Cal. App. 580, 88 Pac. 608, in attack on judgment on ground of fraud for want of jurisdiction of nonresident defendants, presumption that they were duly summoned must be overcome by extrinsic showing to contrary.

Relief in Equity Against Judgments and decrees. See note, 103 Am. St. Rep. 95.

107 Cal. 49-54, 40 Pac. 21, 386, **FALKNER v. HENDY**.

Unqualified Reversal of Judgment has effect to remand cause for new trial.

Approved in *Glassell v. Hansen*, 149 Cal. 514, 87 Pac. 201, where issues were joined as to whether land in controversy was formed by accretions from mainland or island, and upon former appeal law was properly declared, but judgment was reversed in general terms, issues must be tried anew; *Riley v. Loma Vista Ranch Co.*, 5 Cal. App. 26, 89 Pac. 850, reversal of order denying new trial, on ground that findings were not justified by evidence has effect to award new trial.

Disapproved in *State v. District Court*, 40 Mont. 212, 105 Pac. 723, where cause reversed without any specific direction, district court is vested with legal discretion to take such action not inconsistent with order as seems proper, and mandamus does not lie to compel dismissal of action after remand without any specific directions either to retry or dismiss.

Section 939 of Code of Civil Procedure provides that exception to decision or judgment, that it is not supported by evidence, may be reviewed on appeal from judgment, if appeal is taken within sixty days after rendition of judgment.

Approved in *Rickey Land etc. Co. v. Glader*, 153 Cal. 180, 94 Pac. 769, though appeal from judgment of dismissal was taken after lapse of more than sixty days, such judgment may be reviewed.

Proof of Presentation of Claim is not essential to validity of judgment.

Distinguished in *Clayton v. Dinivoodey*, 33 Utah, 264, 93 Pac. 727, defense that claim is barred by statute of limitations cannot be waived by executor.

107 Cal. 55-67, 40 Pac. 45, FIRST NAT. BANK OF BRIDGEPORT v. PERRIS IRR. DIST.

Assignee of Sum Due, Purchasing in good faith and for value, takes assignment free from latent equities of third person of which he had no notice.

Approved in *Reardon v. Cockrell*, 54 Wash. 402, 103 Pac. 458, assignee of mortgage note, after maturity, is not, in absence of notice, charged with equities subsisting between maker and intermediate indorser.

Distinguished in *American Bridge Co. of New York v. Boston*, 202 Mass. 377, 88 N. E. 1090, assignee of architect's certificates for money due for work done by assignor under building contracts with city took them subject to city's right to recoup for damages from possible breach by assignor of his contracts.

107 Cal. 67-78, 40 Pac. 42, HOWE v. JOHNSON.

Where Alleged Sale of Personal Property is not accompanied by immediate delivery, sale is conclusively presumed to be fraudulent as against attaching creditor.

Approved in *Kennedy v. Conroy* (Cal.), 44 Pac. 796, where stepfather delivered to stepson, living with him, lease of his ranch, reserving two rooms in house for himself, and at same time gave him, for value, bill of sale of cattle on ranch, and lease was never recorded, and they lived together same as before, bill of sale was void, under section 3440 of Civil Code.

107 Cal. 78-83, 40 Pac. 33, EX PARTE TYLER.

When Attorney is Charged With Violation of his professional obligations, it is no defense to proceeding for disbarment that same transaction may render him liable to criminal prosecution.

Approved in *Matter of Danford*, 157 Cal. 428, 108 Pac. 324, although accusation for disbarment also states facts for which crime of obtaining money by false pretenses might be punished, yet proceeding for disbarment on ground assigned is not thereby precluded, in advance of termination of criminal prosecution for such offense.

Disbarment for Criminal Acts prior to conviction therefor. See note, 114 Am. St. Rep. 843.

Court Being Authorized to Entertain Charges against attorney for violating his professional duties, irrespective of any civil or criminal proceedings against him, bar of statute of limitations is immaterial.

Approved in *Matter of Danford*, 157 Cal. 431, 108 Pac. 324, in disbarment proceedings, findings of fact and conclusions of law are unnecessary; In *re Smith*, 73 Kan. 750, 85 Pac. 586, in proceedings for disbarment of attorney, statute of limitations is no defense; *State Medical Examining Board v. Stewart*, 46 Wash. 84, 123 Am. St. Rep. 915, 89 Pac. 477, 11 L. R. A. (n. s.) 557, statute of limitations does not apply in proceeding to revoke license to practice medicine.

Limitations as Defense to Revocation of physician's or attorney's license. See note, 11 L. R. A. (n. s.) 557.

107 Cal. 84-91, 40 Pac. 98, STINCHFIELD v. GILLIS.

What Possession by the Owner of Surface Estate constitutes adverse possession of severed mineral estate. See note, 140 Am. St. Rep. 953.

107 Cal. 92-94, 40 Pac. 26, FAIRCHILD v. SAN FRANCISCO BOARD OF EDUCATION.

Board of Education can Pass no rules in contravention of statutory provisions securing to teacher position of same grade and compensation.

Approved in *Barthel v. Board of Education*, 153 Cal. 379, 95 Pac. 893, election and dismissal of teachers in public schools are not "municipal affairs," which may, by freeholder's charter, be regulated in manner in conflict to that provided by the general law; *Loehr v. Board of Education*, 12 Cal. App. 673, 108 Pac. 326, board of education has discretion to transfer teachers of primary schools from one class of "A-First" grade in school at fixed salary to another class of "B-Third" grade in another primary school at less salary.

Distinguished in *Ewin v. Independent School District*, 10 Idaho, 113, 77 Pac. 225, under statute which empowers trustees of independent school "to employ or discharge teachers," without specifying any cause or requiring any notice to teacher, such board has unrestricted power to dismiss.

107 Cal. 94-101, 40 Pac. 115, PEOPLE v. LINDEN.

Where Any Important Provisions of Law have been violated or ignored in organization of municipal corporation, corporation may be annulled at suit of people in action of quo warranto.

Approved in *Beaumont v. Samson*, 5 Cal. App. 493, 90 Pac. 841, certiorari will not lie to test validity of action of supervisors in declaring territory described in its order to be duly incorporated as municipal corporation of sixth class under specified name.

Statute Governing Organization of Municipal Corporation is satisfied by publication of petition, affidavit and notice of time when petition was presented to board by petitioners themselves.

Approved in *People v. Larkspur*, 16 Cal. App. 175, 116 Pac. 705, mere filing of petition for formation of municipal incorporation with clerk of supervisors, and his notice of such fact to board, does not deprive board of power to act on same, where before its presentation to board it was published for period required by municipal corporation act.

Order of Supervisors Delegating Power or discretion of what notice of election shall be is not substantial compliance with statute.

Distinguished in *People v. Ontario*, 148 Cal. 638, 84 Pac. 211, where resolution of trustees provided for election to be held in accordance with notice of election, which was complete in every respect, and instructed clerk to have it printed according to law in certain papers, leaving nothing to his discretion, notice and publication thereof were sufficient.

107 Cal. 102-106, 40 Pac. 25, MILLETT v. LAGOMARSINO.

Color of Title. See note, 88 Am. St. Rep. 729.

107 Cal. 107-116, 40 Pac. 111, KNOWLES v. MURPHY.

Where Lessees Paid Money to Lessor, and took receipt, such payments must be presumed to have been made under lease.

Approved in *Thompson v. Folsom*, 26 Okl. 327, 108 Pac. 1105, where there is any evidence reasonably tending to support judgment finding relation of landlord and tenant to exist, it will not be disturbed on appeal.

In Action for Unlawful Detainer, tenant may show that he was induced to accept lease by way of fraud of lessor, which, if shown, would destroy relation of landlord and tenant.

Distinguished in *Ogle v. Hubbel*, 1 Cal. App. 361, 82 Pac. 219, where lease also made lessee preferred purchaser in case of sale, in action for unlawful detainer by grantees of lessor, defendant may set up equitable defense that sale to such grantees was with intent to oust defendant, after lessor had refused his request to set price.

In Action of Unlawful Detainer, lessees cannot avoid obligation assumed by reason of lease, by showing that lessors did not have title to premises demised by them.

Distinguished in *Teich v. Arms*, 5 Cal. App. 478, 90 Pac. 963, in unlawful detainer, lessee is not estopped to show that lessor's title has expired or been extinguished since lease was executed, or has been alienated from him by operation of law.

Unlawful Detainer. See note, 120 Am. St. Rep. 39, 62.

Tender by Virtue of Option Clause in lease does not release lessees from obligation to pay rent.

Approved in *Sullivan v. Woods*, 5 Ariz. 201, 50 Pac. 115, where mortgagor, in satisfaction of mortgage debt, gave deed absolute to mortgagees, and latter canceled mortgage and agreed to allow him to repurchase within six months for amount of indebtedness, he to have use in meantime upon monthly payments, agreement was simply option to purchase.

Subsequent Payment of Rent by Lessees must be regarded as abandonment of option to purchase.

Approved in *Walshe v. Endom*, 124 La. 706, 50 So. 660, where defendant leased community property to plaintiff with option of purchase, and plaintiff paid rent during period of lease, specific performance could be decreed.

Estoppel to Deny Landlord's Title. See note, 89 Am. St. Rep. 95, 109, 114.

Miscellaneous.—Cited in *Richmond v. Superior Court*, 9 Cal. App. 64, 98 Pac. 58, where complaint in justice's court alleges proper proceedings under relation of landlord and tenant, answer that defendant has subsisting contract to buy property and never was tenant of plaintiff does not involve question of title.

107 Cal. 120-130, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596,
GIRANDI v. ELECTRIC IMP. CO.

Electric Company is Required to Use very great care to prevent injury to person or property.

Approved in *Dow v. Sunset Tel. & Tel. Co.*, 157 Cal. 187, 106 Pac. 589, evidence tending to show that wires of two companies were placed in dangerous proximity and occasionally came in contact, and that "jumping arc" of light was produced by them, which fact was known to company, was sufficient to warrant presentation to jury of question of negligence by reason of defective insulation; *Tackett v. Henderson Bros. Co.*, 12 Cal. App. 665, 108 Pac. 153, it is actionable negligence for electric light company to permit charged wire, having appearance of harmless insulated guy wire, to sag upon ground for two days; *Eaton v. Weiser*, 12 Idaho, 555, 118 Am. St. Rep. 225, 86 Pac. 543, it is negligence for municipal corporation maintaining electric lighting plant and having notice of condition of charged wire to

allow it to remain suspended over street in such manner that it is likely to come in contact with persons on horseback or in vehicles; *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 437, 73 N. E. 145, telephone company which permits its wire to become broken and lie across highly charged electric light wire is guilty of want of ordinary care; *Geismann v. Mo.-Edison Electric Co.*, 173 Mo. 678, 73 S. W. 661, electric lighting company must use every accessible precaution to insulate its wire at all points where people have right to be and might be expected to go, and to use utmost care to keep them so insulated; *Shawnee Light etc. Co. v. Sears*, 21 Okl. 23, 95 Pac. 453, electric light company using public streets of municipality is required to exercise highest degree of care and to maintain in best possible condition best appliances known to science; *Memphis St. Ry. Co. v. Kartright*, 110 Tenn. 282, 284, 100 Am. St. Rep. 807, 75 S. W. 721, street-car company, in constructing and maintaining its electric wires, is under obligation to use highest degree of care so as to avoid injuring persons in streets; *Cole v. Parker*, 27 Tex. Civ. App. 566, 66 S. W. 137, where persons dealing with electricity are negligent in seeing that their plant is properly constructed before operating same, they are liable for resulting death, even without actual knowledge of defect, though plant is operated by their employees.

Duties and Liabilities of Electric Corporations. See note, 100 Am. St. Rep. 517, 521, 529.

Negligence as to Electric Wires on or in buildings. See note, 32 L. R. A. 401.

Expert cannot be Asked Whether Structure is safe one, or whether certain methods are prudent.

Approved in *Ambre v. Postal Telegraph-Cable Co.*, 43 Ind. App. 53, 86 N. E. 873, in action for injuries to employee caused by permitting bare grounded wire, which he took up telegraph pole with him to test telegraph wires, to come in contact with lighting wires strung thereon, it was error to permit witness to give his opinion as to whether lineman of ordinary caution and experience would have taken bare wire up pole without taking precaution to prevent contact with lighting wires.

If Answer Gives Facts in Full, and explains what methods would have been safe, and all information given might have been obtained by proper questions, and defendant's negligence was fully proved by other evidence, error in form of question is not prejudicial.

Approved in *Parkin v. Grayson-Owen Co.*, 157 Cal. 46, 106 Pac. 213, testimony, as expert, that method adopted by defendant in hitching his team was not safe one is without prejudice, if witness bases his opinion of unsafety of method on liability of bridle to give way, and it is admitted that no such injury to bridle happened at time of accident; *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 320, 84 Pac. 1013, where it was necessary conclusion from facts testified to by expert and others that timbers were rotten, admission of opinion as to effect of unsoundness of timber is harmless.

Mere Fact That Dangerous Agency is used raises no presumption that public know enough of its nature to avoid danger which may arise from its use.

Approved in *Foley v. Northern California Power Co.*, 14 Cal. App. 413, 112 Pac. 472, following rule.

Even if Defendant had Previously Observed wires, it would be question for jury to say whether it was want of ordinary care for him not to have recollected their location when injured.

Approved in *Brett v. Frank*, 153 Cal. 274, 94 Pac. 1053, exceptional cases that forgetfulness of peril raises question for jury are in no way subversive to rule that one working in place where he is exposed to danger cannot recover for neglect of rule that he exercise his faculties for his own protection.

If Insulating Material was not in Good Condition, and fact that wires were wet destroyed insulation for time being, and there was no evidence showing knowledge on part of plaintiff, he cannot be charged with contributory negligence in coming in contact with wires.

Approved in *Braun v. Buffalo Gen. Electric Co.*, 200 N. Y. 495, 140 Am. St. Rep. 645, 94 N. E. 210, whether workman engaged in erecting building is guilty of contributory negligence in taking hold of electric wire, not knowing character thereof, nor noticing its defective insulation, is question for jury; *Thomas v. Wheeling Elec. Co.*, 54 W. Va. 406, 46 S. E. 221, if one take hold of electric wire at place where it ought to be safely insulated, and is injured by reason of defective insulation, not knowing of its defect, he is not, for so doing, guilty of contributory negligence forbidding recovery.

To Forget, in Hurry of Work, does not prove absence of ordinary care.

Distinguished in *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 437, 84 Pac. 393, 6 L. R. A. (n. s.) 290, where intestate, twenty-four years old, knowing that heavily charged electric wire which had been broken in storm had been wound around picket fence, and having been warned not to go near place, deliberately went to wire for purpose of ascertaining whether it was still charged, he was guilty of contributory negligence.

107 Cal. 130-132, 40 Pac. 108, JANES v. BULLARD.

Order of Sale Issued upon Decree of Foreclosure held not prematurely issued.

Approved in *Hill v. Superior Court*, 15 Cal. App. 312, 114 Pac. 807, construing Code of Civil Procedure, section 1118, relating to filing statement of election contest; *Baum v. Roper*, 1 Cal. App. 437, 82 Pac. 391, in action of ejectment, writ of possession may be executed against defendant against whom judgment has been rendered or his grantee pendente lite, although judgment had not been entered against him prior to issuance of writ.

107 Cal. 151-153, 40 Pac. 107, PEOPLE v. FRIGERIO.

Where Objection to Language of District Attorney is general, and defendant did not direct court's attention specifically to transgression of privilege, fact cannot be taken advantage of for first time upon appeal.

Reaffirmed in *People v. Owens*, 3 Cal. App. 752, 86 Pac. 981.

Confidence Game. See note, 134 Am. St. Rep. 367.

Miscellaneous.—Cited in *People v. Balletto* (Cal.), 40 Pac. 108.

107 Cal. 154-160, 40 Pac. 105, PREWETT v. DYER.

In Action by Divorced Wife to Set Aside Decree of divorce on ground of fraud, where plaintiff discovered fraud more than three

years before action was commenced, action was barred by subdivision 4 of section 338 of Code of Civil Procedure.

Approved in *Hurley v. Hurley*, 117 Iowa, 623, 91 N. W. 896, where plaintiff and defendants were married, in 1888, but never lived together, and in 1892 defendant procured divorce, of which plaintiff had knowledge same year, but she made no effort to set aside decree until 1899, such delay constituted laches precluding relief; *Sammons v. Pike*, 108 Minn. 296, 133 Am. St. Rep. 425, 120 N. W. 542, 23 L. R. A. (n. s.) 1254, where decree of divorce by court having jurisdiction of party seeking divorce is voidable because of fraud in service of summons or conduct of case, victim of fraud may, by unexplained delay, be prevented from successfully asserting right to distributive share of original wrongdoer's estate.

When Estoppel Exists Against Urging Invalidity of void or voidable divorce. See note, 133 Am. St. Rep. 450.

107 Cal. 160-162, 40 Pac. 117, BOOB v. HALL.

In Absence of Agreement for Payment of counsel fees in mortgage, court is not authorized to include counsel fees as part of judgment.

Reaffirmed in *Cooper v. Island Realty Co.*, 16 Haw. 106.

107 Cal. 166-174, 40 Pac. 235, EUREKA v. FAY.

Municipal Corporation may Recover Possession of strip of land alleged to be part of city street.

Distinguished in *San Francisco v. Grote* (Cal.), 47 Pac. 940, city cannot maintain ejectment for recovery of possession of street dedicated to public by user, without showing ownership in fee.

Ejectment for Public Easement. See note, 11 L. R. A. (n. s.) 130.

107 Cal. 177-187, 40 Pac. 231, MCGOWAN v. FORD.

Section 25 of County Government Act of 1891 has no application to contract for repairs or alterations or improvements upon grounds.

Approved in *Riverside v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 694, 86 Pac. 901, subdivision 21 of section 25 of County Government Act of 1897 does not include purchase of furniture for use in county offices in county courthouse.

Where Indebtedness is Incurred within one fiscal year, it can only be paid out of revenue provided for that fiscal year.

Approved in *Tehama County v. Sisson*, 152 Cal. 172, 175, 178, 92 Pac. 67, 68, 69, prohibition of section 18, article XI, of state Constitution, is limitation upon powers of county officers, and prevents them from creating liability against county contrary to its terms.

Burden Does not Rest upon Plaintiff to show by affirmation proof that supervisors had power to issue warrant, merely because averments of answer show that board had no jurisdiction to allow claim.

Approved in *Kelley v. Sersanous* (Cal.), 46 Pac. 299, 300, in action to compel county treasurer to pay warrant, where plaintiff alleged that supervisors allowed claim under contract, and that auditor drew warrant, and answer averred that contract was ultra vires, but contract did not appear to be ultra vires on its face, burden was on defendant.

107 Cal. 187-193, 40 Pac. 329, 28 L. R. A. 594, SINNOT v. COLOMBET.

Term "Kindergarten" Applies to System elaborated for instruction of children of tender years, guiding their inclination to play into

organized movement and investing games with ethical and educational value.

Approved in *Los Angeles County v. Kirk*, 148 Cal. 388, 391, 83 Pac. 251, 252, in apportioning state school fund according to "average daily attendance" upon primary and grammar schools, pupils attending kindergartens cannot be considered.

City Board of Education has Power to adopt kindergarten as part of public primary schools, under section 1617, subdivision 9, and section 1662 of Political Code.

Explained in *Los Angeles County v. Kirk*, 148 Cal. 391, 392, 83 Pac. 252, attendance of children in kindergarten classes cannot be considered part of "average daily attendance" for purpose of apportionment of state school fund.

107 Cal. 193-198, 40 Pac. 334, CENTRAL LUMBER ETC. CO. v. CENTER.

Stay Bond upon Appeal from Foreclosure Decree of mechanic's lien must be given under section 945 of Code of Civil Procedure, and not be merely bond in double amount under section 942.

Approved in *Weldon v. Rogers*, 154 Cal. 636, 98 Pac. 1071, appeal from order of superior court granting leave to have execution issued, as provided in section 685 of Code of Civil Procedure, is not order directing payment of money, and section 942 of Code of Civil Procedure does not apply; *Olsen v. Birch*, 1 Cal. App. 102, 103, 81 Pac. 657, 658, upon appeal from judgment foreclosing liens against vessel, and providing for sale thereof, ordinary bond on appeal is sufficient to stay execution, and stay bond given under section 942 of Code of Civil Procedure is void; *Naylor v. Lewiston etc. Ry. Co.*, 14 Idaho, 725, 95 Pac. 828, appeal from foreclosure decree of mechanic's lien, not being appeal from judgment directing payment of money, in order to stay proceedings, bond in double amount named in judgment is not good.

107 Cal. 199-206, 40 Pac. 437, HELM v. McCLURE.

Where Obstructions in Public Highway cut off access to highway from land of abutting owner, such owner sustains injury entitling him to have nuisance abated.

Distinguished in *City Store v. San Jose-Los Gatos etc. Ry. Co.*, 150 Cal. 279, 88 Pac. 978, general allegations of special injury from construction of double track street railway is insufficient, in absence of statement of width of street, proximity of tracks to property, or whether any embankment or depression will be created preventing access, or other facts from which court can determine whether such injury exists.

Testimony of Owner of Land as to his intention not to dedicate it to public use is relevant, but not conclusive evidence upon his actual intent.

Distinguished in *Los Angeles v. McCollum*, 156 Cal. 152, 103 Pac. 916, 23 L. R. A. (n. s.) 378, in action involving question whether land was dedicated to public, owner, after recording map, cannot give testimony of intent not to dedicate strips delineated thereon as streets.

107 Cal. 210-214, 40 Pac. 333, BIGGINS v. RAISON.

Effect Against Surety of Judgment Against Officer. See note, 52 L. R. A. 187.

107 Cal. 214-220, 48 Am. St. Rep. 121, 40 Pac. 486, **PEOPLE v. ELK RIVER MILL ETC. CO.**

Where There is Public Use of Stream, pollution of water by any unreasonable use is nuisance.

Approved in *Territory v. Long Bell Lumber Co.*, 22 Okl. 910, 99 Pac. 919, where it is alleged that certain parties have created monopoly in lumber, coal and grain business, and were charging exorbitant prices and preventing others from engaging in such business, such acts constitute public nuisance and parties may be restrained.

Pollution of Watercourse by Stock. See note, 26 L. R. A. (n. s.) 223, 224.

107 Cal. 221-229, 48 Am. St. Rep. 125, 40 Pac. 531, **PEOPLE v. ELK RIVER MILL ETC. CO.**

In Order That Stream may be Floatable for logs, within section 2349 of Political Code, it must be capable of being of value as highway for some portions of year.

Approved in *Kamm v. Normand*, 50 Or. 12, 126 Am. St. Rep. 698, 91 Pac. 449, 11 L. R. A. (n. s.), 290, stream capable of floating logs unaided by artificial means, during freshets or stages of water occurring with reasonable frequency, and continuing long enough to make its use of commercial value, is public highway for that purpose.

Right to Use Stream for Floating Logs. See note, 41 L. R. A. 371, 374.

Legislative Declaration Does not Make River navigable stream.

Approved in *People v. Economy Power Co.*, 241 Ill. 330, 89 N. E. 771, statute declaring Desplaines river to be navigable stream was ineffective to deprive riparian properties of vested property rights with reference to such stream in its natural condition.

What Waters are Navigable. See notes, 126 Am. St. Rep. 717, 727, 730; 42 L. R. A. 320.

When a Fresh-water Stream is Navigable. See note, 80 Am. St. Rep. 913.

Protection from Pollution of Source of municipal water supply. See note, 11 L. R. A. (n. s.) 1163, 1167.

Statutory Protection of Municipal Water Supply. See note, 41 L. R. A. 177.

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 759.

107 Cal. 229-236, 40 Pac. 337, **RAUER v. LOWE.**

Certificate Purporting to be That of City Engineer, but signed by clerk, is insufficient as basis of lien upon any property charged with expense of work, and is inadmissible in evidence.

Approved in *Dowling v. Adams* (Cal.), 41 Pac. 413, where city surveyor is required to sign certificate as to public improvement, it cannot be signed by his clerk, who had no specific directions from him to sign it.

Distinguished in *Williams v. Cuneo* (Cal.), 41 Pac. 417, before act of March 14, 1889, improvement proceedings did not provide for city engineer's certificate as prima facie proof of regularity of proceedings.

107 Cal. 236-243, 40 Pac. 538, PEOPLE v. WARD.

Supervisors cannot by Anticipation fill vacancy which is to arise in future during term of newly elected board.

Approved in *Dixon v. Caudill*, 143 Ky. 628, 136 S. W. 1045, county superintendent may, after election is held for school trustee, result of which is not ascertained by reason of untoward interference, appoint school trustee to fill vacancy before time trustee would take office, to take effect at such time, where superintendent's term extends beyond such time; *Terry v. Cornett*, 136 Ky. 633, 124 S. W. 871, superintendent of schools may appoint school trustee to fill vacancy to occur during year, where his term extended beyond that date, appointment to be made when vacancy occurred; *State v. Sullivan*, 81 Ohio St. 93, 90 N. E. 149, established rule is neither abrogated nor modified by provision of act creating railroad commission, and requiring governor to appoint thereto in January, 1909, and biennially thereafter, one commissioner for term of six years from first Monday in February of such year.

Where District Attorney has Been Elected, and has died after qualification, and before expiration of incumbent's term, vacancy arises in office, which exists upon expiration of prior incumbent's term.

Approved in *People v. Nye*, 9 Cal. App. 162, 98 Pac. 245, where vacancy in office of controller occurred after his election for second term by death before qualification, appointment for "balance of the unexpired term" would end on day before beginning of second term for which he was elected; *State v. Foster*, 39 Mont. 591, 104 Pac. 864, where there was tie vote for clerk of district court, office became vacant at end of incumbent's term.

Distinguished in *Ballantyne v. Bower*, 17 Wyo. 365, 99 Pac. 871, under statute providing that elective office shall become vacant upon death of incumbent, after person has been elected justice of peace and has filed oath and bond, but before commencement of his term, and before his bond was approved, he died, person already holding office was "incumbent" within section, and death of other did not create vacancy.

Power of Officer to Make Appointment to take effect after own term expires. See note, 26 L. R. A. (n. s.) 514.

Under Terms of Section 879 of Political Code, incumbent has fixed term and contingent term.

Approved in *Chadduck v. Burke*, 103 Va. 699, 49 S. E. 977, under act providing that each circuit judge shall, in November, 1907, and each fourth year thereafter, or at any time vacancy occurs, appoint superintendent of poor, circuit judge cannot, before November, 1907, appoint one to succeed incumbent holding over after expiration of term ending January 1, 1904.

107 Cal. 243-256, 40 Pac. 386, BUENA VISTA FRUIT ETC. CO. v. TUOHY.

Party Defrauded may Rescind and Restore within reasonable time all of value he has received under contract.

Approved in *Wills v. Porter* (Cal.), 61 Pac. 1111, where corporation which owed money to its principal stockholder borrowed money from bank, and, in consideration of his guaranteeing its note, paid its indebtedness to him before maturity, action by other stockholders to compel repayment to corporation, could not be maintained without releasing principal stockholder from his guaranty.

Every Complaint in Action must be Founded upon theory under which plaintiff is entitled to recover, and must state all facts essential to support such theory.

Approved in *Bartley v. Fraser*, 16 Cal. App. 565, 117 Pac. 685, although plaintiff prays for return of papers deposited in escrow from bank, yet it appearing from allegations of complaint that conditions of escrow were not complied with, complaint will not support decree requiring bank to deliver papers to plaintiffs; *Wesley v. Diamond*, 26 Okl. 176, 109 Pac. 526, where party has been induced by fraud and deceit to part with title to real property, and seeks relief, he cannot at same time affirm contract and sue for damages, and also rescind.

107 Cal. 256-258, 40 Pac. 391, **PEOPLE v. MOUNT SHASTA MFG. CO.**

Right to Amend Complaint may be Refused if court is able to see that complaint cannot be so amended as to state good cause of action.

Approved in *Norton v. Bassett*, 158 Cal. 427, 111 Pac. 253, after reversal of judgment in favor of plaintiffs, it is not abuse of discretion for trial court to refuse amendment to complaint setting up facts directly contrary to those testified to by them on former trial.

107 Cal. 262-272, 40 Pac. 392, **TAYLOR v. HEARST.**

To Constitute Libel There must be Malice, actual or implied, on part of publisher.

Approved in *Davis v. Hearst*, 160 Cal. 156, 157, 158, 116 Pac. 536, 537, constructive malice of law, presumed from intentional doing of wrongful act, without reason or excuse, will exist where there is entire absence of malice in fact and where tortious act or libel arose from pure negligence.

Where Defendant has Been Guilty of malice, actual or presumed, jury may give exemplary damages.

Approved in *Walker v. Chanslor*, 153 Cal. 125, 126 Am. St. Rep. 61, 94 Pac. 608, 17 L. R. A. (n. s.) 455, in personal action for damages for forcible exclusion of persons in possession of oil lands as adverse claimants, where answer pleaded title in defendants and self-defense against shooting by occupants, evidence of defendant's title was relevant on question of both exemplary and actual damages; *Tingley v. Times-Mirror*, 151 Cal. 16, 89 Pac. 1103, where publication is libelous per se, law presumes malice in fact in its publications, and in absence of evidence on defendant's part rebutting this presumed malice, plaintiff is entitled to exemplary damages.

Where Published Article is Libelous Per Se, fact that it was made to apply to plaintiff by mistake in his initials does not excuse publication.

Approved in *Davis v. Hearst*, 160 Cal. 184, 116 Pac. 548, where libelous article was ambiguous as to person referred to, it is for jury to say whether article would be understood as referring to plaintiff.

Where It is Clearly Established that publication was not made by reason of any ill-will against plaintiff, or with any intention to injure or defame him, plaintiff is not entitled to exemplary or punitive damages, and court may so instruct.

Approved in *Davis v. Hearst*, 160 Cal. 166, 171, 116 Pac. 540, 542, instruction defining express malice as being malice in fact, and implied

malice to be malice in law, and declaring that exemplary damages could be awarded upon finding of either malice in fact or malice in law, is erroneous.

If Publication was Untrue and Libelous as to plaintiff, he was entitled to such compensatory damages as would afford reparation for all injury which had naturally and proximately resulted from publication.

Approved in *Butler v. Every Evening Printing Co.*, 140 Fed. 935, where, in action for injury to reputation and feelings through newspaper publication, false and libelous per se, plaintiff limited demand to purely compensatory damages, it is effect which libel is likely to have on readers, and not any actual intent to defame, that is material in consideration of damages for jury.

Verdict for Defendant cannot be Allowed to stand upon claim that plaintiff was entitled at most to only nominal damages.

Approved in *Von Schroeder v. Spreckels*, 147 Cal. 187, 81 Pac. 516, in action to recover for libel, where verdict was for defendant upon plea of justification and good faith, and court made general order granting new trial, rule governing actions ex contractu has no application.

Corporate Liability for Libel and Slander. See note, 115 Am. St. Rep. 723.

Sufficiency of Retraction to Reduce Damages in libel action as question for court or jury. See note, 25 L. R. A. (n. s.) 797.

107 Cal. 272-276, 40 Pac. 394, **OLANCY v. PLOVER.**

In Fixing Attorneys' Fees, Only Limitation is that court shall not abuse discretion committed to court by statute.

Reaffirmed in *Hampton v. Christensen* (Cal.), 84 Pac. 204.

107 Cal. 276-282, 40 Pac. 420, **HECKMAN v. SWETT.**

State may Make Exclusive Grants of fisheries in designated waters so far as same do not impair private rights already vested.

Approved in *State v. Leavitt*, 105 Me. 80, 72 Atl. 877, 26 L. R. A. (n. s.) 799, law which forbids digging of clams in any of shores of Scarborough from April 1st until October 1st of each year by anyone except inhabitants of town, or hotel-keepers therein, is not obnoxious to fourteenth amendment of Constitution of United States.

Law of Fishing. See note, 131 Am. St. Rep. 760.

Right to Fish. See note, 60 L. R. A. 501, 504, 524.

Governmental Control Over Right of Fishery. See note, 39 L. R. A. 585.

107 Cal. 282-285, 40 Pac. 430, **RAUER v. BRODER.**

When Note is Payable at Specified Date, in order to charge indorser before maturity, demand should be made upon maker upon very day note falls due.

Distinguished in *Kinsel v. Ballou*, 151 Cal. 758, 91 Pac. 621, where note provides that upon default in interest whole sum shall become due at holder's option, holder has reasonable time, after default, within which to determine whether or not he will exercise option.

107 Cal. 285-291, 40 Pac. 435, **THURSTON v. CLARK.**

Each Term of an Office is Entity Separate and distinct from all other terms of same office.

Approved in *State v. Rose*, 74 Kan. 268, 86 Pac. 298, 6 L. R. A. (n. s.) 843, where mayor forfeits his office by official misconduct, and forfeiture is judicially declared in quo warranto proceedings, electors of city cannot, by electing him for remainder of term forfeited, restore that which was forfeited; *Thomssen v. Hall County*, 63 Neb. 782, 89 N. W. 391, 57 L. R. A. 303, action brought against county treasurer and his bondsmen for recovery of moneys alleged to have been converted by him is not prematurely brought, if commenced after his term of office, and after he has given bond and qualified as his own successor; *Bell v. District Court*, 28 Nev. 298, 113 Am. St. Rep. 854, 81 Pac. 878, 1 L. R. A. (n. s.) 843, upholding act of 1873, relating to elections.

Removal from Office Under Section 772 of Penal Code is, in its nature, criminal case.

Approved in *Coffey v. Superior Court*, 2 Cal. App. 456, 83 Pac. 581, proceedings under section 758 et seq. of Penal Code for removal of local officers for misconduct in office, though complete in themselves, and separate and independent of Penal Code provisions as to indictments, are criminal in their nature.

Constitutional Protection Against Being Forced to furnish evidence against one's self in a civil case. See note, 29 L. R. A. 812, 821.

107 Cal. 291-297, 40 Pac. 428, **WOOD v. BLANEY.**

Where Agent of Vendors of Real Estate falsely represented that he had received deposit on account of sale, and vendors were induced thereby to approve contract of sale, amount of alleged deposit may be recovered from him as money had and received.

Approved in *Hazelton v. Locke*, 104 Me. 167, 71 Atl. 662, 20 L. R. A. (n. s.) 35, legal currency may be subject of action of trover, so long as it may be identified.

107 Cal. 298-303, 40 Pac. 422, **ADAMS v. HELBING.**

Where Court Fails to Find upon Material Issue, decision is against law, and may be reviewed.

Approved in *Brown v. Macey*, 13 Idaho, 455, 90 Pac. 341, following rule; *Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 307, in action for divorce, court erred in failing to find upon material averments of husband's cruelty set forth in cross-complaint; *Winchester v. Becker*, 8 Cal. App. 366, 97 Pac. 75, in action to rescind contract to sell real estate, plaintiff is entitled to finding on issue of fraud in its procurement, interposed in answer to purchaser's cross-complaint; *Durphy v. Pearsall*, 6 Cal. App. 57, 91 Pac. 408, where, in suit for accounting of partnership, court limited its findings to partial settlement, figures of which show mistake, and there were other partnership transactions, of which no accounting was found to have been had, matter of complete accounting was material issue, and failure to find thereon renders decision against law.

Finding Being Sufficient to Support Judgment for forcible detainer, it is immaterial whether it is sufficient to support judgment upon ground of forcible entry.

Approved in *Hayden v. Collins*, 1 Cal. App. 262, 81 Pac. 1121, where defendant took issue upon plaintiff's ownership and right of possession, issues were properly tried in ejectment, and defendant's

objection that title could not be found in action of unlawful detainer is inapplicable.

Specifications of Insufficiency of Evidence which are merely brief statements of what evidence shows are insufficient.

Reaffirmed in *Love v. Anchor Raisin Vineyard Co.* (Cal.), 45 Pac. 1046.

It is not Necessary That Specification in statement on motion for new trial should state what evidence does show.

Approved in dissenting opinion in *Smith Table Co. v. Madsen*, 30 Utah, 316, 84 Pac. 892, majority holding assignment of errors need not be filed in court below.

107 Cal. 309-317, 40 Pac. 423, O'HARA v. O'BRIEN.

Agent Who has No Authority to Agree upon division line does not bind owner by staking line so as to authorize adjoining owner to build fence on such line.

Approved in *Ferguson v. Basin Consolidated Mines*, 152 Cal. 714, 93 Pac. 868, in action for alleged trespass on plaintiff's mining claim, where location of plaintiff's boundary line is involved, it is error to admit in evidence for plaintiff declarations of superintendent of defendant's mine, tending to support plaintiff's contention as to location of line, without any showing as to extent of his authority beyond fact that he was superintendent.

Conclusiveness of Established Boundaries. See note, 110 Am. St. Rep. 679.

107 Cal. 317-327, 48 Am. St. Rep. 132, 40 Pac. 432, REDINGTON v. PACIFIC POSTAL TELEGRAPH CABLE CO.

Telegraph Company may Reasonably Stipulate upon its message blanks that it will not be liable for mistake or delay in sending message beyond amount received, unless it is guilty of gross negligence.

Approved in *Basler v. Sacramento Gas etc. Co.*, 158 Cal. 521, 111 Pac. 533, in action of tort, defendant may, under section 997 of Code of Civil Procedure, plead offer to let plaintiffs take judgment in stated amount, but should not accompany pleading of tender with explanatory, apologetic or extenuating matters not going to defense.

Validity of Limitation of Liability for unrepeatd telegrams. See note, 11 L. R. A. (n. s.) 562.

Gross Negligence may Consist in Exercise of so slight degree of care as to justify belief that there was indifference to interest and welfare of others.

Approved in *Ambroz v. Cedar Rapids Electric etc. Co.*, 131 Iowa, 339, 108 N. W. 541, where plaintiff was injured by blowing off of steam from defendant's blow-off pipe connected with its boilers, it was sufficient to sustain allegation that injury was wantonly inflicted, that defendant had knowledge that persons were likely to be in position to be injured if steam were thus discharged without warning.

Where Witness upon Cross-examination testifies to collateral matter, which is not responsive to anything testified to by him in chief, his answer is not open to contradiction by party cross-examining him.

Reaffirmed in *Moody v. Peirano* (Cal. App.), 84 Pac. 784.

107 Cal. 327-334, 48 Am. St. Rep. 140, 40 Pac. 431, 28 L. R. A. 692, **UNION INS. CO. v. AMERICAN FIRE INS. CO.**

Where There is Known Usage of Trade, persons carrying on that trade are held to have contracted in reference to usage unless contrary appears, and usage forms part of contract.

Approved in *Corey v. Struve*, 16 Cal. App. 321, 116 Pac. 980, in lease of lands for sugar beet farming, if it is silent as to disposition of beet tops, and it is unreasonable to presume that defendants did not know usage of place as to their disposition by plowing beet tops under for fertilization of land, such general usage forms part of contract; *Pennsylvania R. R. Co. v. Naive*, 112 Tenn. 254, 79 S. W. 127, 64 L. R. A. 443, where there is general and uniform custom at place where freight is consigned not to give notice of arrival of freight, one shipping goods to agent at such place is bound by such custom, though he had no actual knowledge thereof.

Liability of Reinsurer. See note, 8 L. R. A. (n. s.) 857.

107 Cal. 334-340, 40 Pac. 426, **CALIFORNIA ACADEMY OF SCIENCES v. SAN FRANCISCO.**

Decree of Circuit Court Confirming Pueblo Claim to city declared that confirmation was in trust for benefit of lot-holders under grants of San Francisco.

Cited in *Merritt v. Barta*, 158 Cal. 380, 111 Pac. 259, reciting history of "outside lands" in San Francisco.

107 Cal. 340-345, 40 Pac. 485, **MILLER v. KEHOE.**

Counsel Fees are not Recoverable except where expressly allowed by statute.

Approved in *Scurich v. Ryan*, 14 Cal. App. 754, 113 Pac. 125, fees paid to attorney consulted by tenant are not proper element of damages for exclusion of tenant for two days by locking gate, under claim that lease had been violated.

Distinguished in *Estate of Riviere*, 8 Cal. App. 776, 98 Pac. 47, court properly allowed compensation for services rendered executor by attorney, in resisting contest of will before probate.

Counsel Fees are Allowable in Equity in action for preservation or distribution of fund where all parties have common interest.

Approved in *Estate of O'Connor*, 2 Cal. App. 478, 84 Pac. 321, superior court, upon settlement of first account of trustees appointed under will after distribution, may allow claim of one of them for counsel fees incurred in obtaining distribution to trustees, where cotrustee, who was executrix, refused to petition for such distribution after final settlement of her account, and her sisters, beneficiaries, were assailing trust.

Allowance of Attorneys' Fees Out of Fund for attorneys of creditors who sue in behalf of themselves and others. See note, 54 L. R. A. 819.

107 Cal. 345-348, 40 Pac. 440, **PEOPLE v. SIMONSEN.**

To Prove Corpus Delicti, All Elements of crime must be made to appear before defendant's confessions are admissible for any purpose.

Approved in *People v. Besold*, 154 Cal. 368, 97 Pac. 873, following rule; *People v. Wilkins*, 158 Cal. 536, 111 Pac. 615, in prosecution

for murder, evidence being circumstantial, it is proper to admit defendant's admissions and facts tending to connect him with crime, without first proving corpus delicti; *People v. Spencer*, 16 Cal. App. 759, 117 Pac. 1040, corpus delicti was sufficiently proved to justify evidence of defendant's admissions, by proof that defendant represented that he had twenty thousand dollars on deposit, and expected to have seventy-five thousand dollars more there in few days, taken in connection with fact that draft drawn for five hundred dollars on said bank was dishonored few days later for want of funds; *People v. Saunders*, 13 Cal. App. 747, 110 Pac. 827, where physical condition of property showed that three distinct fires had been started, and it appeared improbable that fire was result of accident, corpus delicti was sufficiently shown to warrant defendant's admissions; *People v. Rowland*, 12 Cal. App. 11, 106 Pac. 430, where defendant was charged with embezzlement of particular fund, and check was drawn thereon by debtor of bank for one thousand dollars, and defendant conducted transaction personally, and withheld usual tag which would result in record thereof, and no record was made, and there was general shortage of one hundred thousand dollars by defendant, corpus delicti was sufficiently proved; *People v. Chadwick*, 4 Cal. App. 73, 87 Pac. 388, charge of previous conviction of felony, with charge of perjury, cannot be sustained by reporter's testimony of mere admission of defendant, made upon former trial of forgery charge, that he had been convicted upon prior charge of felony at different date from that in judgment-roll; *People v. Grill*, 3 Cal. App. 516, 86 Pac. 614, in murder trial, where corpus delicti had been established by independent evidence showing death produced by criminal means only used by one other person, which evidence pointed strongly to defendant, defendant's admissions were properly admitted against him; *People v. Frank*, 2 Cal. App. 285, 83 Pac. 579, on charge of murder, no conviction can be sustained upon defendant's admissions alone; *In re Kelly*, 28 Nev. 498, 83 Pac. 225, on preliminary examination on charge of rape, evidence of medical expert that from examination of prosecutrix shortly after alleged offense, he thought she had had intercourse with someone, and of other witnesses that they had seen marks of violence on her person, were sufficient, when coupled with defendant's admission shortly after crime that he had done it, to justify his commitment for crime; *State v. Marselli*, 43 Wash. 276, 86 Pac. 587, on prosecution for rape, where defendant was convicted of attempt to rape, erroneous admission of confession, without proof of corpus delicti, was prejudicial.

Proof of Corpus Delicti. See note, 68 L. R. A. 42, 75.

Corpus Delicti in False Pretenses. See note, 19 L. R. A. (n. s.) 443.

107 Cal. 348-362, 40 Pac. 534, **LASSING v. JAMES.**

In Cases of Uncertainty, Language of contract is to be interpreted most strongly against party who caused uncertainty to exist.

Approved in *Payne v. Neuval*, 155 Cal. 50, 99 Pac. 478, where grantee prepared instrument, any uncertainties existing in said agreement are to be interpreted most strongly against him.

In Contract for Sale of Nine Stacks of hay at five dollars per ton, title passes presently, notwithstanding agreement to ascertain number of tons at some future time by weight and measurement.

Approved in *Grange Co. v. Farmers' Union etc. Co.*, 3 Cal. App. 524, 86 Pac. 617, where cause of business between buyer and seller, and seller's conduct, indicate intention to transfer title to grain at time of shipment, title thereto vested in buyer.

Where Vendor has Right to Sell personal property under facts of any particular case, he has right to choose his remedy as between suing for entire purchase price or selling property and bringing action for difference, if sale results in loss.

Approved in *Botsford v. Heney*, 12 Cal. App. 383, 107 Pac. 594, where defendant as purchaser made default in payment of purchase price as agreed, vendor's assignee has vendor's elective remedy to enforce payment of agreed purchase price against defendant; *Idaho Implement Co. v. Larnbach*, 16 Idaho, 511, 101 Pac. 956, discussing difference between "actual sale" and "executory agreement to sell."

Right to Rescind or Abandon Contract because of other party's default. See note, 30 L. R. A. 34.

Sufficiency of Selection or Designation of goods sold out of larger lot. See note, 26 L. R. A. (n. s.) 20.

107 Cal. 363-368, 40 Pac. 489, **PERRY v. MALARIN.**

Miscellaneous.—Cited in *Perry v. Malarin* (Cal.), 40 Pac. 490.

107 Cal. 373-378, 40 Pac. 492, **HEYDENFELDT v. JACOBS.**

Capacity in Which Executor or Administrator may be sued for personal tort. See note, 51 L. R. A. 264.

Miscellaneous.—Cited in *Heydenfeldt v. Jacobs* (Cal.), 40 Pac. 493.

107 Cal. 378-381, 40 Pac. 495, **GRIFFIN & SKELLY CO. v. MAGNOLIA ETC. FRUIT C. CO.**

Plaintiff is Entitled, Under Section 16 of article XII of Constitution, to sue corporation in county where contract was made only when corporation is sole defendant in action.

Approved in *Bond v. Karma-Ajax Con. Min. Co.*, 15 Cal. App. 474, 115 Pac. 256, where superior court acquired jurisdiction of corporation by service on president and he permitted default against it under belief that claims sued on were valid, court could render default judgment; *Pittman v. Carstenbrook*, 11 Cal. App. 226, 104 Pac. 700, where transitory action is brought in county outside defendants' residence, fact that foreign corporation codefendant did not unite in demand for change of venue cannot affect their right to such change, in absence of showing that original venue was county where foreign corporation had its place of business in this state.

Provision of Section 16 of Article XII is merely permissive to plaintiff.

Approved in *Miller & Lux v. Kern County Land Co.* (Cal.), 65 Pac. 313, where action was brought against corporation for injuries to real estate in county where it had its principal place of business, which was other than where land was, section 16 of article XI of Constitution could not affect right under section 392 of Code of Civil Procedure to have venue changed.

107 Cal. 382-386, 40 Pac. 482, **AHERN v. McOARTHY.**

Deed Absolute in Form, if Given to secure debt, will be treated in equity as mortgage, and facts and circumstances attending its execution may be shown by parol evidence.

Reaffirmed in *Couts v. Winston*, 153 Cal. 688, 691, 96 Pac. 358, 359.

Evidence must be Clear that there was existing debt, and that deed was intended to secure its payment, in order for deed absolute on its face to be declared mortgage.

Approved in *Peres v. Crocker* (Cal.), 47 Pac. 930, in action to declare deed absolute a mortgage, judgment that deed was in fact absolute cannot be set aside where there was evidence of grantor's conduct, and of his pecuniary condition at its execution, and his declarations before and after.

Whether Deed can be Treated as Mortgage or not must depend upon whether there was continuing indebtedness from plaintiffs to defendants to be secured by it.

Approved in *Keifer v. Myers*, 5 Cal. App. 673, 91 Pac. 164, where transfer of half of stock of corporation was contemporaneous with right to purchase same, and none of plaintiff's existing liabilities as stockholder were canceled or assumed by defendant, transfer was pledge and not sale.

Relief from Mistake of Law as to effect of instrument. See note, 28 L. R. A. (n. s.) 802.

107 Cal. 386-391, 40 Pac. 545, **TOWN OF HAYWARD v. PIMENTAL.**

Duty of Recorder to Issue Execution is purely ministerial.

Approved in *Rabin v. Pierce*, 10 Cal. App. 736, 103 Pac. 772, where action appealed from justice's court to superior court has been improperly dismissed therefrom, appellant cannot invoke certiorari to review and annul act of justice in issuing execution thereafter upon judgment.

Judgment Being Rendered by Court which had jurisdiction of parties and of defectively stated cause of action is valid until appealed from or reversed.

Approved in *Matter of Hughes*, 159 Cal. 365, 113 Pac. 686, judgment of superior court of county of venue convicting defendant of crime was conclusive upon that point, and judgment by court of another county upon habeas corpus holding commitment void was erroneous.

Where Answer to Affidavit for Writ of Mandate presents no issues of facts, and raises only issues of law, hearing matter on pleadings is sufficient compliance with section 1088 of Code of Civil Procedure.

Cited in *Ferguson v. Board of Education*, 7 Cal. App. 570, 95 Pac. 166, arguendo.

Mandamus as Proper Remedy Against Public Officers. See note, 98 Am. St. Rep. 904.

Mandamus to Compel Inferior Court to enforce its judgment or decree. See note, 24 L. R. A. (n. s.) 888.

107 Cal. 391-397, 40 Pac. 493, **SANDELL v. SHERMAN.**

Where Party has Communicated All Facts of which he had knowledge to attorney, and acted upon advice received, in good faith, action of malicious prosecution will not lie.

Approved in *Holliday v. Holliday* (Cal.), 53 Pac. 46, defendant, in action for malicious prosecution, who relies on defense of probable cause by acting in good faith upon counsel's advice, after having disclosed all material facts within his knowledge, need not show that he also disclosed all material facts which he could have ascertained by reasonable diligence.

Question of Good Faith of Counsel in giving advice is not element in determining whether or not there was probable cause.

Reaffirmed in *Shea v. Cloquet Lumber Co.*, 92 Minn. 351, 100 N. W. 112.

Advice of Counsel as Defense to Action for malicious prosecution. See note, 18 L. R. A. (n. s.) 50, 55, 63, 64, 65, 66.

Liability for Malicious Prosecution of civil action. See note, 93 Am. St. Rep. 461.

107 Cal. 402-410, 40 Pac. 496, **DEMARTINI v. SAN FRANCISCO.**

User Sufficient to Establish Dedication by owner must be with knowledge and consent of owner, and under such circumstances as to show intention by owner to dedicate to such use.

Approved in *Hailey v. Riley*, 14 Idaho, 502, 95 Pac. 693, 17 L. R. A. (n. s.) 86, estoppel in pais cannot be applied in favor of public against property owner, unless he stood by, and by his action or silence concurred in allowing use by public, so that to deprive them of such use would invade right founded upon such presumption.

107 Cal. 410-423, 40 Pac. 552, **LE BRETON v. COOK.**

Construction of Wills Leading to intestacy is not favored.

Approved in *Estate of Claiborne*, 158 Cal. 649, 112 Pac. 279, provision in will, which otherwise made no disposition of property, that it was testator's wish that all property should be considered as community property, should be construed as testamentary disposition to wife of such portion as she would take under law of succession, if property were community property.

Interpretation Should be Placed on Wills so as to prevent intestacy, where will evinces intention by testator to dispose of his whole estate.

Approved in *Estate of Blake*, 157 Cal. 459, 108 Pac. 291, presumption against intestacy is subordinate to cardinal rule in interpretation that will is to be construed according to testator's intention, as expressed in language of will; *Estate of Gregory*, 12 Cal. App. 312, 107 Pac. 568, though wife died before husband's death, and trust thereby created for her benefit failed, bequest of residue of personal property to named grandchildren was not thereby defeated; *Estate of Grannis*, 3 Cal. Prob. 434, will making certain bequests, and giving residue of property to daughter, is not affected by subsequent declaration in will that all estate therein devised is separate property; *In re Lotzgesell's Estate*, 62 Wash. 359, 113 Pac. 1108, where testator gave small pecuniary legacy to each of five daughters, real estate to two sons, and all personal property to one of five daughters, further stating that others had received advances as their share of inheritance, sum of six thousand two hundred dollars passed to fifth daughter under clause stated.

Where It is Manifest from Context that testator used "residue" in restricted sense, it will be given meaning in which it was clear testator used it.

Approved in *Estate of Koch*, 8 Cal. App. 94, 96 Pac. 100, where codicil leaves all "belongings, furniture and clothes included," codicil does not include any money.

Word Used More Than Once in Will is presumed to be used in same sense, unless contrary intention appears from context.

Approved in *Estate of Vogt*, 154 Cal. 511, 98 Pac. 267, where testator, after devise of separate property to wife, provided that rest

of his "estate" go to her and four children, equally, and further declared that all but eight thousand dollars of "estate" was separate property, and value of entire estate was eleven thousand dollars, and of lot devised two thousand three hundred dollars, widow had election to take under will or share in community.

Except for Establishment of General Principles, very little aid can be procured from adjudged cases in construction of wills.

Reaffirmed in *Estate of Skae*, 1 Cal. Prob. 422.

Specific, Demonstrative and General Bequests. See note, 140 Am. St. Rep. 613.

107 Cal. 423-428, 40 Pac. 549, SPENCER v. DUNCAN.

In Action for Accounting of Trust Funds, finding against defendants' plea of statute of limitations need not find date of demand.

Approved in *Centerville v. Turner County*, 25 S. D. 303, 126 N. W. 606, where county, in collection of city's taxes, retained more than statutory commission, which retention was under claim of right, and known to city, limitations ran against each amount so retained from date of each settlement.

Erroneous Conclusion of Law is not ground of reversal if judgment is right.

Approved in *Lange v. Waters*, 156 Cal. 144, 103 Pac. 890, in action by vendee for damages for breach of contract for sale of land, findings inserted among so-called conclusions of law that contract was incapable of enforcement because of uncertainty in description of land should be construed as findings of fact.

Section 633 of Code of Civil Procedure is Directory.

Approved in *McKelvey v. Waggy*, 157 Cal. 409, 108 Pac. 269, court may make general finding in order of sale that all allegations of complaint are true, and is not required to make any findings upon affirmative defense, where no evidence is introduced to support it; *Butler v. Agnew*, 9 Cal. App. 330, 99 Pac. 397, if correct findings or conclusions of law and fact are made, they may be considered in their true character although set out together.

107 Cal. 432-438, 40 Pac. 540, SMITH v. LIVERPOOL ETC. INS. CO.

Before Agents' Declarations are Admissible to bind his principal, fact of agency must be established.

Approved in *Santa Cruz Butchers' Union v. I. X. L. Lime Co. (Cal.)*, 46 Pac. 382, following rule.

Evidence of Declarations of Person claimed to be agent are inadmissible to establish agency.

Approved in *Pease v. Fink*, 3 Cal. App. 379, 85 Pac. 660, one who deals with another upon his statement that he is agent of third person takes upon himself risk of being able to show that such agency existed.

107 Cal. 438-445, 40 Pac. 555, VAN PRAAG v. GALE.

Cases of Negligence Present Mixed Question of law and fact.

Approved in *Doyle v. Eschen*, 5 Cal. App. 57, 61, 89 Pac. 837, 839, where plaintiff's evidence does not show as matter of law that he was guilty of contributory negligence, it was proper to deny motion for nonsuit, and to submit question of contributory negligence to jury; *Johnson v. Thomas (Cal.)*, 43 Pac. 579, 580, where plaintiff was run

over by wagon driven at great speed, and he saw it when it was block away, but thinking it would not be turned toward side street where he was standing, because of speed, paid no further attention, question of contributory negligence was properly left to jury.

Court Should Decide Question of Negligence as matter of law when facts are clearly settled.

Approved in *Wardlaw v. California Ry. Co.* (Cal.), 42 Pac. 1076, where passenger goes on side of platform car opposite platform, and not at place arranged to receive passengers, and attempts to climb on train from between cars, and in so doing places his foot on bumper, where it was injured by engine moving up to couple train, he is guilty of contributory negligence.

Where Plaintiff Knew of Dangerous Opening, which he inadvertently stepped into, question of his negligence is one for jury.

Distinguished in *Brett v. Frank*, 153 Cal. 273, 94 Pac. 1053, where employer maintained open elevator shaft-hole in tannery floor, existence of which plaintiff knew, but into which he stepped, in temporary forgetfulness, while backing truck to elevator, such forgetfulness, being due to want of ordinary care, does not raise question of fact for jury.

107 Cal. 446-447, 48 Am. St. Rep. 145, 40 Pac. 557, BROWN v. MERRILL.

Creditor Stockholder of Corporation may Sue other stockholders for their pro rata of debt.

Approved in *Hinshaw v. Austin*, 64 Kan. 464, 67 Pac. 883, where corporation stockholders guarantee payment of promissory notes of corporation, portion of stockholders, who paid same when reduced to judgment, may maintain action for contribution against costockholders for their pro rata share of debts so paid.

When Stockholder has Paid His Portion of corporation's debts, he is freed from all liability.

Approved in *Gardiner v. Bank of Napa*, 160 Cal. 580, 117 Pac. 668, section 322 of Civil Code does not conflict with provisions of section 3 of article XII of Constitution.

107 Cal. 447-455, 40 Pac. 542, PACIFIC FRUIT CO. v. COON.

Issuance of Certificate of Corporate Stock is not necessary preliminary to ownership or assessibility of such stock.

Approved in *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 29, 108 Pac. 873, following rule; *Cotter v. Butte & R. V. Smelting Co.*, 31 Mont. 133, 77 Pac. 510, where plaintiff made part payment, but stock had not been delivered to him, but company recognized him as stockholder, and he was permitted to vote stock, he was estopped to deny delivery of stock to him and acceptance of it.

Subscription for Capital Stock of Corporation cannot be rescinded or canceled, except for fraud or mistake, without unanimous consent of all stockholders.

Approved in *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 411, 117 Pac. 1044, where directors released one-half of subscriptions, stockholders are estopped from objecting to directors' power to make such compromise, where, at subsequent meeting of stockholders, such subscribers were recognized as holding only one-half of their original subscriptions, and corporation resold surrendered stock as its own.

Withdrawal of Stock Subscription. See note, 33 L. R. A. 596.

Nature and Validity of Subscription Agreement to corporate stock
See note, 136 Am. St. Rep. 739.

107 Cal. 461-464, 40 Pac. 752, PEOPLE v. GRESS.

On Trial for Murder, Admission of declarations of deceased made on day before homicide, to effect that he had discovered that defendant was trying to get his wife and child to run away with him, is prejudicial error.

Approved in concurring opinion in *People v. Cook*, 148 Cal. 352, 83 Pac. 51, evidence of motive is admissible only where fact of homicide is denied and is in doubt and not when it is admitted.

Criticised in *People v. Cook*, 148 Cal. 343, 344, 83 Pac. 47, 48, when district attorney offered evidence of defendant's criminal relations with his daughter, and offered to connect it with proof that defendant was extremely jealous of attentions of anyone to her, and that deceased had been paying her attention, offer made admission of proof correct.

107 Cal. 464-477, 40 Pac. 742, 29 L. R. A. 512, SKINNER v. SANTA ROSA.

Where Common Council, Under Notice of election stating that interest was to be paid annually, made interest payable semi-annually, in New York, it was added burden upon bondholders, and unauthorized.

Approved in *Murphy v. San Luis Obispo (Cal.)*, 48 Pac. 975, city cannot issue bonds payable in "gold coin of the United States" instead of in "gold coin or lawful money of the United States," as required by act of March 1, 1893; *Carlson v. Helena*, 39 Mont. 107, 102 Pac. 47, to submit to taxpayers question of issuance of bonds to acquire particular municipal water supply, without first ascertaining that such particular supply is available and can be acquired, is illegal divestment of discretion vested in city council to purchase particular water supply.

Prior to Amendment of 1893, grant of power to municipality to issue bonds, without limitation as to kind of money in which they shall be payable, confers authority to make them payable "in gold coin of the present standard of weight and fineness."

Reaffirmed in *Hillsborough Co. v. Henderson*, 45 Fla. 361, 33 So. 998.

Form of Judgment and Procedure in Case of liability to make payment in coin. See note, 29 L. R. A. 593.

City cannot Issue Bonds in Form which does not substantially comply with terms stated in ordinance of submission and notice of election.

Disapproved in *Carlson v. Helena*, 39 Mont. 111, 102 Pac. 48, under Code, section 3455, it may be presumed that voter understood that time of payment stated in bonds would be that fixed by section 3459.

107 Cal. 477-482, 40 Pac. 754, PEOPLE v. LEE.

Defendant is Entitled to be Apprised with reasonable certainty of nature and particulars of crime charged against him.

Approved in *People v. Bradbury*, 155 Cal. 810, 103 Pac. 217, where indictment for perjury charged that defendant testified that he never "told" designated bank not to do certain thing, without naming officer of bank told, it is good against general demurrer; In re

Myrtle, 2 Cal. App. 389, 84 Pac. 338, where conviction was obtained under plea of guilty upon information not objected to and substantially charging offense in terms of section 211 of Penal Code, information and plea together established case of robbery; Daggs v. Territory, 11 Ariz. 454, 94 Pac. 1108, under statute defining rape, indictment charging defendant with assault with intent to commit rape, and without her consent by force was attempting to have intercourse with her, was defective.

107 Cal. 482-487, 40 Pac. 804, FLAGG v. DARE.

Affidavit Showing That Defendants are Indebted to plaintiff in specified sum upon contract for direct payment of money is sufficient in affidavit of attachment.

Approved in Ross v. Gold Ridge Min. Co., 14 Idaho, 697, 95 Pac. 825, contract providing for placing of twenty-five thousand shares of mining stock at five cents clear is contract for direct payment of money, and authorizes attachment in action therein for failure to sell such stock according to agreement.

107 Cal. 497-500, 40 Pac. 805, PEOPLE v. FLY.

Offense of Embezzlement was Complete the moment it was taken with intent wrongfully to appropriate it.

Approved in People v. Kinard, 14 Cal. App. 284, 111 Pac. 504, statute commenced to run from date of misappropriation of money.

107 Cal. 500-504, 40 Pac. 806, WOOD v. OAKLAND ETC. RAPID TRANSIT CO.

Memorandum of Contract Filed with recorder reciting that materials are to be furnished in conformity with specifications mentioned in connection therewith is void where specifications are neither set out nor filed.

Approved in Burnett v. Glas, 154 Cal. 255, 97 Pac. 425, where building contract refers in description of work to specifications, same must be filed even though contract itself does not refer to them as annexed, but refers to them as being kept in architect's office.

Where Contract Between Owner of Property and original contractor was void, materialman could maintain action against owner to enforce their liens.

Approved in Gnekow v. Confer (Cal.), 48 Pac. 332, section 1183 of Code of Civil Procedure does not create contractual relation between owner and subcontractor, whereby owner can be held personally liable, but merely affords opportunity for lien.

Fact That Complaint Alleged that building was completed "on or about" certain date does not subject complaint to general demurrer where complaint alleges that claim of lien was filed within thirty days after completion of building.

Approved in Stewart v. Simmons, 101 Minn. 377, 112 N. W. 283, allegation that lien was filed February 26, 1906, and within ninety days after delivery of last materials is sufficient against general demurrer, although exact date of furnishing of last materials is not given.

107 Cal. 504-512, 40 Pac. 802, BERRY v. WOODBURN.

Partnership Relation Arises from Ownership of interest in mine.

Approved in *Cascaden v. Dunbar*, 157 Fed. 66, 84 C. C. A. 566, where one of defendants entered into agreement with plaintiff, whereby latter was to locate mining claims in name of some one of defendants, who would record same, plaintiff to have half interest therein, and defendants did not record until after time for recording had expired, when they relocated them, defendants became partners with plaintiff from time of agreement and he was entitled in equity to his interest.

"Grubstake" Contract is One Whereby One Party furnishes labor and other "grub," and is of nature of qualified partnerships.

Approved in *Cascaden v. Dunbar*, 2 Alaska, 412, where one gratuitously stakes mining claim for another who gives no aid to venture, oral promise by locator to convey to latter after title by location is acquired cannot be enforced.

Cotenants in Mines. See note, 91 Am. St. Rep. 856.

107 Cal. 524-530, 40 Pac. 796, 29 L. R. A. 327, SAN BERNARDINO v. SOUTHERN PACIFIC CO.

Corporate Taxation and the Commerce Clause. See note, 60 L. R. A. 685.

Taxation of Corporate Franchises. See note, 57 L. R. A. 92.

107 Cal. 535-536, 40 Pac. 798, HENRY v. BARTON.

Where City Ordinance Entitles Every Man complying with its provisions to retail liquor license, one complying therewith may compel issuance of license by mandamus where trustees refuse.

Approved in *Inglin v. Hoppin*, 156 Cal. 490, 105 Pac. 585, land owners seeking to have their lands in particular reclamation district set off into independent district, and who have taken steps required by sections 3446, 3472, 3481 et seq. of Political Code, may have writ of mandate against supervisors upon their refusal to establish such independent district; *Montpelier v. Mills*, 171 Ind. 182, 85 N. E. 8, where liquor license is wrongfully and arbitrarily denied applicant therefor without any excuse for such denial, applicant may by mandamus compel issuance of license.

Criticised in *Reed v. Collins*, 5 Cal. App. 497, 498, 499, 501, 502, 504, 90 Pac. 974, 975, 976, mandamus lies to compel issuance of license, under county liquor ordinance, where applicants had been refused license, although they had followed prescribed methods for obtaining such under ordinance, and were fit and proper persons.

107 Cal. 541-548, 40 Pac. 956, PEOPLE v. HARRISON.

Court cannot Set Aside Judgment foreclosing certificate of purchase upon evidence not found in judgment-roll.

Approved in *Tuffree v. Stearns Ranchos Co. (Cal.)*, 54 Pac. 827, judgment regular on its face cannot be set aside on motion attacking its validity.

Distinguished in *George Frank Co. v. Leopold etc. Co.*, 13 Cal. App. 64, 108 Pac. 880, where judgment was rendered by default and after lapse of six months and day motion was made to vacate same as being void, court might vacate judgment, upon proof outside record, that court never obtained jurisdiction over defendant.

107 Cal. 549-562, 48 Am. St. Rep. 146, 40 Pac. 1020, 29 L. R. A. 718,
JUDSON v. GIANT POWDER CO.

Negligence is Prima Facie Established from fact of explosion of nitroglycerine factory, in absence of evidence showing care on part of defendant's employees.

Approved in *Rathbun v. White*, 157 Cal. 254, 107 Pac. 311, instruction, that explosion of powder kept by defendants in such quantities as to be very dangerous to property in neighborhood and to persons rightly in neighborhood raised presumption of negligence, burden of rebutting which was on defendant, was correct; *Bauhofer v. Crawford*, 16 Cal. App. 679, 117 Pac. 932, where wagon was standing at side of street, and defendant's automobile, running at speed of ten or fifteen miles an hour, ran into it, defendant's negligence is presumed, where evidence showed that collision was at 8 o'clock at night, when street was clear, and that arc-light made wagon plainly visible for fifty feet, and driver of wagon was unaware of defendant's approach until collision occurred; *Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St. 385, 113 Am. St. Rep. 980, 78 N. E. 530, proof of falling of trolley pole from electric car when it stopped at usual stopping place, upon person standing there for purpose of getting on car, raises presumption of negligence on part of traction company; *Whaley v. Sloss-Sheffield S. & I. Co.*, 164 Ala. 228, 51 So. 424, *arguendo*.

Distinguished in *Sauer v. Eagle Brewing Co.*, 3 Cal. App. 132, 84 Pac. 427, presumption of negligence from accident has no application to case where both parties were in exercise of equal right, and are chargeable with same degree of care at street crossing.

Presumption of Negligence from Happening of accident causing personal injuries. See note, 113 Am. St. Rep. 993, 1003, 1015.

Presumptions of Negligence are Created from experience of past.

Approved in *Bowley v. Mangrum & Otter*, 3 Cal. App. 234, 84 Pac. 998, it is not error to refuse to instruct that defendant's negligence could not be presumed from happening of accident, where defendant's servant raised trap-door, which caused accident.

In Making Grant for Purpose of dynamite factory, grantor has right to assume that due care will be exercised in conduct of business.

Approved in *Waters-Pierce Oil Co. v. Snell*, 47 Tex. Civ. App. 421, 106 S. W. 174, it is no defense to action for injury from negligent drawing of gasoline from tanks near furnace that fire never before ignited gas from gasoline so drawn.

What are Public Nuisances. See note, 107 Am. St. Rep. 244.

Presumption of Negligence of Master from unexplained starting of machinery injuring servant. See note, 1 L. R. A. (n. s.) 299.

Municipal Power Over Nuisances relating to trade or business. See note, 38 L. R. A. 642.

Municipal Power Over Nuisances affecting safety, health, and personal comfort. See note, 38 L. R. A. 311.

Applicability of Res Ipsa Loquitur in absence of contractual relations. See note 6 L. R. A. (n. s.) 800.

107 Cal. 563-577, 48 Am. St. Rep. 156, 40 Pac. 950, DAVIS v. PACIFIC POWER CO.

It is Only Where Facts are Such as to Leave but inference of negligence that court is justified in taking question of contributory negligence from jury.

Reaffirmed in Doyle v. Eschen, 5 Cal. App. 57, 89 Pac. 837.

Where Owner of Building Erected in Basement, alongside of basement steps, over tenants' protest, shaft to transmit power to new building, which shaft was unprotected and dangerous, and liable to catch clothing, verdict for damages to employee is good.

Approved in Capwell v. Blake, 9 Cal. App. 111, 98 Pac. 54, when drainage of rain water from roof was defective, causing damage to lessee of ground floor, fact that lessee endeavored to ascertain cause and remedy trouble does not tend to show acknowledgment of his duty to care for roof.

Liability to Third Persons of Lessors of Personal Property. See note, 92 Am. St. Rep. 520.

Right of Servant to Recover Damages from third persons for injuries in performance of duties. See note, 46 L. R. A. 84, 86.

107 Cal. 577-586, 40 Pac. 1026, HELLINGS v. HEYDENFELDT.

Where Consideration has Passed to Obligor, and he has given absolute promise to pay, damage is amount due by terms of obligation, with interest.

Approved in Dickinson v. Zubiarte Mining Co., 11 Cal. App. 663, 106 Pac. 125, where complaint alleges conditional purchase of mining stock, under express agreement that, if dissatisfied upon examination of property, company would refund price paid, and alleging tender of stock and demand of payment under such agreement, demurrer is properly overruled.

107 Cal. 587-602, 40 Pac. 810, MORFFEY v. SAN FRANCISCO & SAN RAFAEL RY. CO.

After Decree of Distribution to Widow as trustee no confirmation of sale under power held by her as trustee was required.

Approved in Blair v. Hazzard, 158 Cal. 724, 112 Pac. 299, where land is devised to trustees, with valid power to sell, fact that deed from them erroneously recites that it was made in pursuance of order of court will not prevent title from passing to grantee.

Trustee Takes Estate Adequate to Execution of trust, no more and no less.

Approved in Keating v. Smith, 154 Cal. 192, 97 Pac. 303, under decree distributing residuary estate to trustees to control during minority of testator's children, and then "to go" one-third to testator's widow, widow takes vested estate in such share.

Where There is No Trust for Purpose of Sale, life estate, vested in trustee as individual, is not enlarged to fee by power of sale, and trustee's power to sell remainder after termination of life estate is mere naked power to sell.

Approved in Estate of Nelson, 3 Cal. Prob. 446, where will gives widow estate for life, with remainder over, power of disposition given by another clause in will does not enlarge her estate into fee and destroy rights of remainderman.

Remainder After Devise or Bequest for Life with power of disposition. See notes, 139 Am. St. Rep. 83; 1 L. R. A. (n. s.) 782.

107 Cal. 602-610, 40 Pac. 1024, 41 Pac. 304, **RANKIN v. NEWMAN.**

No Finding or Averment of Probative Matter can qualify ultimate fact established.

Approved in *People v. McCue*, 150 Cal. 199, 88 Pac. 901, in action to abate obstructions to streets, where probative facts are not necessarily inconsistent with ultimate fact found, that such streets were public highways, and no evidence appears in records, finding of ultimate fact prevails and supports judgment abating nuisances; *Fairbanks v. Rollins* (Cal.), 54 Pac. 79, finding of ultimate fact cannot be impeached by immaterial finding of mere probative fact.

107 Cal. 614-618, 48 Am. St. Rep. 164, 40 Pac. 1030, **ESTATE OF SALMON.**

Intentional Omission of Child from Will. See note, 79 Am. St. Rep. 816.

Pretermitted Heirs. See note, 115 Am. St. Rep. 582, 589.

107 Cal. 618-622, 40 Pac. 1032, **ESTATE OF CARRIGER.**

Homestead cannot be Set Aside by probate court in lands in which deceased could not have declared homestead in his lifetime.

Approved in *Estate of Davidson*, 159 Cal. 100, 115 Pac. 50, where husband held undivided half interest in land as community property, and wife other half as her separate property, probate court cannot set apart to wife his interest as homestead, leaving her undivided interest in cotenancy properly unimpressed with homestead characteristics; *Schoonover v. Birnbaum*, 148 Cal. 549, 550, 83 Pac. 999, no homestead can be selected or claimed upon lands owned by claimant as joint tenant or tenant in common.

Distinguished in *Estate of Pohlmann*, 2 Cal. App. 362, 84 Pac. 355, under section 1465 of Code of Civil Procedure, probate court could set apart any portion of testator's estate which was suitable as homestead, although deceased had never resided upon it, and could not have filed declaration of homestead thereon.

107 Cal. 622-626, 40 Pac. 1018, **MORSE v. DE ARDO.**

Land Held Under Agricultural Patent from United States is not "mining claim" under section 1183 of Code of Civil Procedure.

Approved in *Berentz v. Kern King Oil etc. Co.* (Cal. App.), 84 Pac. 46, 47, mining claims referred to in section 1183 of Code of Civil Procedure do not include oil wells.

Explained in *Berentz v. Belmont Oil Min. Co.*, 148 Cal. 582, 113 Am. St. Rep. 308, 84 Pac. 49, land in process of development as oil mine is mining claim within meaning of lien law.

"Mining Claim" is That Portion of Lode, or surface, which claimant has acquired by virtue of compliance with laws of United States and miners' customs.

Approved in *Escott v. Crescent Coal etc. Co.*, 56 Or. 195, 196, 106 Pac. 454, 455, in construing statute providing for liens, in title of which words "mining claim" are used, words are not to be strictly construed to determine rights to lien, but they are to control in measuring extent of lien.

107 Cal. 629-644, 40 Pac. 1047, KNOWLES v. SANDERCOCK.

In Action to Enforce Liability of stockholders of corporation, plaintiff must prove whole amount of stock outstanding to enable court to determine liability.

Approved in *Thomas v. Wentworth Hotel Co.*, 158 Cal. 277, 139 Am. St. Rep. 120, 110 Pac. 943, averment that number of shares outstanding was three thousand five hundred, word "outstanding" was not insufficient under Civil Code, section 322.

Stockholders of Corporation are Liable for debts of corporation.

Approved in *Anderson v. Schloesser*, 153 Cal. 222, 94 Pac. 886, in action to enforce stockholder's liability, upon contract of corporation with plaintiff, in which defendant's real estate was attached and sold under execution, defendant's transfer of such real estate is not such transfer of interest as to entitle transferee to be substituted as party defendant, under section 385 of Code of Civil Procedure.

In Action on Stockholder's Liability, if debt of corporation was created by written contract, debt must be pleaded in usual mode.

Approved in *Foreign Mines Development Co. v. Boyes*, 180 Fed. 596, 597, in suing stockholder on his liability, it is essential to allege contract of corporation out of which it arises.

Fact That Debt of Corporation is Secured by mortgage does not affect liability of stockholder, who is not injured, or benefited by fact that corporation has given security.

Distinguished in *Foreign Mines Development Co. v. Boyes*, 180 Fed. 598, action against stockholder to enforce his proportionate liability as stockholder on notes given by corporation and secured by mortgage is one based on notes so as to preclude attachment under section 537 of Code of Civil Procedure.

Whether Stockholder's Liability for Debts of corporation includes interest. See note, 19 L. R. A. (n. s.) 430.

107 Cal. 644-655, 48 Am. St. Rep. 167, 40 Pac. 1033, SMITH v. BRODERICK.

Section 18 of Article XI of Constitution means that no liability or indebtedness incurred in any one year shall be paid out of income of any future year.

Approved in *County of Tehama v. Sisson*, 152 Cal. 178, 92 Pac. 69, where county supervisors borrowed from bank amount of estimated deficit, and made entry that same was obtained as proceeds of sale of county property, and after commencement of next fiscal year made entry of repurchase of such property for same amount, sale being wholly fictitious and colorable, transaction was in violation of constitutional provision.

Constitutional Restrictions on Power of Municipalities to contract debts. See note, 121 Am. St. Rep. 256.

107 Cal. 656-658, 40 Pac. 1042, LABS v. COOPER.

Description of Lot in Assessment merely by particular number, which is its number on official city map, is insufficient to support assessment lien, if there is nothing in assessment referring to such official map.

Approved in *Smith v. Los Angeles*, 158 Cal. 709, 112 Pac. 310, under section 3650 of Political Code, description, in Mexican grant, giving name of ranch and statement that it is fractional section 24, T. 1 N.

R. 14 W. is insufficient to identify property assessed where no survey of land into congressional districts had ever been made; *Chapman v. Zoberlein*, 152 Cal. 218, 92 Pac. 188, assessment description of lot 34 in University Addition Tract in Los Angeles, though prima facie insufficient, in action involving validity of tax deed based upon such assessment, may be so explained as to hold assessment good by extraneous evidence showing that there was definite tract known by name given; *San Diego Realty Co. v. Cornell*, 150 Cal. 638, 89 Pac. 603, where description in assessment was to lot 1, block 17, Ocean Beach, injunction lies to restrain execution of deed to state for unpaid taxes based upon assessment; *Wright v. Fox*, 150 Cal. 681, 89 Pac. 833, assessment as lot 5, block 3, in Jefferson street, in Los Angeles county, but failing to designate city, or to refer to any map or tract, is void; *McLauchlan v. Bonyne*, 15 Cal. App. 242, 114 Pac. 799, where no map was referred to in assessment or tax deeds from state, reference to recorded map of "Clifton Tract" in deed in plaintiff's chain of title prior to assessment is insufficient where it is sought to divest owner of title by proceedings in invitum; *Stough v. Reeves*, 42 Colo. 439, 440, 95 Pac. 960, where land was described by number and block of certain tract, without any reference to map, and lot was not subdivision of town, but of adjoining quarter section of land known as "Fairground plat," description was insufficient to identify lands sold.

Distinguished in *Baird v. Monroe*, 150 Cal. 573, 89 Pac. 357, where there was stipulation as to recorded map of "Pellissier Tract," and designation of property assessed by lot and block number therein, it is to be taken to mean that there is but one such map, and property is sufficiently identified.

Where Assessment Does not Refer to any official map, court cannot take judicial notice that there is such map.

Approved in *Fox v. Townsend*, 152 Cal. 57, 91 Pac. 1004, where assessment description was to county, tract, lot and block, it was prima facie insufficient to identify land assessed.

Where Relative Locations of Streets to each other, etc., were shown, description is good.

Approved in *Pacific Paving Co. v. Verso*, 12 Cal. App. 365, 107 Pac. 591, where resolution of intention to make street improvements limits work to intersection of three streets, but fails to define limits so that same could be readily understood, assessment is unsupported.

107 Cal. 659-664, 40 Pac. 1045, **RAMISH v. KIRSCHBAUM.**

Where Eggs were Sold, to be Sent by Freight, and bill of lading was sent to bank, with sight draft, to be delivered to vendee upon payment of price, title did not pass until before bill of lading was received by bank for delivery.

Approved in *Masoner v. Bell*, 20 Okl. 623, 95 Pac. 241, 18 L. R. A. (n. s.) 166, on sale of goods for cash on delivery, if, on delivery, payment is refused, and vendee appropriates goods, action lies against him for value.

Distinguished in *National Warehouse etc. Co. v. Toomey*, 144 Mo. App. 522, 129 S. W. 425, in contract to sell and deliver hay on track at point in Iowa for vendee in St. Louis, even though hay of such quality had no market value at shipping point, place of shipment was place of delivery.

To Whom Delivery may be Made under bill of lading. See note, 38 L. R. A. 360.

107 Cal. 667-674, 40 Pac. 1053, GREENBERG v. CALIFORNIA BITUMINOUS ROCK CO.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 345.

107 Cal. 675-676, 40 Pac. 1057, CRAIG v. HESPERIA LAND ETC. CO.

Ruling of Trial Court upon Nonsuit presents question of law.

Approved in Smith v. Superior Court, 2 Cal. App. 531, 84 Pac. 55, upon appeal from judgment of justice's court granting nonsuit, where there was no trial upon merits in that court, superior court, upon reversal, properly refused trial de novo therein and remanded case for new trial in justice's court.

Rulings of Court upon Nonsuit must be excepted to.

Distinguished in Saul v. Moscone, 16 Cal. App. 509, 118 Pac. 454, where court summarily dismisses action for specific performance of contract, at conclusion of evidence of both parties, without motion for nonsuit by defendant, it was final judgment "deemed excepted to" under section 647 of Code of Civil Procedure.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 108 CALIFORNIA.

108 Cal. 1-7, 40 Pac. 1077, WINONA WAGON CO. v. BULL.

Corporation cannot Extend Liability of stockholders by giving note for prior liability for which alone stockholders were responsible.

Reaffirmed in *O'Neill v. Quarnstrom*, 6 Cal. App. 473, 92 Pac. 392.

108 Cal. 8-14, 41 Pac. 281, PEOPLE v. YOUNG.

Fact That Some Jurors were not Qualified does afford ground for challenge to panel.

Reaffirmed in *People v. Richards*, 1 Cal. App. 573, 82 Pac. 694.

Uncontradicted Statement in Presence of Accused as confession.
See note, 25 L. R. A. (n. s.) 543.

108 Cal. 19-25, 40 Pac. 1059, GARD v. GARD.

Vendor's Lien is Permitted Only for unpaid purchase money, and exists only where there is a certain, ascertained, absolute debt therefor.

Approved in *Marchand v. Chicago etc. R. R. Co.*, 147 Mo. App. 629, 127 S. W. 390, holding lien did not arise on failure of vendee to perform covenant to maintain a dam which was part of consideration for conveyance.

Waiver of Vendor's Lien. See note, 137 Am. St. Rep. 196.

108 Cal. 25-31, 41 Pac. 24, ALEXANDER v. McDOW.

Whether Complaint States Cause of action may be considered on appeal from default judgment.

Approved in *Martin v. Lawrence*, 156 Cal. 193, 103 Pac. 914, upholding complaint on appeal from default judgment.

Complaint Considered and Held to state cause of action, though assignment of note sued on was defectively pleaded, when no demurrer was interposed.

Approved in *Tustin Fruit Assn. v. Earl Fruit Co.* (Cal.), 53 Pac. 696, and *Kreiger v. Feeny*, 14 Cal. App. 543, 112 Pac. 903, both upholding complaint as against general demurrer; *Nevin v. Gary*, 12 Cal. App. 5, 106 Pac. 423, upholding on appeal from default judgment complaint defectively worded; *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 311, 90 Pac. 207, holding complaint sufficiently averred ownership of mortgage in absence of demurrer thereto.

Clerk may Enter Judgment on Default for attorneys' fees where amount is provided for in note.

Distinguished in *Parker v. Dekle*, 46 Fla. 457, 35 So. 5, holding it error to enter judgment for attorneys' fees and damages assessed by clerk in suit on note which provided for "reasonable attorney's fee."

Necessity of Jury to Compute Damages on default judgment. See note, 20 L. R. A. (n. s.) 7.

108 Cal. 33-37, 40 Pac. 1057, **BUCKMAN v. FERGUSON.**

Under Vrooman Act, Superintendent of Streets must fix time for commencement of work.

Approved in *Buckman v. Hatch* (Cal.), 70 Pac. 222, holding time for commencement and completion need not be given in contract, but must be fixed by superintendent and authenticated by his signature.

108 Cal. 38-45, 41 Pac. 330, **HOSTETTER v. LOS ANGELES TERMINAL RY. CO.**

Where Description of Land by Lines and monuments is indefinite, statement of acreage is essential part of description.

Approved in *Smith v. Owens*, 63 W. Va. 67, 59 S. E. 765, following rule; *Barbour, Stedman & Herod v. Tompkins*, 58 W. Va. 591, 52 S. E. 715, 3 L. R. A. (n. s.) 715, holding acreage essential to locate land when description was imperfect.

Where Attempt to Locate Monuments leads to confusion, distances given are controlling.

Approved in *Goss v. Golinsky*, 12 Cal. App. 76, 106 Pac. 606, holding where marks of government survey were obliterated and corner could not thus be located, measurements in field-notes controlled.

Location of Boundaries. See note, 129 Am. St. Rep. 1002, 1012.

Effect of Bounding Grant on River or Tide Water. See note, 42 L. R. A. 510.

108 Cal. 45-46, 40 Pac. 1056, **LACEY v. LACEY.**

Additional Counsel Fees for Past Services of attorney cannot be awarded in final judgment of divorce.

Approved in *Bordeaux v. Bordeaux*, 29 Mont. 483, 75 Pac. 361, following rule; *Leak v. Leak*, 156 Fed. 477, 84 C. C. A. 284, holding court could not in final divorce decree award wife money to cover cost of depositions previously taken by her.

Jurisdiction to Award Temporary Alimony, suit money, and counsel fees pending appeal. See note, 27 L. R. A. (n. s.) 713.

108 Cal. 54-58, 40 Pac. 1051, **PEOPLE v. DENBY.**

Where Accused Testifies on His Own Behalf, it is improper to ask him on cross-examination if he has passed under another than true name, such evidence having no connection with matters testified to in chief.

Reaffirmed in *People v. Mohr*, 157 Cal. 735, 109 Pac. 477.

Party has Right to Resist Unlawful Attempt to arrest him.

Approved in *State v. Gum*, 68 W. Va. 111, 69 S. E. 465, holding party had no right to stab person who unlawfully attempted to arrest him.

For Beggar to Ask Assistance on One Occasion does not make him a vagrant nor justify his arrest by private person for vagrancy.

Approved in *People v. Craig*, 152 Cal. 46, 91 Pac. 999, holding accused guilty of acts amounting to vagrancy, and arrest therefor lawful.

Vagrancy. See note, 137 Am. St. Rep. 950.

108 Cal. 58-67, 41 Pac. 279, DREYFUS v. BADGER.

Patent Regular on Face is Conclusive as against collateral attack.

Approved in *Worcester v. Kitts*, 8 Cal. App. 184, 96 Pac. 337, holding state patent to land in sixteenth section conclusive as to nonmineral character of land as against collateral attack by mineral claimants; dissenting opinion in *Williams v. San Pedro*, 153 Cal. 52, 94 Pac. 237, majority holding in action to quiet title to tide lands defendants could show plaintiff's certificate of purchase was void when plaintiff showed no possession.

Ejectment by Executor or Administrator. See note, 136 Am. St. Rep. 84.

108 Cal. 68-72, 41 Pac. 20, MESNAGER v. ENGELHARDT.

Creation and Conveyance of Easements Appurtenant. See note, 136 Am. St. Rep. 689.

108 Cal. 72-81, 41 Pac. 18, 30 L. R. A. 390, HARGRAVE v. COOK.

Upper Owner has No Concern with any use or diversion of water after it has passed his land.

Approved in *San Luis Water Co. v. Estrada*, 117 Cal. 182, 48 Pac. 1080, reaffirming rule; *Hudson v. Dailey*, 156 Cal. 627, 105 Pac. 753, *Bathgate v. Irvine*, 126 Cal. 140, 77 Am. St. Rep. 158, 58 Pac. 444, *Rogers v. Overacker*, 4 Cal. App. 339, 87 Pac. 1109, *Crawford Co. v. Hathaway*, 67 Neb. 375, 108 Am. St. Rep. 647, 93 N. W. 798, 60 L. R. A. 889, and *Perry v. Calkins*, 159 Cal. 178, 113 Pac. 138, all holding use by lower owner of water permitted to pass by land of upper owner gave no right by prescription.

Right of Riparian Proprietor to Waters of stream is usufructuary including right to reasonable use of reasonable quantity for irrigation.

Approved in *Turner v. James Canal Co.*, 155 Cal. 95, 132 Am. St. Rep. 59, 99 Pac. 525, 22 L. R. A. (n. s.) 401, holding upper owner entitled to reasonable use of water for irrigation though it diminished flow to lower proprietor; *Anderson v. Bassman*, 140 Fed. 22, holding upper owner limited to reasonable use of water for irrigation.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 718.

Right of Prior Appropriator of Water. See note, 30 L. R. A. 678.

108 Cal. 81-88, 41 Pac. 29, SABICHI v. CHASE.

Conveyance to Trustee for Payment of certain creditors with provision that surplus after payment of such creditors be returned to grantor is not contract of security only but assignment for benefit of creditors.

Approved in *Brecht v. Law Union etc. Ins. Co.*, 153 Fed. 456, holding contract to convey real and personal property to mortgagee to manage same and pay grantor's debts and pay surplus over to him was not mortgage but vested title in grantee.

Preference by Mortgage or Sale as assignment for creditors. See note, 37 L. R. A. 340.

108 Cal. 92-95, 40 Pac. 1055, BACIGALUPO v. SUPERIOR COURT.

Citation Under Section 1328, Code of Civil Procedure, is in nature of summons, and jurisdiction to issue ceases one year after petition for revocation of probate of will is filed.

Approved in *Focha v. Estate of Focha*, 8 Cal. App. 577, 97 Pac. 322, holding where petition for revocation of will was filed only three days before expiration of year after probate, and citation was delayed six months thereafter, prima facie case of lack of diligence was made out.

108 Cal. 95-101, 49 Am. St. Rep. 64, 41 Pac. 31, 30 L. R. A. 820, **WHOLEY v. CALDWELL.**

Correlative Rights of Upper and Lower Proprietors as to use and flow of stream. See note, 41 L. R. A. 744.

108 Cal. 101-115, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673, **TEBBE v. SMITH.**

One Who Relies upon Overcoming prima facie correctness of official canvass, by resort to ballots, must show ballots have been preserved in manner required by statute.

Approved in *Chatham v. Mansfield*, 1 Cal. App. 305, 82 Pac. 346, holding ballots kept in torn envelope in desk of clerk where others might have access to them were inadmissible on contest; *Oakes v. Finlay*, 5 Ariz. 395, 53 Pac. 174, holding in election contest where ballots were not in court, parol evidence of contents was inadmissible; *Averyt v. Williams*, 8 Ariz. 360, 76 Pac. 464, holding fact that ballots might possibly have been tampered with did not render them inadmissible at election contest.

Where Ballots have Been Admitted in evidence in election contest, appellate court will not disturb ruling unless satisfied evidence does not warrant it.

Approved in *Starkweather v. Dawson*, 14 Cal. App. 673, 112 Pac. 739, refusing to disturb ruling on admission of ballots.

Where Cross on Ballot is Stamped between parallel lines containing name but not at right of column as required by statute, it is not distinguishing mark.

Approved in *Haskell v. Long Beach*, 153 Cal. 550, 96 Pac. 95, holding cross stamped anywhere between parallel lines inclosing name on ballot was not distinguishing mark; *Bloedel v. Cromwell*, 104 Minn. 490, 116 N. W. 949, holding ballot signed by voter opposite name of candidate was properly rejected; *Doll v. Bender*, 55 W. Va. 410, 47 S. E. 296, holding writing of name of candidate above name of office was not distinguishing mark though law required names to be written below; dissenting opinion in *Parker v. Hughes*, 64 Kan. 241, 91 Am. St. Rep. 216, 67 Pac. 645, 56 L. R. A. 275, majority holding ballots contained distinguishing marks; *Salcido v. Roberts* (Cal.), 67 Pac. 1079, arguendo.

Marking Official Ballot. See note, 47 L. R. A. 823, 828, 841.

Departure from Directory Provisions only will not render election void in absence of showing result was changed or rights of voters affected.

Approved in *Murphy v. San Luis Obispo* (Cal.), 48 Pac. 977, holding provision for writing "Yes" or "No" on ballot at bond election was mandatory; *Vigil v. Garcia*, 36 Colo. 440, 87 Pac. 547, holding substantial requirements of law were violated; *Rampendahl v. Crump*, 24 Okl. 888, 889, 105 Pac. 206, 207, holding void election at which practically all mandatory as well as directory provisions were flagrantly violated; *Westville v. Stillwell*, 24 Okl. 897, 105 Pac. 666,

holding provision for voter subscribing to affidavit in presence of election officers at special election was mandatory; *Salcido v. Roberts* (Cal.), 67 Pac. 1078, 1079, *arguendo*.

Irregularities Avoiding Elections. See note, 90 Am. St. Rep. 79, 80.

Scope and Effect of Election Law provisions for preserving ballots. See note, 30 L. R. A. (n. s.) 603, 607.

108 Cal. 115-122, 40 Pac. 1037, **IN RE SMITH.**

Testator is Presumed to Dispose only of his share of community, but where it undertakes in terms to dispose of all community property, wife is put to her election.

Reaffirmed in *Estate of Vogt*, 154 Cal. 510, 98 Pac. 266.

108 Cal. 124-128, 41 Pac. 33, **IN RE BLYTHE.**

Where Decision on Appeal cannot Affect Result as to thing in issue, it will not be retained merely because appellant might be entitled to recover costs.

Approved in *Turner v. Markham*, 156 Cal. 70, 103 Pac. 320, following rule; *Nelson v. Nelson*, 153 Cal. 205, 94 Pac. 880, dismissing appeal when during its pendency all matters in dispute except costs has been settled.

Right to Appeal as a Party Interested or injured. See note, 119 Am. St. Rep. 741.

108 Cal. 129-135, 41 Pac. 22, **GIER v. LOS ANGELES CONSOL. ELEC. RY. CO.**

Employer is Guilty of Lack of Ordinary Care in retention of unfit employee, after knowledge of his unfitness.

Reaffirmed in *Matthews v. Bull* (Cal.), 47 Pac. 775.

Knowledge as Element of Employer's Liability. See note, 41 L. R. A. 92, 96, 99, 141, 144.

Duty of Master With Respect to Employment of his servants. See note, 48 L. R. A. 375, 376, 385, 391.

After Proof of Unfitness of Employee, evidence of his general bad reputation may be shown to charge employer with negligence in his selection or retention.

Approved in *Still v. San Francisco etc. Ry. Co.*, 154 Cal. 569, 571, 572, 129 Am. St. Rep. 177, 98 Pac. 676, 677, 678, 20 L. R. A. (n. s.) 322, holding railroad liable for injury on ground of negligence in selecting conductor; *Southern Pacific Co. v. Hetzer*, 135 Fed. 276, 277, 278, 68 C. C. A. 26, 1 L. R. A. (n. s.) 288, holding specific acts of negligence of employee known to master admissible to prove incompetence of servant; *Wicklund v. Saylor Coal Co.*, 119 Iowa, 338, 93 N. W. 306, holding proof of prior acts of negligence was insufficient to charge employer with negligence in retaining employee; *Rosenstiel v. Pittsburg Rys. Co.*, 230 Pa. 282, 79 Atl. 559, holding incompetence of fellow-employee could be proven by proof of habitual recklessness in work he was employed to do.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 757, 759, 760, 763, 764, 766.

108 Cal. 135-143, 41 Pac. 35, 413, **GAROUTTE v. WILLIAMSON.**

Errors in Giving Instructions not Excepted to at trial cannot be considered on appeal.

Reaffirmed in *Fleischhauer v. Fabens*, 8 Cal. App. 32, 96 Pac. 18.

108 Cal. 143-146, 41 Pac. 37, BRENOT v. ROBINSON.

Miscellaneous.—Cited in *Aber v. Twichell*, 17 N. D. 233, 116 N. W. 97, to point that giving notice of claim of third party is not necessary when sheriff attaches and sells property when in possession of third party.

108 Cal. 146-148, 41 Pac. 40, RIVERSIDE LAND & IRR. CO. v. JENSEN.

In Action to Quiet Title Against Devisee of deceased, plaintiff may put in evidence as estoppel judgment quieting his title against deceased.

Approved in *Ahlers v. Smiley*, 11 Cal. App. 347, 104 Pac. 998, holding plaintiff could show estoppel by judgment without pleading it.

108 Cal. 148-153, 41 Pac. 38, CALIFORNIA NAT. BANK v. GINTY.

One Signing Note as Principal will be Held as such though creditor knew he was only surety as between him and principal debtor.

Approved in *National Bank of Commerce v. Schrim*, 3 Cal. App. 699, 86 Pac. 983, holding parol evidence admissible to show defendants sued on note as principals were in fact sureties when note appeared to be given as security for another note of even date and same terms.

Creditor Holding Two Obligations, one better secured than other, and having collateral security for both, may apply collateral upon the more precarious obligation.

Approved in *Hutchings v. Reinhalter*, 23 R. L. 527, 51 Atl. 432, 58 L. R. A. 680, holding where mortgage securing several notes was foreclosed before all were due, proceeds could be applied to notes not yet due, so that attached property of debtor, not included in mortgage, could be applied to notes which were due.

Application of Payments. See note, 96 Am. St. Rep. 56, 82.

Miscellaneous.—Cited in *Malone v. Johnson* (Cal.), 47 Pac. 580, holding pledge of corporate stock by indorsement and delivery of certificate was valid as between parties.

108 Cal. 154-166, 41 Pac. 283, DIGGINS v. HARTSHORNE.

Courts Do not Take Judicial Notice of streets established by dedication, or municipal ordinance.

Approved in *Merritt v. Barta*, 158 Cal. 381, 111 Pac. 260, holding court would take judicial notice of map made under authority of legislative act and recognized by later act as official map of city; *Coe College v. Cedar Rapids*, 120 Iowa, 546, 95 N. W. 269, holding width of street not established by city charter must be shown by evidence.

Judicial Notice of Localities and Boundaries. See note, 82 Am. St. Rep. 444.

Failure to Appeal from Decision of superintendent of streets as to whether contractor has completed contract renders decision conclusive.

Approved in *Oak Hill Water Co. v. Gillette*, 13 Cal. App. 608, 110 Pac. 318, following rule.

Defects in Work as Defense to Assessment for local improvement. See note, 56 L. R. A. 908.

108 Cal. 166-173, 41 Pac. 287, **WILLIAMS v. BERGIN.**

On Appeal by Contractor to Supervisors for increase in amount of lien on owner's property, personal notice must be given to every person affected by appeal.

Distinguished in *Stockton Automobile Co. v. Confer*, 154 Cal. 409, 97 Pac. 884, holding notice to deputy of obstruction in streets sufficient to cast liability on superintendent of streets.

Where Statute Prescribes Mode of Acquiring Jurisdiction, such mode must be complied with.

Approved in *Williams v. Bergin* (Cal.), 57 Pac. 1073, holding petition on appeal from street assessment which failed to allege warrant was issued was ineffective.

Term "Notice" Imports That Information given thereby comes from authentic source, and is directed to someone who is to act or refrain from acting in consequence of such information.

Approved in *Wiener v. Graff*, 7 Cal. App. 586, 95 Pac. 170, holding notice to accept option to renew lease was sufficient.

108 Cal. 173-179, 41 Pac. 465, **O'CONOR v. ROARK.**

Affidavit for Attachment Need Specify only amount of indebtedness, and not amount of plaintiff's demand in complaint.

Distinguished in *Finch v. McVean*, 6 Cal. App. 275, 91 Pac. 1020, holding attachment properly dissolved where issued for sum in excess of amount stated in affidavit.

108 Cal. 179-189, 49 Am. St. Rep. 76, 41 Pac. 289, **FREEMAN v. BELLEGARDE.**

Grant Bounded by Shore of River where grantor is owner of river conveys land up to lowest point of shore at any time.

Approved in *Peoria v. Central Nat. Bank*, 224 Ill. 57, 79 N. E. 300, 12 L. R. A. (n. s.) 687, holding water's edge and not survey meander line is shore line from which lines should be drawn to show water and accretion rights of adjacent proprietors.

Effect of Bounding Grant on River or tide water. See note, 42 L. R. A. 504, 506, 512.

108 Cal. 189-197, 41 Pac. 291, 35 L. R. A. 33, **SAN DIEGO v. LINDA VISTA IRR. DISTRICT.**

Pueblo Lands Within Irrigation District, though unused, are not exempt from assessment for purposes of district.

Approved in *City Street Imp. Co. v. Regents*, 153 Cal. 778, 780, 96 Pac. 801, 802, 18 L. R. A. (n. s.) 451, holding street assessment could be enforced against lands of state university not in actual use for school purposes; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 247, 101 Pac. 91, holding failure to appear and show that land would receive no benefit from irrigation district assessment waived any objection thereto; *Newberry v. Detroit*, 164 Mich. 413, 129 N. W. 700, holding city park not exempt from street assessment.

Distinguished in *Tulare Irr. Dist. v. Collins*, 154 Cal. 443, 97 Pac. 1126, holding unused lands of irrigation district not subject to execution sale on judgment against district.

Exemption from Taxation or Assessment of lands owned by governmental bodies or in which they have an interest. See note, 132 Am. St. Rep. 293, 300, 309, 318, 321.

Local Assessments for Benefits on Property exempt from general taxation. See note, 18 L. R. A. (n. s.) 451.

Liability of Railroad Right of Way to assessment for local improvements. See note, 12 L. R. A. (n. s.) 116.

Superiority of Lien of Local Assessment over prior lien. See note, 35 L. R. A. 373, 376.

Special Assessment as Tax. See note, 3 L. R. A. (n. s.) 837.

Personal Liability to Pay Assessment for local improvement. See note, 35 L. R. A. 59.

108 Cal. 211-214, 41 Pac. 41, **GRADY v. DONAHOO.**

Upon Application for Opening Default, any doubt should be resolved in favor of trial on merits.

Approved in *Greene v. Montana Brewing Co.*, 32 Mont. 108, 79 Pac. 694, holding defendant entitled to have default opened.

108 Cal. 214-223, 41 Pac. 467, **SECURITY LOAN & TRUST CO. v. KAUFFMAN.**

Place of Trial of Action to Foreclose Lien is not element going to jurisdiction of court, but is matter of legislative regulation.

Approved in *State v. Campbell*, 3 Cal. App. 604, 86 Pac. 841, holding defendant in action by controller to recover moneys which came officially into his hands was entitled to change of venue to county of his residence.

Suit to Foreclose Lien on Land is triable in original county, although land is embraced in new county formed after suit is commenced.

Distinguished in *Pope v. State*, 124 Ga. 807, 110 Am. St. Rep. 197, 53 S. E. 386, holding criminal case could not be tried in original county over defendant's objection.

Abandonment of Homestead. See note, 102 Am. St. Rep. 395.

Abandonment, Conveyance, or Encumbrance of homestead during insanity of spouse. See note, 13 L. R. A. (n. s.) 431.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 937.

Lease of Homestead by One Spouse Only. See note, 133 Am. St. Rep. 340.

108 Cal. 224-226, 49 Am. St. Rep. 82, 41 Pac. 42, **COWAN v. GRIFFITH.**

Mechanic's Lien on Dwelling Extends only to land required for its convenient use, and not to surrounding farm.

Reaffirmed in *Filston Farm Co. v. Henderson*, 106 Md. 374, 67 Atl. 235.

Extent of Land to Which Mechanic's Lien will attach. See note, 26 L. R. A. (n. s.) 839.

108 Cal. 240-246, 41 Pac. 299, **RIVERSIDE WATER CO. v. GAGE.**

Upon Appeal from Order Denying New Trial, question whether findings are sufficient to support judgment cannot be considered.

Approved in *Crescent Feather Co. v. United Upholsterers' Union*, 153 Cal. 434, 95 Pac. 872, *Owen v. Pomona Land etc. Co.* (Cal.), 61 Pac. 473, *Frank v. Chatfield* (Cal.), 60 Pac. 525, *Houser & Haines Mfg. Co. v. Hargrove* (Cal.), 59 Pac. 948, and *Schroeder v. Mauzy*, 16 Cal. App. 448, 118 Pac. 462, all following rule.

Where Issue has Been Tendered by plaintiff and evidence thereon admitted by both parties without objection, upon assumption that answer raised issue, parties cannot for first time contend on appeal that such issue was not before court.

Reaffirmed in *Hoover v. Lester*, 16 Cal. App. 154, 116 Pac. 384.

Finding upon Evidence Outside Issues will be disregarded on appeal.

Approved in *Howe v. Schmidt*, 151 Cal. 441, 90 Pac. 1058, holding on appeal from judgment findings entirely outside issues could not be considered in support of judgment.

108 Cal. 247-249, 41 Pac. 464, **MASON v. CULBERT.**

Jurors are Entitled to Per Diem Only for days actually spent in attendance on court.

Reaffirmed in *Emmer v. Bostock*, 130 Mich. 342, 89 N. W. 964.

108 Cal. 250-261, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472, **CARDENAS v. MILLER.**

Unrecorded Chattel Mortgage is Void as to attaching creditors of mortgagor, regardless of actual notice of its existence.

Approved in *Hopper v. Keys*, 152 Cal. 497, 92 Pac. 1021, holding failure of mortgagee to record chattel mortgage in county to which it was removed for thirty days rendered mortgage void as to creditors of mortgagor; *Bank of Ukiah v. Gibson* (Cal.), 39 Pac. 1070, holding recording of chattel mortgage had same effect as delivery of possession as against creditors of mortgagor; *Pierson v. Hickey*, 16 S. D. 48, 91 N. W. 340, holding unrecorded chattel mortgage void as against creditors of mortgagor, though their debt existed before creation of mortgage.

108 Cal. 261-263, 41 Pac. 472, **LAKESHORE CATTLE CO. v. MODOC LAND ETC. CO.**

Where Affidavits on Motion for Change of venue as to place obligation was incurred are conflicting, court will not interfere with order denying motion.

Approved in *Bradley v. Davis*, 156 Cal. 269, 104 Pac. 303, applying rule where affidavits as to residence were conflicting; *Lunnun v. Morris*, 7 Cal. App. 714, 95 Pac. 908, upholding order refusing to set aside default based on documentary evidence; *Haas v. Mutual Relief Assn.* (Cal.), 42 Pac. 237, denying change of venue of action against corporation when affidavit was not inconsistent with complaint as to place obligation was incurred.

When Notice of Motion to Change Venue bases it on "papers, files, records and proceedings" in action, court may consider complaint.

Approved in *Montijo v. Sherer*, 5 Cal. App. 739, 91 Pac. 262, holding records could be considered in hearing of motion to set aside default when notice referred to them.

108 Cal. 264-273, 41 Pac. 301, **GORDON v. SAN DIEGO.**

Grant Duly Executed is Presumed to have been delivered at its date.

Reaffirmed in *Gerke v. Cameron* (Cal.), 50 Pac. 436.

108 Cal. 273-284, 41 Pac. 305, **HAMILTON v. SAN DIEGO.**

School District is Corporation Organized for educational purposes.

Approved in *Agar v. Pugin*, 39 Ind. App. 571, 79 N. E. 380, holding board of school trustees not such corporation as could be investigated by city council under act authorizing it to investigate corporations with which city deals.

Taxpayer cannot Recover Back Taxes paid to de facto school district on ground it has no legal existence.

Approved in *Metcalf v. Merritt*, 14 Cal. App. 248, 111 Pac. 506, holding attack upon petition for organization of reclamation district could not be made in action to compel payment of bonds.

108 Cal. 288-294, 41 Pac. 12, **FRATT v. HUNT.**

Tenant's Duty to Leave Premises in good condition. See note, 64 L. R. A. 664.

108 Cal. 294-300, 41 Pac. 410, **SANTA BARBARA v. ELDRED.**

Objection That Complaint is Ambiguous or uncertain cannot be reached by general demurrer.

Approved in *Spreckels v. Gorrill*, 152 Cal. 387, 92 Pac. 1013, holding indirect allegation of fraud in complaint not demurred to for uncertainty was cured by verdict; *Dillon v. Cross*, 5 Cal. App. 768, 91 Pac. 440, upholding averment made by inference in absence of demurrer thereto; *Wells, Fargo & Co. v. McCarthy*, 5 Cal. App. 312, 90 Pac. 207, holding ownership of mortgage sued on was sufficiently alleged, when no objection was raised until appeal.

108 Cal. 300-303, 41 Pac. 407, **PHILIP v. DURKEE.**

Where Complaint States Cause of Action for damages but is uncertain as to what damage consisted of, or its extent, it is subject to special demurrer.

Approved in *Harron, Rickard & McCone v. Wilson etc. Co.*, 4 Cal. App. 500, 88 Pac. 516, upholding special demurrer for uncertainty to counterclaim for damages.

108 Cal. 303-306, 41 Pac. 278, **STODDARD v. SUPERIOR COURT.**

Court has No Power, After Judgment has been rendered against plaintiff and pending appeal therefrom, to grant an injunction in same action.

Distinguished in *Pierce v. Los Angeles*, 159 Cal. 517, 114 Pac. 819, upholding injunction granted to preserve status quo after injunction was denied defendants and before taking appeal, pending motion for new trial.

Certiorari will not Lie When Matter complained of can be corrected on appeal.

Approved in *Baird v. Justice's Court*, 11 Cal. App. 443, 105 Pac. 260, *Canadian Bank of Commerce v. Wood*, 13 Idaho, 805, 93 Pac. 260, and *Chapman v. Justice Court*, 29 Nev. 161, 86 Pac. 554, all following rule.

108 Cal. 306-325, 39 Pac. 630, 41 Pac. 335, **LOWER KINGS RIVER RECLAMATION DISTRICT v. PHILLIPS.**

Order of Supervisors Made upon Due Notice to owner of land included is conclusive against him that reclamation district is lawfully organized.

Approved in *Roly v. Shunganunga Drainage District*, 77 Kan. 757, 95 Pac. 400, following rule.

Determination of Assessment Commissioners of reclamation district may be attacked by way of defense to action on assessment, when there has been no prior opportunity to be heard before commissioners.

Approved in *Reclamation District v. Glide (Cal.)*, 41 Pac. 278, following rule; *Swamp Land etc. District v. Blumenberg*, 156 Cal. 535, 106 Pac. 391, holding willful refusal of district to do work for which assessment was made and which never could be done was good defense to action on assessment; *Swamp Land etc. District v. Blumenberg*, 156 Cal. 541, 542, 106 Pac. 393, 394, holding land owner could not object to validity of assessment after having been heard in action brought to determine its

validity under section 3493½, Political Code; *Roly v. Shunganunga Drainage District*, 77 Kan. 760, 95 Pac. 401, upholding assessment on drainage district.

Any Attack on Final Determination provided by law to avoid or correct a judgment is direct and not collateral attack.

Reaffirmed in *In re Central Irr. Dist.*, 117 Cal. 389, 49 Pac. 357.

Procedure for Establishment of Drains and sewers. See note, 60 L. R. A. 244.

Selection of Interested Person to assess benefits from improvements. See note, 16 L. R. A. (n. s.) 293.

Miscellaneous.—Cited in *Lower Kings River Reclamation District v. Phillips* (Cal.), 39 Pac. 634, *Lower Kings River etc. District v. Wood* (Cal.), 41 Pac. 337, and *Lower Kings River etc. District v. Phillips* (Cal.), 41 Pac. 337, all companion cases.

108 Cal. 326-331, 49 Am. St. Rep. 93, 41 Pac. 411, 38 L. R. A. 640, **EX PARTE LACEY.**

Article XI, Section 11, Constitution, makes direct grant of police power to municipalities for local purposes.

Approved in *In re Pfahler*, 150 Cal. 80, 88 Pac. 274, 11 L. R. A. (n. s.) 1092, and *Home Telephone etc. Co. v. Los Angeles*, 155 Fed. 566, both following rule; *In re Ackerman*, 6 Cal. App. 10, 91 Pac. 431, holding legislature could not limit exercise of police power conferred by Constitution.

Ordinance Prohibiting Conducting of Steam Shoddy or carpet-beating machine within one hundred feet of church, school or dwelling is valid exercise of police power.

Approved in *Grumbach v. Lelande*, 154 Cal. 684, 98 Pac. 1061, holding ordinance excluding liquor business from specified districts was valid exercise of police power; *In re San Chung*, 11 Cal. App. 520, 105 Pac. 613, upholding ordinance forbidding laundries in buildings used as public stores; *Ex parte Murphy*, 8 Cal. App. 445, 97 Pac. 201, upholding ordinance prohibiting public poolrooms; *In re Newell*, 2 Cal. App. 768, 84 Pac. 226, upholding ordinance establishing fire limits in city; *In re Jones*, 4 Okl. Cr. 86, 109 Pac. 575, upholding ordinance prohibiting billiard-halls.

Determination by Municipal Authorities of Questions of fact calling for exercise of police power is conclusive.

Reaffirmed in *Goytino v. McAleer*, 4 Cal. App. 658, 88 Pac. 992.

What are Public Nuisances. See note, 107 Am. St. Rep. 202, 212, 232.

Power of Municipal Corporations to Define, prevent, and abate nuisances. See note, 36 L. R. A. 606.

Municipal Power Over Buildings and other structures as nuisances. See note, 38 L. R. A. 161.

Municipal Control Over Smoke as public nuisance. See note, 39 L. R. A. 551.

Injunctions by Municipal Corporations against nuisances affecting public morals, good order, health and safety. See notes, 38 L. R. A. 305; 41 L. R. A. 326.

Municipal Power as to Nuisances affecting public morals, decency, peace, and good order. See note, 39 L. R. A. 520.

Municipal Powers Over Nuisances affecting highways and waters. See note, 39 L. R. A. 649.

Prescriptive Right to Maintain Public Nuisance. See note, 53 L. R. A. 894.

108 Cal. 331-344, 41 Pac. 458, **BURRIS v. KENNEDY.**

Superior Court has Jurisdiction of all matters of probate in like manner as of cases at law and in equity.

Approved in *Elizalde v. Murphy*, 4 Cal. App. 118, 119, 87 Pac. 247, holding superior court had power to require accounting from administrator of deceased administrator.

Same Presumption as to Jurisdiction of court in probate proceedings attaches as in ordinary actions.

Approved in *Del Campo v. Camarillo*, 154 Cal. 654, 98 Pac. 1053, and *Estate of Davis*, 151 Cal. 325, 121 Am. St. Rep. 105, 86 Pac. 185, both following rule; *Simmons v. Rowe*, 4 Cal. App. 758, 89 Pac. 624, holding conclusiveness of judgment in foreclosure suit not affected as to all matters which might have been litigated by fact that findings were waived; *Smith v. Vandepen*, 3 Cal. App. 302, 85 Pac. 137, holding decree of final distribution was conclusive on lapse of time to appeal; *Clark v. Rossier*, 10 Idaho, 360, 78 Pac. 361, holding decree of probate court could not be collaterally attacked.

Where Court has Jurisdiction, errors in exercise of it cannot render decision invalid.

Reaffirmed in *Raggio v. Palmtag*, 155 Cal. 803, 103 Pac. 315.

Petition is Sufficient to Support Decree of sale of property of estate when it states general facts showing sale was necessary.

Approved in *Dane v. Layne*, 10 Cal. App. 369, 101 Pac. 1069, holding omission to state "condition and value" did not render petition insufficient; *Plains Land & Imp. Co. v. Lynch*, 38 Mont. 281, 129 Am. St. Rep. 645, 99 Pac. 849, and *Blackman v. Mulhall*, 19 S. D. 545, 104 N. W. 253, both upholding petition for sale of property of estate.

Purchase of Property of Estate Sold at public auction by administrator through third person is not void, but only voidable at instance of those interested in estate who may rescind and restore purchase money.

Reaffirmed in *Estate of Richards*, 154 Cal. 494, 98 Pac. 535, 536.

Who may not Purchase at Judicial, execution and other compulsory sales. See note, 136 Am. St. Rep. 796, 801, 802.

Where Heirs of Decedent Brought Action to quiet title as against purchasers at administrator's sale, they could not rely on fraud not pleaded to set aside defendant's title.

Approved in *Virginia etc. Lumber Co. v. Glenwood Lumber Co.*, 5 Cal. App. 260, 90 Pac. 49, holding in conversion, fraud of third party in procuring goods from plaintiff which were transferred to defendant for pre-existing debt could not be proven when not pleaded.

Criticised in *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 416, 95 Pac. 1031, holding in trover, fraud of third party in procuring goods from plaintiff and transfer to defendant without consideration could be proven without pleading it.

108 Cal. 345-350, 41 Pac. 409, **SEABRIDGE v. McADAM.**

Advice of Counsel as Defense to Action for malicious prosecution. See note, 18 L. R. A. (n. s.) 64.

108 Cal. 354-359, 41 Pac. 337, SAMONSET v. MESNAGER.

Gratuitous Agent to Loan Money is liable for failure to exercise good faith and ordinary diligence in investing it.

Approved in *Schroeder v. Mauzy*, 16 Cal. App. 449, 118 Pac. 462, holding exemption from liability for breach of contract to insure stored property for benefit of party storing it could not be claimed merely because no charge was made for such service; *Kevane v. Miller*, 4 Cal. App. 602, 88 Pac. 645, holding gratuitous agent to purchase stock could not make profit by misrepresenting purchase price to principal.

Distinguished in *Hudson v. Ellsworth*, 56 Wash. 247, 248, 105 Pac. 465, 466, holding gratuitous agent who had not entered upon performance of service assumed no liability.

108 Cal. 359-365, 41 Pac. 473, CARPENTER v. SHINNERS.

Though Genuineness and Due Execution of instrument pleaded by defendant are admitted by failure of plaintiff to file affidavit denying same, its terms and legal effect are to be construed by court.

Approved in *Cordano v. Wright*, 159 Cal. 616, 115 Pac. 230, holding in such case plaintiff could show that for any cause not going to genuineness or due execution, instrument was still ineffectual for any purpose; *Newsom v. Woollacott*, 5 Cal. App. 725, 91 Pac. 348, holding in such case plaintiff could by parol evidence controvert instrument by showing fraud, mistake, or that it had no connection with contract sued on.

Recital in Tax Deed Which Shows that less than statutory notice was given of sale cannot be prima facie evidence of its regularity.

Approved in *Cadman v. Smith*, 15 Okl. 639, 85 Pac. 348, holding tax deed void when sale was made on less than statutory notice.

108 Cal. 365-369, 41 Pac. 408, GOULD v. ADAMS.

Failure to Find Immaterial Issue is not ground for reversal.

Reaffirmed in *Hoyt v. Hart*, 149 Cal. 730, 87 Pac. 572, and *Dalton v. Pacific Electric Ry. Co.*, 7 Cal. App. 513, 94 Pac. 869.

Conclusiveness of Prior Decisions on subsequent appeals. See note, 34 L. R. A. 321.

108 Cal. 369-431, 41 Pac. 308, FOX v. HALE & NORCROSS SILVER MIN. CO.

Validity of Service in Action against corporation, upon nonresident officer within state as party or witness. See note, 24 L. R. A. (n. s.) 277.

Presumption Against the Destroyer (spoliator) of evidence. See note, 34 L. R. A. 587.

Miscellaneous.—Cited in *Fox v. Hale & Norcross etc. Min. Co.*, 108 Cal. 475, 476, 41 Pac. 328, *Fox v. Hale & Norcross etc. Min. Co.*, 108 Cal. 480, 41 Pac. 329, and *Fox v. Hale & Norcross Silver Min. Co. (Cal.)*, 53 Pac. 36, all on other appeals.

108 Cal. 431-439, 41 Pac. 477, YORE v. SUPERIOR COURT.

Judgment of Ouster from Franchise usurped by corporation upheld.

Approved in *State v. Delmar Jockey Club*, 200 Mo. 73, 98 S. W. 544, upholding judgment forfeiting franchise of agricultural fair corporation for nonuser; *State v. Armour Packing Co.*, 173 Mo. 393; 96

Am. St. Rep. 515, 73 S. W. 654, 61 L. R. A. 464, holding judgment of ouster from franchise not necessary for illegal combination of corporations when combination was abandoned.

108 Cal. 440-446, 41 Pac. 480, PEOPLE v. LEYSHON.

Where in Defining Offense Statute enumerates series of acts, either of which, or all, may constitute offense, all such acts may be charged in single count.

Approved in *Ex parte Morgensen* (Cal. App.), 90 Pac. 1064, upholding complaint charging conjunctively in language of ordinance prohibiting keeping of saloons that defendant unlawfully and willfully did all things prohibited by ordinance; *People v. Lapique* (Cal.), 67 Pac. 15, holding information charging forgery of note and of indorsement of maker charged but one offense; *People v. Barnnovich*, 16 Cal. App. 432, 117 Pac. 574, holding information did not charge two offenses by alleging two intents in commission of one offense; *People v. Wolfrom*, 15 Cal. App. 735, 115 Pac. 1090, upholding indictment charging two offenses by one act; *People v. Swaile*, 12 Cal. App. 195, 107 Pac. 136, upholding information alleging conjunctively intent "to injure, intimidate and terrify" certain persons; *In re Johnson*, 6 Cal. App. 736, 93 Pac. 200, upholding complaint charging in conjunctive form that defendant kept a bar and sold liquors, both in violation of law; *Flohrs v. Territory*, 14 Okl. 485, 78 Pac. 568, upholding indictment which in single count charging grand larceny alleged property was taken by fraud and stealth; *State v. Adams*, 41 Wash. 554, 83 Pac. 1108, holding indictment charging offense of carnally knowing, by force, female under age of eighteen years charged but one offense.

Granting or Refusing Continuance in criminal case for absence of witness is largely in discretion of trial court.

Approved in *People v. Barnnovich*, 16 Cal. App. 432, 117 Pac. 574, upholding denial of continuance asked on ground of absence of witness.

Admissibility in Criminal Trial of Testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 884.

108 Cal. 446-450, 41 Pac. 476, KAUFMAN v. SUPERIOR COURT.

Order Setting Aside Former Judgment of dismissal is appealable.

Approved in *Shumake v. Shumake*, 17 Idaho, 658, 107 Pac. 45, holding appealable order made after final judgment vacating and setting aside such judgment.

108 Cal. 450-459, 41 Pac. 483, 42 Pac. 479, ESTATE OF LEVINSON.

Findings are not Required in Proceeding to settle account of executor or administrator.

Reaffirmed in *Estate of McPhee*, 156 Cal. 337, 104 Pac. 455.

Allowance for Extraordinary Services of administrator cannot be made when not claimed.

Reaffirmed in *Elizalde v. Murphy*, 4 Cal. App. 117, 87 Pac. 246.

After Affirmance of Judgment and Remittitur it is conclusive on all parties in absence of fraud or imposition on court.

Approved in *Philbrook v. Newman*, 148 Cal. 175, 82 Pac. 773, holding petition to obtain order vacating former order rendered nine

years before affirming order denying new trial could not be entertained on ground order was wrong as to facts and law.

108 Cal. 460-463, 41 Pac. 482, SAN FRANCISCO v. BURR.

Delineation on Map of City Survey of space corresponding to street, with numbered lots on either side, indicates intention of city to dedicate space as highway.

Approved in *Los Angeles v. McCollum*, 156 Cal. 151, 103 Pac. 916, 23 L. R. A. (n. s.) 378, holding fact that strip of land appearing on map, recorded by owner, as street was not so named did not overcome presumption of intention to dedicate; *East Birmingham Realty Co. v. Birmingham Machine etc. Co.*, 160 Ala. 472, 49 So. 451, holding sale of lots with reference to streets indicated on map prepared by owner but not so named constituted dedication of such as streets.

Distinguished in *Coe College v. Cedar Rapids*, 120 Iowa, 547, 95 N. W. 270, holding recording of plat showing streets did not amount to dedication thereof when not named as such nor corners marked or dimensions given.

Legislature may Revoke Dedication of Street.

Approved in *Henry v. Seattle*, 42 Wash. 423, 424, 85 Pac. 26, and *Mahoney v. Board of Education*, 12 Cal. App. 297, 107 Pac. 586, both holding state could revoke dedication of street by itself to public.

108 Cal. 463-474, 38 Pac. 628, 41 Pac. 485, ESTATE OF GARRITY.

Right of Family to Allowance is not dependent upon previous order setting apart homestead.

Approved in *Estate of Snowball*, 156 Cal. 238, 104 Pac. 447, following rule; *Estate of Hessler*, 2 Cof. Prob. 359, holding requirement that homestead be set apart for surviving spouse and minor children was mandatory.

Order for Family Allowance may be made on petition of anyone on behalf of widow.

Approved in *Estate of Snowball*, 156 Cal. 237, 104 Pac. 447, holding appointment of guardian ad litem not essential to making of family allowance for minor children.

Where Testator has not Required Security from life tenant, court cannot require it, in absence of showing of danger of waste.

Approved in *Scott v. Scott*, 137 Iowa, 241, 243, 126 Am. St. Rep. 277, 114 N. W. 882, 23 L. R. A. (n. s.) 716, holding court had discretion to require security from devisee of life estate in personal property.

Where Will Discloses Intention That Widow shall have full enjoyment during life of personalty bequeathed to her, without security for its preservation, she is entitled to possession of such personalty.

Reaffirmed in *Estate of Mayhew*, 4 Cal. App. 168, 87 Pac. 420.

Testator may Make Life Tenant Trustee of property bequeathed without requiring any security from him.

Reaffirmed in *Estate of Nelson*, 3 Cof. Prob. 452.

108 Cal. 475-477, 41 Pac. 328, FOX v. HALE & NORCROSS SILVER MIN. CO.

Action by Stockholder to Recover Money of which corporation was fraudulently deprived is suit on behalf of corporation.

Cited in *Shively v. Eureka Tellurium etc. Min. Co.*, 5 Cal. App. 239, 89 Pac. 1074, arguendo.

Stockholder Who Sues to Recover Moneys of which corporation was fraudulently deprived is entitled to be reimbursed for costs and attorneys' fees.

Approved in *Estate of O'Connor*, 2 Cal. App. 478, 84 Pac. 321, holding court could allow, on settlement of account of trustees under will, attorneys' fees for procuring distribution to trustees; *Kimble v. Franklin County*, 32 Ind. App. 389, 66 N. E. 1027, holding taxpayers entitled to costs and attorneys' fees incurred in recovering misappropriated county funds.

108 Cal. 478-484, 41 Pac. 328, FOX v. HALE & NORCROSS SILVER MIN. CO.

Where Litigant Dies After Submission of cause, court should enter judgment as of date prior to his death.

Approved in *San Luis Obispo v. Simas*, 1 Cal. App. 183, 81 Pac. 975, 976, holding offer to prove insanity of absent owner was no objection to signing and filing of findings and judgment in condemnation suit; *More v. Miller (Cal.)*, 53 Pac. 1079, holding judgment rendered against administrator after his removal should be entered as of date of submission.

Where Property is Acquired Which Benefits Party, action for its value survives against his executor.

Approved in *Thornton-Thomas Co. v. Bretherton*, 32 Mont. 90, 80 Pac. 12, holding action lay against executor for damages caused by decedent in wrongfully procuring appointment of receiver.

108 Cal. 490-495, 41 Pac. 487, SAN BERNARDINO INVESTMENT CO. v. MERRILL.

Unless One-fourth of Capital Stock of corporation has been subscribed, directors cannot levy assessment for conducting business.

Approved in *Pettit v. Forsyth*, 15 Cal. App. 158, 113 Pac. 895, holding failure to allege one-fourth capital stock had been subscribed cured by answer alleging one-third stock issued.

When Corporation Seeks to Recover Assessment Levied, solely by virtue of obligation created by statute, strict observance of statutory mode and provision is essential to recovery.

Approved in *Ruck v. Caledonia Silver Min. Co.*, 6 Cal. App. 360, 92 Pac. 195, holding void for failure to comply with statute order levying assessment.

Where Board of Directors of Corporation loses jurisdiction to take further proceedings for collection of delinquent assessment by failure to publish sale, it also loses right to declare, under section 349, Civil Code, that it waives proceedings to sell stock, and elects to collect assessment by action.

Approved in *National etc. Oil Co. v. Chappellet*, 4 Cal. App. 508, 88 Pac. 507, following rule; *Bottle Mining etc. Co. v. Kern*, 9 Cal. App. 532, 94 Pac. 996, holding corporation could elect to waive sale of stock for delinquent assessment and proceed by action, if proceeding to sell was alive when election was made; *State v. Anaconda*, 41 Mont. 582, 111 Pac. 347, holding there could be no waiver unless when exercised right to be waived existed; *Smith v. Gate City Oil Co.*, 160 Cal. 449, 117 Pac. 526, *arguendo*.

Liability to Corporations of Subscribers to Stock. See note, 93 Am. St. Rep. 360, 362, 369, 372.

108 Cal. 503-512, 41 Pac. 463, GLASSELL v. VERDUGO.

Miscellaneous.—Cited in *Verdugo Canyon Water Co. v. Verdugo*, 152 Cal. 672, 93 Pac. 1029, referring historically to principal case.

108 Cal. 513-517, 41 Pac. 415, BANK OF LASSEN CO. v. SHERER.

Court may Require Party Demanding Jury to deposit fees therefor under rule of court.

Disapproved in *Story v. Walker*, 71 N. J. L. 262, 58 Atl. 352, holding justice of peace lost jurisdiction by proceeding to try cause after denial of jury, upon refusal of defendant who demanded it to pay costs thereof.

108 Cal. 517-521, 41 Pac. 422, JOSEPH v. AGER.

Right to Keep Easement in Repair can only be exercised when necessary, and in such manner as not to needlessly increase burden on servient estate.

Approved in *Percival v. Williams*, 82 Vt. 541, 74 Atl. 324, holding owner of water-power easement in dam had right to repair same but not to hold water at such level as needlessly to injure servient estate.

108 Cal. 522-525, 41 Pac. 416, HYDE v. BUCKNER.

Where Grantor was Called to Prove Deed was mortgage and testified to contrary, it could not be shown by other witnesses he had made declarations to opposite effect.

Approved in *Bollinger v. Bollinger*, 154 Cal. 705, 706, 99 Pac. 200, 201, holding where witness called to prove declarations of grantor failed to give affirmative testimony, it could not be shown by other witnesses that he had made statements that he had heard certain declarations of grantor.

108 Cal. 525-528, 41 Pac. 413, LEWIS v. CHAMBERLAIN.

Where Statutory Proceedings Supplementary to execution do not afford adequate relief, resort may be had to creditor's bill.

Approved in *Phillips v. Price*, 153 Cal. 148, 94 Pac. 618, following rule; *Union Collection Co. v. Snell*, 5 Cal. App. 132, 89 Pac. 860, holding title of third person cannot be litigated in such proceeding, but only by creditor's bill.

In Proceedings Supplementary to Execution, court cannot order grantee of judgment debtor who claims title to property conveyed to subject it to judgment.

Approved in *First Nat. Bank v. Cook*, 12 Wyo. 534, 539, 78 Pac. 1088, 1090, 2 L. R. A. (n. s.) 1012, following rule.

108 Cal. 529-535, 41 Pac. 420, McCULLOUGH v. OLDS.

Description of Land in Deed by Lots and blocks on map is sufficient where map is produced and identified.

Approved in *Fox v. Townsend*, 152 Cal. 53, 91 Pac. 1007, following rule; *Crozer v. White*, 9 Cal. App. 616, 100 Pac. 132, admitting parol evidence to explain ambiguity in description in deed; *Borchard v. Eastwood* (Cal.), 65 Pac. 1048, holding description sufficient in deed conveying all "lands owned by grantor" in certain county with certain exceptions; *Bucher v. Overlees*, 6 Ind. Ter. 153, 89 S. W. 1024, holding lands sufficiently described in conveyance when provided it should be according to certain plat; *Burns v. Witter*, 56 Or. 371, 108 Pac. 130, upholding complaint in specific performance of contract to sell

land where it could be shown by extrinsic evidence that description could apply to but one tract; *Flegel v. Dowling*, 54 Or. 46, 135 Am. St. Rep. 812, 102 Pac. 180, description held sufficient though state and county was omitted; *Crotty v. Effler*, 60 W. Va. 263, 54 S. E. 346, description held sufficient for specific performance; *Holley's Exr. v. Curry*, 58 W. Va. 73, 112 Am. St. Rep. 944, 51 S. E. 137, holding writing constituting equitable mortgage was not void for uncertainty in description where defects could be supplied by parol.

108 Cal. 535-537, 41 Pac. 417, WARREN v. FERGUSON.

Engineer's Certificate Signed by Clerk in office held insufficient as basis for lien for street improvement.

Approved in *Warren v. Ferguson* (Cal.), 63 Pac. 1126, holding engineer's certificate was insufficient.

108 Cal. 538-545, 41 Pac. 401, PEOPLE v. COBLER.

Party Acting as Deputy Assessor who receives moneys belonging to county and appropriates them to his own use is guilty of embezzlement.

Approved in *People v. Robertson*, 6 Cal. App. 517, 92 Pac. 499, holding deputy assessor guilty of embezzlement when he appropriated to his own use moneys of county received while acting as agent for county; *Hinds v. Territory*, 8 Ariz. 377, 76 Pac. 470, holding defective indictment charging embezzlement by officer of corporation which did not allege money taken was property of corporation; *State v. Steers*, 12 Idaho, 180, 85 Pac. 106, upholding indictment for embezzlement charging sheriff willfully, unlawfully, fraudulently, and feloniously appropriated to his own use money paid to him in official capacity.

In Prosecution for Embezzlement, evidence of other like acts is admissible for purpose of showing guilty knowledge and intent.

Approved in *People v. Robertson*, 6 Cal. App. 519, 92 Pac. 500, following rule; *State v. Carmean*, 126 Iowa, 299, 106 Am. St. Rep. 352, 102 N. W. 100, holding inadmissible proof of transactions which could have had no relation to embezzlement in question; *State v. Ames*, 90 Minn. 193, 96 N. W. 333, admitting evidence of other crimes which tended to show scheme for commission of crime.

Admissibility of Evidence of Other Crimes. See notes, 105 Am. St. Rep. 983; 62 L. R. A. 265.

108 Cal. 549-562, 41 Pac. 495; 29 L. R. A. 839, SAN DIEGO WATER CO. v. SAN DIEGO FLUME CO.

Seeking of Different Kinds of Relief in complaint does not establish two causes of action.

Approved in *Messer v. Hibernia Sav. etc. Society*, 149 Cal. 127, 84 Pac. 837, holding complaint could demand that contract be reformed and specifically enforced, and also demand alternative money relief.

Monopoly Signifies Sole Power of dealing in particular thing, or doing particular thing, either generally or in particular place.

Approved in *Continental Securities Co. v. Interborough etc. Co.*, 165 Fed. 957, holding consolidation of several street railroads was monopoly.

Contracts Between Corporations Having Common Directors or officers. See note, 33 L. R. A. 790.

Effect of Agreement to Share Profits to create partnership. See note, 18 L. R. A. (n. s.) 1097.

Establishment and Regulation of Municipal Water Supply. See note, 61 L. R. A. 75.

108 Cal. 562-566, 41 Pac. 445, SAN LUIS OBISPO v. FARNUM.

It is not Part of Official Duty of auditor to pay over to county license taxes which he was not authorized to receive.

Approved in *State v. Hale*, 166 Ind. 415, 77 N. E. 803, holding city officers who received fund voted by council for purposes of lobby did not hold money as officers; *Hartnett v. State*, 56 Tex. Cr. 285, 133 Am. St. Rep. 971, 119 S. W. 857, 23 L. R. A. (n. s.) 761, holding where police officer had no authority to receive money in payment of fines, he could not be charged with embezzlement of money so received by him.

Sureties on Official Bond are not Liable for officer's failure to account for moneys received by him which it was not his duty to collect.

Approved in *Hewlett v. Beede*, 2 Cal. App. 565, 83 Pac. 1087, holding executor who had paid deficit of deceased coexecutor could not recover from sureties of coexecutor; *Witte v. Weinstein*, 115 Iowa, 250, 88 N. W. 350, holding sureties not liable on bond of oil inspector for injury resulting from act of his done at instance of Secretary of State, who had no authority to demand its performance; *State v. Griffith*, 74 Ohio St. 95, 77 N. E. 687, holding sureties of clerk of board of education not liable for his failure to account for tuition fees intrusted to him without authority of law.

Actions for Which Sureties on official bonds are liable. See note, 91 Am. St. Rep. 572.

Miscellaneous.—Cited in *San Luis Obispo County v. Farnum* (Cal.), 41 Pac. 447, companion case.

108 Cal. 567-569, 41 Pac. 447, SAN LUIS OBISPO v. FARNUM.

Liability of Auditor to Account for Moneys of county received by him without authority is barred in two years.

Approved in *Bannock County v. Bell*, 8 Idaho, 4, 101 Am. St. Rep. 140, 65 Pac. 711, holding limitations runs against county in civil action to recover illegal fees paid to auditor; *County of Sonoma v. Hall*, 132 Cal. 591, 65 Pac. 13, *arguendo*.

Distinguished in dissenting opinion in *Bannock County v. Bell*, 8 Idaho, 9, 101 Am. St. Rep. 140, 65 Pac. 713, majority holding limitations runs against action by county to recover illegal fees paid auditor.

Maxim "Nullum Tempus Occurrit Regi." See note, 101 Am. St. Rep. 156, 186.

Applicability of Statute of Limitations to action by agencies of state. See note, 3 L. R. A. (n. s.) 747.

108 Cal. 569-581, 41 Pac. 491, WITMER BROS. v. WEID.

Agreement for Deposit of Notes in Escrow to be delivered upon performance of conditions specified in contract considered and upheld.

Approved in *Daniels v. Daniels*, 3 Cal. App. 299, 85 Pac. 136, upholding agreement for delivery of notes in escrow to be delivered to payees only upon death of maker.

Escrows. See note, 130 Am. St. Rep. 955.

Contemporaneous Agreements and Their Breach as defense to note. See note, 43 L. R. A. 471.

108 Cal. 581-588, 41 Pac. 451, PEOPLE v. RYAN.

Disqualification of Deputy Sheriff who summons jurors is ground for challenge to panel.

Cited in *People v. Le Doux*, 155 Cal. 543, 102 Pac. 520, *arguendo*.

Prosecuting Attorney Should not Ask inadmissible questions for purpose of exciting suspicions in minds of jurors prejudicial to defendant.

Approved in *People v. Wong Loung*, 159 Cal. 525, 114 Pac. 831, reversing conviction on ground jury was prejudiced by reading of articles in newspapers prejudicial to defendant.

108 Cal. 589-596, 41 Pac. 448, SCHWERDTLE v. PLACER COUNTY.

Opinion of Trial Judge Forms No Part of record on appeal from judgment.

Approved in *People v. Soto*, 8 Cal. App. 328, 96 Pac. 916, following rule; *Higgins v. Los Angeles Ry. Co.*, 5 Cal. App. 750, 91 Pac. 345, holding erroneous opinion of trial judge did not affect decision which could be sustained on other grounds.

Act of Congress Granting Right to establish roads over public land operating with statute of 1870 declaring roads in use for two years to be highways constituted acceptance of dedication by Congress.

Approved in *Mills v. Glasscock*, 26 Okl. 127, 110 Pac. 378, and *Tholl v. Koles*, 65 Kan. 806, 70 Pac. 883, both holding act of Congress operating with state statute declaring section lines highways constituted dedication and acceptance as such.

Where Dedication of Highway is Sought to be established by adverse user for period not long enough to give right by prescription, acquiescence of owner is essential.

Approved in *Hartley v. Vermillion (Cal.)*, 70 Pac. 273, holding permissive user of road for fifteen years did not show dedication; *Hughes v. Veal*, 84 Kan. 539, 114 Pac. 1083, holding where proceedings were insufficient to establish highway over public land, public adoption and use of surveyed line were sufficient to constitute acceptance of congressional grant.

Long-continued Adverse Use of Highway by public establishes conclusive presumption of dedication by owner.

Approved in *Barnes v. Daveck*, 7 Cal. App. 491, 94 Pac. 781, following rule; *Pitser v. McCreery*, 172 Ind. 671, 88 N. E. 306, construing statute relating to establishment of highway by user.

Answer Held Objectionable in Pleading as conclusion of law that land in controversy was public highway.

Criticised in *Leverone v. Weakley*, 155 Cal. 398, 101 Pac. 305, holding allegation that land was public highway was pleading of ultimate fact.

Finding of Specific Probative Facts which establish ultimate fact of highway is sufficient to sustain judgment under allegation that land was highway.

Reaffirmed in *Leverone v. Weakley*, 155 Cal. 400, 101 Pac. 306.

Right of Public to Use of Highway is not lost by placing gates across it by owner after asking permission of board of supervisors to do so.

Approved in *Sheridan County v. Patrick*, 18 Wyo. 138, 104 Pac. 532, holding individual members of county board could not give verbal consent to closing of highway.

108 Cal. 597-608, 41 Pac. 697, **PEOPLE v. OHIN HANE.**

Threats Made by Defendants Against Witness who identified them may be shown upon their trial.

Approved in *State v. Constantine*, 48 Wash. 222, 93 Pac. 319, holding fact that civil action was brought by prosecuting witness against defendant charged with assault to murder was material on question of credibility of such witness.

Testimony of Witness That He Identified Accused before coroner's jury is improper when conduct of accused when so identified was not shown.

Approved in *People v. Machado* (Cal.), 63 Pac. 67, holding it not error to admit evidence of statements of third persons to accused though his conduct was not shown, when no motion was made to strike it out.

In Order to Impeach Witness, Including Defendant, he may be asked whether he ever committed felony. Beyond this examination should not go.

Approved in *Slater v. United States*, 1 Okl. Cr. 280, 98 Pac. 112, holding it improper to ask witness if he had been indicted, arrested, or imprisoned before conviction, for any offense whatever.

In Murder Case It may be Proven, for purpose of showing motive, that deceased was upon bond of one who was arrested on charge of assault to murder accused, without proof accused knew of such fact before homicide.

Approved in *Spick v. State*, 140 Wis. 120, 121 N. W. 670, holding in murder trial it could be proven to show motive that deceased knew accused had committed crime and had reported it.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 705, 708.

Deposition of Absent Witness Taken at preliminary examination may be used at trial for homicide.

Reaffirmed in *People v. Clark*, 151 Cal. 204, 90 Pac. 551.

Admissibility in Criminal Trial of Testimony given upon preliminary examination by witnesses not available at trial. See note, 25 L. R. A. (n. s.) 881.

Photographs as Evidence. See note, 35 L. R. A. 808.

108 Cal. 608-626, 41 Pac. 701, **ESTATE OF LANGFORD.**

To Set Aside Will for Undue Influence, there must be substantial proof of pressure exerted to overcome volition of testator in performing testamentary act.

Approved in *Estate of Higgins*, 156 Cal. 263, 104 Pac. 9, holding undue influence not shown.

Undue Influence. See notes, 1 Cof. Prob. 251, 533; 2 Cof. Prob. 95.

Ante-testamentary Declarations as Evidence of undue influence. See note, 3 L. R. A. (n. s.) 753.

That Will is Immaterial may, when there is evidence tending to show mental incapacity, fraud, or undue influence, help out weak case.

Approved in *Estate of Snowball*, 157 Cal. 315, 107 Pac. 604, approving instruction to effect that nature of will may be considered as circumstance in determining whether fraud or undue influence was exercised; *Estate of Dolbeer*, 3 Cof. Prob. 248, holding will could

not be set aside for mere injustice of its provisions; In re Will of Notley, 15 Haw. 441, 458, holding will not unnatural.

Testator is Presumed to be of Sound Mind until contrary is shown. Reaffirmed in Estate of Dolbeer, 3 Cal. Prob. 245.

Miscellaneous.—Cited in In re Daly, 15 Cal. App. 337, 114 Pac. 709, as enunciating rule on motion for nonsuit.

108 Cal. 627-660, 49 Am. St. Rep. 97, 41 Pac. 772, ESTATE OF WALKERLY.

Trust in Will to Convey Property of testator is void.

Approved in Estate of Heberle, 153 Cal. 276, 95 Pac. 41, Campbell-Kawannanako v. Campbell, 152 Cal. 204, 92 Pac. 185, and Estate of Spreckels, 5 Cal. Prob. 345, all following rule.

Distinguished in Estate of Campbell, 149 Cal. 720, 87 Pac. 576, upholding will limiting power of executor to convey for fixed period.

Trustees of Express Trust Take Whole Estate, both legal and equitable.

Approved in Los Angeles v. Winans, 13 Cal. App. 262, 109 Pac. 652, holding where trust was created by operation of law, trustee could maintain action to quiet title against beneficiaries who could set up their equitable rights; Estate of Spreckels, 5 Cal. Prob. 330, arguendo.

Doctrine of Equitable Conversion does not apply to void trust to convey in will.

Approved in Campbell-Kawannanako v. Campbell, 152 Cal. 207, 92 Pac. 186, following rule; Estate of Spreckels, 5 Cal. Prob. 321, holding equitable conversion not intended in absence of imperative directions; Estate of Skae, 1 Cal. Prob. 420, holding equitable conversion by power to sell in will took place, though power to sell was not imperative.

Trust to Convey in Will is void as to real property situated in California.

Approved in Campbell-Kawannanako v. Campbell, 152 Cal. 207, 92 Pac. 186, following rule.

Testator must Do More Than Evince Intention to disinherit before heirs' right of succession can be cut off. He must make valid disposition of his property.

Approved in Campbell-Kawannanako v. Campbell, 152 Cal. 207, 92 Pac. 186, holding when will was void heirs took as if no will had been made.

Right of Testamentary Disposition is given by statute, and may be restrained, modified, or abrogated entirely.

Approved in Estate of Miller, 158 Cal. 421, 111 Pac. 256, holding decedent could not by will prevent widow from taking whole estate if worth less than fifteen hundred dollars.

"Heirs," as Used in Section 1465, Code of Civil Procedure, providing widow's homestead shall vest in heirs, does not include devisees.

Approved in Estate of McGee, 154 Cal. 205, 97 Pac. 299, holding "heirs," as used in section 1474, Code of Civil Procedure, does not include devisees.

Rights of Children in Homestead of Parent. See note, 56 L. R. A. 38.

Trust in Will Which Suspends Power of alienation for twenty-five years is void.

Approved in *Estate of Fay*, 5 Cal. App. 191, 89 Pac. 1066, following rule; *Estate of Spreckels*, 5 Cal. Prob. 367, holding will void on ground it suspended power of alienation beyond lives of persons in being; *Estate of Fay*, 3 Cal. Prob. 273, 275, holding trust in will void as creating perpetuity; *Estate of Werner*, 3 Cal. Prob. 227, holding trust clause of will unduly suspended power of alienation; *Lyons v. Bradley*, 168 Ala. 523, 53 So. 250, holding trust in will for twenty-five years was valid for twenty-one years only.

Distinguished in *Estate of Merchant*, 143 Cal. 540, 77 Pac. 476, holding doctrine of perpetuities did not apply in case of charitable bequest; *Stevens v. Annex Realty Co.*, 173 Mo. 522, 73 S. W. 508, holding conveyance of streets and parks to trustees with power to assess costs of maintenance on lots in same tract did not violate rule against perpetuities.

Trust in Personal Property may be Created generally for any purpose for which contract may be made.

Approved in *Estate of Gregory*, 12 Cal. App. 311, 107 Pac. 567, upholding trust in will in personal property for life of widow with direction to trustee to pay over residue to grandchildren at her death; *Estate of Spreckels*, 5 Cal. Prob. 368, holding section 715, Civil Code, applies to trusts in personalty.

Void Trust in Will Does not Render Void bequests in will valid in themselves.

Reaffirmed in *Reid v. Voorhees*, 216 Ill. 247, 74 N. E. 808.

Devises and Bequests to Persons constituting a class. See note, 4 Cal. Prob. 379, 382.

Miscellaneous.—Cited in *In re Walkerly's Estate* (Cal.), 41 Pac. 780, on another appeal.

108 Cal. 661-663, 41 Pac. 793, IN RE CURTIS.

Proceedings Under Section 772, Penal Code, are summary, and judgment of superior court is final.

Cited in *Larue v. Davies*, 8 Cal. App. 754, 755, 97 Pac. 905, *arguendo*.

Miscellaneous.—Cited in *Guttery v. Wishon* (Cal.), 43 Pac. 2, companion case.

108 Cal. 666-670, 41 Pac. 797, SPINNEY v. DOWNING.

Contract Containing Reciprocal Stipulations is not binding unless signed by both parties.

Approved in *State v. State Prison Commrs.*, 37 Mont. 392, 96 Pac. 741, holding qualified acceptance of new proposal made no contract; *Summers v. Mutual Life Ins. Co.*, 12 Wyo. 393, 109 Am. St. Rep. 992, 75 Pac. 943, 66 L. R. A. 812, holding completed contract of insurance not shown.

Distinguished in *Wiener v. Graff*, 7 Cal. App. 585, 95 Pac. 169, holding notice of election by lessee to take option to extend lease was sufficient though not signed by lessee; *Nash v. Kreling* (Cal.), 56 Pac. 263, holding contract created between parties though never formally drawn up.

108 Cal. 670-679, 41 Pac. 806, TUFFREE v. POLHEMUS.

Limitations Do not Commence to Run against claims under patent confirming Mexican grant until date of issuance of patent.

Reaffirmed in *Adams v. Hopkins* (Cal.), 69 Pac. 230.

Action to Quiet Title cannot be Maintained by holder of equitable title against holder of legal title.

Approved in *County of Los Angeles v. Hannon*, 159 Cal. 48, 112 Pac. 883, *Robinson v. Muir*, 151 Cal. 124, 90 Pac. 524, and *Spotswood v. Spotswood*, 4 Cal. App. 713, 89 Pac. 363, all following rule.

Holder of Equitable Title has Right to have his equities determined as against all other equities.

Approved in *Buchner v. Malloy*, 155 Cal. 255, 100 Pac. 688, *De Leonis v. Hammel*, 1 Cal. App. 394, 82 Pac. 351, and *Battelle v. Wolven*, 19 S. D. 88, 102 N. W. 298, all following rule; *Coleman v. Jaggars*, 12 Idaho, 129, 118 Am. St. Rep. 207, 85 Pac. 895, holding action to quiet title could be maintained though plaintiff had neither possession nor legal title.

Defective Pleading of Allegation is waived when evidence is introduced upon question without objection.

Distinguished in *Reclamation District v. Hershey*, 160 Cal. 693, 117 Pac. 904, holding rule did not apply to facts alleged in complaint which answer by silence admitted to be true.

Miscellaneous.—Cited in *Tuffree v. Stearns Ranchos* (Cal.), 54 Pac. 826, on another appeal.

108 Cal. 680-683, 49 Am. St. Rep. 138, 41 Pac. 693, IN RE WONG HANE.

Statute is Void Which Provides one found in possession of lottery ticket is presumed guilty of violation of law.

Distinguished in *In re Fernandez*, 12 Haw. 122, upholding statute providing punishment for any person found at night without lawful excuse in dwelling-house.

Where Part of Statute is Unconstitutional and is inseparably connected with remainder, whole statute must fall.

Approved in *Roberts v. Police Court*, 148 Cal. 135, 82 Pac. 839, holding void subdivision 2, section 2 of chapter 8 of San Francisco charter, relating to police court's jurisdiction over misdemeanor; *State v. Cudahy Packing Co.*, 33 Mont. 189, 114 Am. St. Rep. 804, 82 Pac. 836, 8 Ann. Cas. 717, holding void statute against combinations excepting persons engaged in agriculture and horticulture.

108 Cal. 684-687, 41 Pac. 797, BRADFORD v. WOODWORTH.

Where Evidence is Conflicting, Appellate Court will not disturb finding on ground it is not supported by preponderance of evidence.

Reaffirmed in *Humphrey v. Pope*, 1 Cal. App. 375, 82 Pac. 224.

108 Cal. 688-690, 41 Pac. 771, IN RE LONES.

Will Revoked by Subsequent Will is not revived by revocation of last will unless by express terms of revocation.

Approved in *Dougherty v. Holscheider*, 40 Tex. Civ. 36, 88 S. W. 1115, will revoked by subsequent conditional will is not revived by failure of happening of event upon which latter was conditioned.

Revocation of Will by Subsequent Will, and revival of former by destruction of latter. See note, 37 L. R. A. 564, 579.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 109 CALIFORNIA.

109 Cal. 1-11, 41 Pac. 809, STOCKTON COMBINED HARVESTER ETC. WORKS v. HOUSER.

Where Stock Certificate Issued for Property bears no indorsement that it was issued for fully paid or nonassessable stock, it is presumed stock was taken subject to same conditions as if issued to original subscriber.

Approved in *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 71, 97 Pac. 8, holding where certificates were issued prior to amendment to section 323, Civil Code, fact that face did not indicate amount paid did not estop corporation to claim stock was not fully paid; *Smith v. Ferries etc. Ry. Co. (Cal.)*, 51 Pac. 714, 724, holding shares of stock delivered by corporation to stockholders of another corporation as part of price of property purchased from it are part of former corporation's capital stock.

Where Record of Corporate Meeting Recites directors were notified, it is insufficient, in absence of evidence to contrary, to show directors had notice.

Reaffirmed in *Turner v. Fidelity Loan Concern*, 2 Cal. App. 130, 83 Pac. 65.

Liability to Corporations of Subscribers to stock. See note, 93 Am. St. Rep. 360.

109 Cal. 12-19, 41 Pac. 781, WOODWARD v. FARIS.

Title by Adverse Possession may be Acquired though possession initiated by mistake.

Reaffirmed in *Steckter v. Ewing*, 6 Cal. App. 767, 93 Pac. 289.

Plaintiff cannot Quiet Title to Land lost by adverse possession to defendant's grantor, though conveyance to defendant does not in its description include land in controversy.

Approved in *Gurnsey v. Antelope Creek etc. Water Co.*, 6 Cal. App. 393, 92 Pac. 328, holding where water right for household purposes was granted by deed, additional adverse use from same source for stock watering could be acquired by adverse user.

Effect of Bar of Statute of Limitations. See note, 95 Am. St. Rep. 674.

109 Cal. 19-28, 41 Pac. 814, LANGDON v. BLACKBURN.

A Decree can be Set Aside in Equity only on ground of extrinsic fraud.

Approved in *Cragie v. Roberts*, 6 Cal. App. 315, 92 Pac. 100, holding patent to land could not be set aside in equity on ground it was obtained by perjured testimony before land department; *Ames-toy Estate Co. v. Los Angeles*, 5 Cal. App. 276, 90 Pac. 44, refusing to vacate judgment on ground of mistake in law of defendant's attorney; *Miller v. Livingstone*, 31 Utah, 437, 88 Pac. 346, holding in suit to set aside will, appellate court could not pass upon weight of evidence or credibility of witnesses.

Probate Decree can Only be Vacated for intrinsic fraud by attack in probate court within one year.

Approved in *Del Campo v. Camarillo*, 154 Cal. 662, 98 Pac. 1056, holding order probating will could not be vacated for fraud or perjury except on direct attack in probate court; *Tracy v. Muir*, 151 Cal. 370, 371, 121 Am. St. Rep. 117, 90 Pac. 834, holding probate of will was conclusive as to its genuineness when no direct attack had been made thereon within one year after probate; *Estate of Davis*, 151 Cal. 327, 121 Am. St. Rep. 105, 86 Pac. 186, *arguendo*.

Relief from Decrees of Courts having exclusive jurisdiction over estates of decedents, minors and incompetent persons. See notes, 106 Am. St. Rep. 643; 1 Cal. Prob. 266.

Complaint in Equity to Set Aside Decree of distribution considered and held not to state such extrinsic fraud as warranted interference of equity.

Approved in *Bacon v. Bacon*, 150 Cal. 482, 89 Pac. 319, setting aside decree of distribution on ground of extrinsic fraud.

Collateral Attack on Right of acting administrators. See note, 81 Am. St. Rep. 561.

109 Cal. 29-42, 41 Pac. 1024, FUDIOKAR v. EAST RIVERSIDE IRR. DISTRICT.

Mere Defects in Manner of Statement in complaint cannot be relied on, on appeal, where no demurrer was interposed.

Reaffirmed in *Hollister v. State*, 9 Idaho, 660, 77 Pac. 341, and *West v. Johnson*, 15 Idaho, 689, 99 Pac. 711.

In Complaint to Quiet Title, Allegation of ultimate fact of ownership controls reference to instruments annexed to complaint by way of description.

Approved in *S. F. Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 698, 106 Pac. 112, holding allegations of complaint controlled in action on undertaking to discharge attachment when there was variance from undertaking attached.

Easement en Gross is Assignable under section 1044, Civil Code.

Reaffirmed in *Pitcairn v. Harkness*, 10 Cal. App. 299, 101 Pac. 810.

Right to Flow of Water in Canal in which party has interest is real property.

Approved in *State v. Smith*, 49 Or. 598, 90 Pac. 1111, holding right of owners of land to have water flow through ditches thereon was real property.

Every Species of Property Except Mere Possibility not coupled with interest may be transferred.

Approved in *Simpson v. Miller*, 7 Cal. App. 253, 94 Pac. 254, holding deed delivered in escrow, beyond power of grantee to recall, with instructions to deliver at his death, vested title in grantee, which was transferable, and passed by operation of law to trustee in bankruptcy.

Transfer of Right to Use Water for irrigation. See note, 65 L. R. A. 409, 412.

In Action to Quiet Title to Real Property, plaintiff must establish legal, as distinct from equitable, title.

Approved in *Los Angeles v. Hannon*, 159 Cal. 48, 112 Pac. 883, holding vendee under contract of sale could not maintain suit to quiet title against subsequent grantee of legal title.

Deed is not Void for Uncertainty in description where by appropriate evidence of facts referred to in description it may be shown to apply to land in question.

Approved in *Lange v. Waters*, 156 Cal. 145, 103 Pac. 891, holding description of land covered by contract to convey was sufficient when aided by parol evidence.

Action Does not Lie to Quiet Title to personal property.

Approved in *Gaggossian v. Arakelian*, 9 Cal. App. 573, 99 Pac. 114, following rule; *German-American Sav. Bank v. Gollmer*, 155 Cal. 687, 102 Pac. 933, 24 L. R. A. (n. s.) 1066, holding action lay to quiet title to leasehold interest in land.

Extent of Municipal Right to pollute waters. See note, 84 Am. St. Rep. 917.

109 Cal. 42-50, 41 Pac. 799, ADLER v. SARGENT.

Mortgage is Mere Incident to debt secured.

Reaffirmed in *Mueller v. Renkes*, 31 Mont. 103, 77 Pac. 513.

109 Cal. 53-63, 41 Pac. 819, HENEY v. PESOLI.

In Action to Quiet Title Plaintiff must show title in himself.

Approved in *Williams v. San Pedro*, 153 Cal. 49, 94 Pac. 236, holding defendants in quiet title suit could defend by showing plaintiff's certificate of purchase was void; *House v. Ponce*, 13 Cal. App. 281, 109 Pac. 161, holding plaintiff in quiet title suit could not disturb possession of defendant by attacking tax title under which defendant held; dissenting opinion in *Allen v. Lucas*, 15 Haw. 58, majority holding mortgagee had sufficient title after default of mortgagor to enable him to bring action to quiet title against third parties.

109 Cal. 63-69, 41 Pac. 817, McGAHEY v. FORREST.

When Recourse is Waived Against other property of estate, claim of mortgagee need not be presented for allowance.

Approved in *Heeser v. Taylor*, 1 Cal. App. 620, 82 Pac. 977, following rule; *First Nat. Bank v. Glenn*, 10 Idaho, 237, 109 Am. St. Rep. 204, 77 Pac. 627, holding action lay to foreclose mortgage, although claim had been presented to administrator.

109 Cal. 70-73, 41 Pac. 792, HARBAUGH v. HONEY LAKE VALLEY LAND ETC. CO.

Power of Court Under Section 473, Code of Civil Procedure, should be liberally exercised to advance ends of justice.

Approved in *Mitchell v. California etc. S. S. Co.*, 156 Cal. 579, 105 Pac. 592, granting relief for mistake in law.

Negligence or Inadvertence of Attorney as ground for relief from judgment. See note, 80 Am. St. Rep. 269.

109 Cal. 73-85, 41 Pac. 801, DEERING v. RICHARDSON-KIMBALL CO.

Decree in Action Brought by Attaching Creditor adjudging defendant was not indebted to plaintiff does not conclude rights of other attaching creditors who intervened, when relative priorities of their attachments were not determined.

Approved in *McCullough v. Connelly*, 137 Iowa, 688, 114 N. W. 303, 15 L. R. A. (n. s.) 823, holding party who intervened in action where title to land was in question to assert paramount title could abandon intervention, and decree entered would not be conclusive as to his rights.

In Order to Settle All Adverse Claims to property sought to be applied to satisfaction of judgment, all new adverse claimants must be made parties in order to bind them by judgment.

Reaffirmed in *Shannon v. Cheney*, 156 Cal. 572, 105 Pac. 590, and *Schino v. Cinquini*, 7 Cal. App. 247, 94 Pac. 84.

Where Garnishee is Subjected to Numerous Attachments, he is not obliged to pay money to defendant until attachments are discharged or to plaintiff until all adverse claims are judicially settled.

Cited in *Finch v. Finch*, 12 Cal. App. 283, 107 Pac. 598, *arguendo*.

109 Cal. 86-96, 50 Am. St. Rep. 17, 41 Pac. 783, 29 L. R. A. 751, STEPHENS v. SOUTHERN PACIFIC CO.

Covenant in Contract of Lease With Railroad that railroad shall not be liable for damage caused by fire is valid.

Approved in *Mansfield Mut. Ins. Co. v. Cleveland etc. Ry. Co.*, 74 Ohio St. 32, 77 N. E. 270, following rule; *Mann v. Pere Marquette R. Co.*, 135 Mich. 219, 97 N. W. 724, upholding covenant in contract for construction of sidetrack for shipper releasing railroad from liability for loss by fire from negligence of railroad; *James Quirk Milling Co. v. Minneapolis & St. L. R. Co.*, 98 Minn. 27, 116 Am. St. Rep. 336, 107 N. W. 744, upholding contract granting right to build elevator on right of way on condition of nonliability for fire losses; *Greenwich Ins. Co. v. Louisville etc. R. R. Co.*, 112 Ky. 605, 99 Am. St. Rep. 313, 66 S. W. 413, 56 L. R. A. 477, and *Ordelheide v. Wabash Ry. Co.*, 175 Mo. 346, 75 S. W. 152, both upholding contract by which railroad sought to relieve itself from liability for loss by communication of fire to building; *Cincinnati Ry. Co. v. Saulsbury*, 115 Tenn. 413, 90 S. W. 627, upholding contract giving right to build mill on railroad right of way on condition of nonliability for loss by fire; *Osgood v. Central Vt. Ry. Co.*, 77 Vt. 345, 60 Atl. 140, 70 L. R. A. 930, upholding contract whereby party who leased ground for coal-shed from railroad agreed to indemnify railroad from liability for loss to such property from negligence of railroad's servants.

Covenant Against Liability for Fire. See note, 99 Am. St. Rep. 316.

Effect on Contract of Change in Law. See note, 80 Am. St. Rep. 260.

109 Cal. 96-100, 41 Pac. 786, 29 L. R. A. 755, KING v. SOUTHERN PACIFIC CO.

Covenant in Contract of Lease With Railroad that railroad shall not be liable for loss by fire is valid.

Approved in *Greenwich Ins. Co. v. Louisville etc. R. R. Co.*, 112 Ky. 605, 99 Am. St. Rep. 313, 66 S. W. 413, 56 L. R. A. 477, upholding contract by which railroad sought to relieve itself from liability for loss by fire; *James Quirk Milling Co. v. Minneapolis etc. R. R. Co.*, 98 Minn. 27, 116 Am. St. Rep. 336, 107 N. W. 744, upholding contract granting right to build elevator on right of way on condition of non-liability for fire losses.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 67.

109 Cal. 100-107, 41 Pac. 794, **COX v. LOS ANGELES TERMINAL RY. CO.**

Conductor is not Authorized to Demand or receive fare of passenger without badge indicating his office.

Approved in *Wieland v. Southern Pac. Co.*, 1 Cal. App. 348, 82 Pac. 228, holding brakeman on freight train not authorized to receive payment of fare.

Ejection of Custodian for Nonpayment of child's fare. See note, 38 L. R. A. 140.

109 Cal. 111-115, 41 Pac. 813, **CENTERVILLE & KINGSBURG IRR. DITCH CO. v. BACHTOLD.**

If Undertaking on Several Appeals has no special reference to either, all will be dismissed.

Approved in *Estate of Sutro*, 152 Cal. 252, 92 Pac. 488, holding appeal ineffectual when two notices were given and undertaking referred to neither by its terms; *Mitchell v. California etc. S. S. Co.*, 154 Cal. 732, 99 Pac. 203, *arguendo*.

Distinguished in *Pacific Paving Co. v. Verso*, 11 Cal. App. 385, 105 Pac. 137, refusing to dismiss appeal from judgment fully identified by bond which misrecited court to which appeal was to be taken.

When Motion to Dismiss Appeal is made on ground it was not perfected, court is limited to determining whether required steps had been taken to perfect it.

Reaffirmed in *Gardner v. Stare* (Cal.), 66 Pac. 4.

109 Cal. 122-125, 41 Pac. 805, **MOORE v. HAMERSTAG.**

Mining Claim is Real Estate, and can be conveyed only by instrument in writing.

Cited in *Anderson v. Caughey*, 3 Cal. App. 27, 84 Pac. 225, *arguendo*.

Parol Promise to Hold Mining Location in trust for another made by locator after title was acquired is void.

Approved in dissenting opinion in *White Star Min. Co. v. Hultberg*, 220 Ill. 634, 77 N. E. 347, majority upholding finding that mine was located for another.

Oral Agreement to Locate Mining Claim for joint benefit of locator and another is valid.

Approved in *Floyd v. Duffy*, 68 W. Va. 350, 69 S. E. 998, upholding oral agreement to form partnership for purchase and resale of land under which one party took title for benefit of both.

Where Mining Claim is Located in name of another, oral promise of such person to convey to actual locator made after location is unenforceable.

Reaffirmed in *Cascaden v. Dunbar*, 2 Alaska, 412, 414.

Location of Mining Claim. See note, 7 L. R. A. (n. s.) 817, 819.

109 Cal. 125-130, 41 Pac. 857, GARBERINO v. ROBERTS.

Conveyance by Vendor to Third Party of land which he has contracted to sell prior to time for performance is not breach of contract, and does not warrant rescission by vendee.

Approved in Foxley v. Rich, 35 Utah, 171, 99 Pac. 669, following rule; Hanson v. Fox, 155 Cal. 108, 132 Am. St. Rep. 72, 99 Pac. 490, 20 L. R. A. (n. s.) 338, and Backman v. Park, 157 Cal. 610, 137 Am. St. Rep. 153, 108 Pac. 687, both holding contract to sell land made by vendor when he had no title was valid, and default could occur only on failure to deliver title at time for performance; Hall v. Northern & Southern Co., 55 Fla. 242, 46 So. 180, holding in such case vendee took land subject to contract.

Where Party Who has Contracted to Do Act at given time repudiates contract before such time, other party may treat contract as rescinded and bring action for breach at once.

Approved in Cabrera v. Payne, 10 Cal. App. 678, 103 Pac. 177, holding plaintiff entitled to rescind before time for performance and recover purchase money when defendant tendered insufficient deed and stated it was all he could do; Stum v. Hadrich, 7 Cal. App. 244, 94 Pac. 83, holding cause of action for breach of contract to sell arose immediately upon notice of repudiation of contract without reference to subsequent tender of payment.

Purchaser cannot Rescind Contract for sale of land and recover purchase money paid without showing facts putting defendant in default.

Approved in Poheim v. Meyers, 9 Cal. App. 37, 98 Pac. 67, holding where plaintiff was in default in payments, he could not recover payments already made.

109 Cal. 133-139, 41 Pac. 868, HOPKINS v. WARNER.

On Foreclosure of Mortgage, Personal Judgment can be rendered only for deficiency after mortgage security is exhausted.

Reaffirmed in Howe v. Sears, 30 Utah, 348, 84 Pac. 1108.

109 Cal. 140-145, 41 Pac. 869, 29 L. R. A. 463, CAPITAL GAS CO. v. YOUNG.

City is Liable to Gas Company for gas furnished on its demand, though mayor of city is president and stockholder of gas company.

Approved in Reclamation District v. Clark, 155 Cal. 351, 100 Pac. 1093, holding land owner in reclamation district could act as trustee when reclamation works were in course of construction.

Liability of Municipality or Other Public Corporation on implied contract. See note, 27 L. R. A. (n. s.) 1124.

When Officers Represent Corporation in dealings with themselves, it is presumed self-interest prompts them to prefer their own advantage to that of the corporation.

Approved in Woods v. Potter, 8 Cal. App. 44, 95 Pac. 1127, holding members of city council could not vote salaries to themselves when charter made no provision for such salaries.

109 Cal. 146-151, 41 Pac. 871, KELLER v. HEWITT.

Mandamus Lies to Compel Issuance of teacher's certificate when applicant has complied with all requirements therefor.

Approved in *Inglin v. Hoppin*, 156 Cal. 490, 105 Pac. 585, holding mandamus lay to compel supervisors to set apart independent reclamation district when applicants had taken all necessary legal steps therefor; *Van Vleck v. Board of Dental Examiners* (Cal.), 48 Pac. 225, denying mandamus to compel state board of dental examiners to issue certificate on presentation of diploma from dental college; *Good v. Common Council*, 5 Cal. App. 271, 90 Pac. 47, holding mandamus lay to compel calling of special election by city council when sufficient petition had been presented; *Raaf v. State Board of Medical Examiners*, 11 Idaho, 718, 84 Pac. 36, holding court could not compel state medical examiners to reopen and re-examine examination papers at suit of disappointed applicant; *State v. Lincoln Medical College*, 81 Neb. 543, 116 N. W. 298, 17 L. R. A. (n. s.) 930, holding mandamus lay to compel issuance of diploma by college when candidate had fulfilled all demands of institution; *State v. District Court*, 30 Mont. 12, 75 Pac. 518, *arguendo*.

Necessary Parties to Proceedings in Mandamus. See note, 105 Am. St. Rep. 126.

109 Cal. 152-155, 41 Pac. 864, HOWLAND v. SAN JOAQUIN COUNTY.

Section 18, Article XI, Constitution, requiring that county cannot incur debt in excess of annual revenue without making provision before or at time debt is incurred for tax to meet interest and sinking fund, does not require tax for sinking fund or interest to be levied at that time.

Approved in *Pettibone v. West Chicago Park Commrs.*, 215 Ill. 320, 74 N. E. 393, upholding act requiring annual levy by park commissioners to meet interest on park improvement bonds.

Requirement of Two-thirds Vote of qualified electors voting at election to be held for certain purpose means two-thirds of electors voting on that particular proposition and not of all voting at election.

Approved in *State v. Fabrick*, 18 N. D. 406, 121 N. W. 67, holding "majority vote" meant majority of votes cast on particular question only; *State v. Blaisdell*, 18 N. D. 38, 43, 119 N. W. 364, 366, holding majority of votes cast on question of changing county boundary was sufficient though less than half votes at election.

Basis for Computation of Majority essential to adoption of proposition submitted at general election. See note, 22 L. R. A. (n. s.) 484, 485.

109 Cal. 156-159, 41 Pac. 862, BROWN v. CLINE.

When Order Granting New Trial is conditional, noncompliance with condition renders it ineffective.

Approved in *Winningham v. Philbrick*, 56 Wash. 41, 105 Pac. 145, and *Harrington v. Butte, Anaconda etc. Ry. Co.*, 39 Mont. 24, 101 Pac. 150, both holding conditional order denying new trial becomes effective on compliance with condition.

109 Cal. 160-164, 41 Pac. 855, BATES v. CORONADO BEACH CO.

Contract Entered into by President of corporation who with full knowledge and acquiescence of officers assumed control of general business, held to be ratified and confirmed by stockholders at meeting subsequent to making of contract.

Approved in *Welmer v. Bauer*, 160 Fed. 245, holding contract by agent ratified by principal by acquiescence therein.

Distinguished in *Black v. Harrison Home Co.*, 155 Cal. 129, 99 Pac. 498, holding corporation not estopped from denying binding effect of contract executed by president on theory he owned all stock, when deceased daughter of whom he was only heir owned nearly one-half stock.

Fact That Contract Within Apparent Scope of organization of corporation has been entered into by its representative is determination that it was essential, and corporation cannot question its effect.

Approved in *Preston v. Central Cal. etc. Irr. Co.*, 11 Cal. App. 201, 104 Pac. 466, upholding assignment of claims in favor of corporation by general manager.

109 Cal. 165-170, 50 Am. St. Rep. 25, 41 Pac. 1014, **VAN SANDT v. ALVIS.**

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 916.

Lien for Purchase Money of homestead. See note, 86 Am. St. Rep. 176, 181.

109 Cal. 170-178, 41 Pac. 865, **MILLET v. BRADBURY.**

Bill of Particulars of Account Sued on furnished defendant is part of complaint.

Reaffirmed in *Gage v. Billing*, 12 Cal. App. 692, 108 Pac. 666.

Under Section 344, Code of Civil Procedure, account is not mutual unless parties have dealt with each other in same relation, and items on different sides are capable of being set off against each other.

Approved in *Copriviza v. Rilovich*, 4 Cal. App. 29, 87 Pac. 399, holding charges on one side and payments, whether in money or merchandise, on the other do not constitute mutual account; *State v. Illinois Central R. R. Co.*, 246 Ill. 227, 92 N. E. 832, holding account may include no more than catalogue of items, whether debts or credits.

109 Cal. 178-185, 41 Pac. 873, **CORBETT v. CHAMBERS.**

Mechanic's Lien Law is Remedial, and is to be liberally construed to effect its purpose.

Approved in *Union Lumber Co. v. Simon*, 150 Cal. 757, 89 Pac. 1078, holding description in notice of lien need only be sufficient for identification; *Hampton v. Christensen*, 148 Cal. 739, 84 Pac. 204, holding inartificial notice to withhold was sufficient; *Mivelaz v. Johnson*, 124 Ky. 258, 124 Am. St. Rep. 398, 98 S. W. 1021, holding sufficient inaccurate description in claim of lien.

Claim of Lien Need not State Name of owner at time materials were furnished.

Approved in *Waters v. Johnson*, 134 Mich. 439, 96 N. W. 505, following rule; *Lucas v. Gobbi*, 10 Cal. App. 651, 103 Pac. 158, holding where name of owner or reputed owner was not known, claim of lien need not state it; *Kelly v. Lemberger (Cal.)*, 46 Pac. 8, holding claim of lien not impaired by proof that person therein stated as owner was reputed owner; *Davis v. Big Horn Lumber Co.*, 14 Wyo. 524, 525, 85 Pac. 981, holding name of owner in claim of lien must be as of time of filing.

109 Cal. 186-192, 50 Am. St. Rep. 29, 41 Pac. 1010, **DAVIS v. WARD.**

One Who Sets Up Defense of Subsequent Purchase in good faith without notice of plaintiff's equity must affirmatively show purchase for value, and payment before notice.

Approved in *Johnson v. Georgia Loan etc. Co.*, 141 Fed. 598, 72 C. C. A. 639, following rule; *Fulkerson v. Stiles*, 156 Cal. 706, 105 Pac. 967, 26 L. R. A. (n. s.) 181, holding general creditor of married woman who had recovered judgment against her on debt accruing to him before she took deed to community property in her name was not encumbrancer in good faith for value.

Bona Fide Purchaser will be Protected only to extent of actual payment made before notice.

Reaffirmed in *Lindley v. Blumberg*, 7 Cal. App. 146, 93 Pac. 897.

Record of Mortgage Containing Mistaken Description imparts no constructive notice of mistake.

Distinguished in *Gray v. Maier & Zobelein Brewery*, 2 Cal. App. 656, 84 Pac. 282, holding record of lease, though containing error, imparted constructive notice of terms as reasonably construed.

109 Cal. 192-197, 50 Am. St. Rep. 34, 41 Pac. 1016, **MARYSVILLE ELECTRIC ETC. CO. v. JOHNSON.**

Subscription to Stock of Corporation to be formed for given purpose cannot be enforced when articles of incorporation include additional and distinct purpose.

Approved in *Burke v. Mead*, 159 Ind. 259, 64 N. E. 883, holding in action to compel specific performance of contract to convey land in consideration of stock in corporation to be formed, complaint was defective in not alleging corporation was of kind agreed upon.

Nature and Validity of Subscription Agreement to corporate stock. See note, 136 Am. St. Rep. 748.

109 Cal. 197-202, 41 Pac. 1008, **BANK OF UKIAH v. GIBSON.**

Chattel Mortgage on Personal Property not included among articles subject to mortgage under section 2955, Civil Code, is valid as between parties.

Reaffirmed in *McRae v. Lackmann*, 8 Cal. App. 243, 96 Pac. 506.

Miscellaneous.—Cited in *Bank of Ukiah v. Gibson* (Cal.), 41 Pac. 1010, on another appeal.

109 Cal. 211-221, 41 Pac. 1028, **CHAFFEE v. BROWNE.**

Where Complaint to Foreclose Mortgage shows with reasonable certainty that at time mortgage was given debt was due and unpaid, objection that nonpayment is not alleged is untenable.

Approved in *Whiteacre v. Nichols*, 17 Okl. 392, 87 Pac. 867, holding in replevin by mortgagee, petition was not subject to general demurrer for failure to allege condition broken and notes were due, when mortgage was attached and notes copied in petition showed they were past due.

Mortgage Given by Wife on Separate Property to secure husband's antecedent debt, without new consideration to husband or wife, is not obligatory.

Distinguished in *Lyon v. Robertson* (Cal.), 59 Pac. 990, holding widow liable on her note given to renew prior notes of deceased husband, under belief she was liable thereon.

Effect of Conveyance or Encumbrance of homestead by one spouse only. See note, 95 Am. St. Rep. 939.

Duty is upon Husband to Maintain Wife and children.

Approved in Title Ins. etc. Co. v. Ingersoll, 158 Cal. 492, 111 Pac. 368, following rule.

Liability of Husband for Necessaries furnished wife while living with him. See note, 65 L. R. A. 535.

Evidence of Meaning of Words used in written contracts. See note, 122 Am. St. Rep. 557.

109 Cal. 221-228, 41 Pac. 876, BALFOUR v. FRESNO CANAL & IRR. CO.

Extrinsic Evidence may be Resorted to where language of contract is fairly susceptible to two interpretations.

Approved in Payne v. Neural, 155 Cal. 52, 99 Pac. 479, admitting parol testimony to explain ambiguous instrument; Pearsall v. Henry, 153 Cal. 330, 95 Pac. 159, admitting parol evidence to show circumstances surrounding making of ambiguous contract; Peterson v. Chaix, 5 Cal. App. 532, 533, 90 Pac. 950, and Grosse v. Barman, 9 Cal. App. 663, 100 Pac. 354, both holding extrinsic evidence properly excluded when contract was capable of but one construction; Fireman's F. I. Co. v. Aachen-Munich F. I. Co., 2 Cal. App. 697, 84 Pac. 255, holding whether term "warehouse" in insurance policy was applicable to "elevator" could be explained by parol.

109 Cal. 228-236, 41 Pac. 1022, SMITH v. GREEN.

Executed Parol License When Investments have been made on faith of it as irrevocable.

Approved in Stoner v. Zucker, 148 Cal. 520, 113 Am. St. Rep. 301, 83 Pac. 810, holding executed parol license to construct irrigating ditch over plaintiffs' land was irrevocable.

Revocability of License to Maintain Burden on land, after licensee has incurred expense. See note, 49 L. R. A. 517.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 712.

Abandonment or Loss of Rights of prior appropriators of water. See note, 30 L. R. A. 265.

109 Cal. 236-242, 50 Am. St. Rep. 37, 41 Pac. 1031, VERMONT MARBLE CO. v. BROW.

Where Goods are Delivered Under Contract to be paid for at listed price when sold, transaction is sale upon condition.

Approved in Elsom v. Moore, 11 Cal. App. 379, 105 Pac. 271, holding sale was conditional or absolute at choice of vendor when title was not to pass until payment.

What Constitutes a Transaction a Sale. See note, 94 Am. St. Rep. 241, 245.

109 Cal. 242-249, 41 Pac. 1020, TAHOE ICE CO. v. UNION ICE CO.

Loss of Profits Which are Direct and natural result of breach of contract may be recovered under general allegation of damage.

Approved in Germain Fruit Co. v. Armsby, 153 Cal. 590, 96 Pac. 321, Schiffman v. Peerless Motor Car Co., 13 Cal. App. 604, 110 Pac. 462, and Carlson v. Stone-Ordean-Wells Co., 40 Mont. 442, 107 Pac. 422, all following rule.

Loss of Profits of Sale or Purchase as Damages. See note, 52 L. R. A. 210, 246, 247, 257.

Countermand of Executory Contract of Sale. See note, 94 Am. St. Rep. 122.

109 Cal. 250-257, 41 Pac. 1033, **TRUMPLER v. COTTON.**

Guardian Who Accepts Appointment under law which prescribes notice may be served by publication is to be regarded as assenting in advance, that upon leaving state, service may be made upon him by publication.

Approved in *Michigan Trust Co. v. Ferry*, 175 Fed. 674, 99 C. C. A. 221, applying rule to executor.

Right, in Action on Bond, to Recover Interest swelling total beyond penalty. See note, 19 L. R. A. (n. s.) 84.

Miscellaneous.—Cited in *Trumpler v. Cotton* (Cal.), 41 Pac. 1036, companion case.

109 Cal. 258-263, 41 Pac. 1040, **PEOPLE v. FULTZ.**

Evidence of Other Crimes in Criminal Cases. See note, 62 L. R. A. 322, 338, 353.

109 Cal. 268-275, 41 Pac. 1083, **SOUTHERN PACIFIC R. R. CO. v. WHITAKER.**

Limitations Begin to Run in Favor of adverse possessor of lands allotted to railroad from date of definite location of road, and are not affected by subsequent issuance of patent therefor.

Approved in *Northern Pacific Ry. Co. v. Pyle*, 19 Idaho, 16, 112 Pac. 682, *Sage v. Rudnick*, 91 Minn. 332, 100 N. W. 107, and *Wiese v. Union Pacific R. R. Co.*, 77 Neb. 48, 108 N. W. 177, all following rule.

Findings Should be Statements of ultimate facts.

Approved in *Leggat v. Blomberg*, 15 Idaho, 501, 98 Pac. 725, holding findings of ultimate facts alone were sufficient.

Failure to Make Finding cannot be taken advantage of by appellant when it must have been against him.

Approved in *Craig v. Gray*, 1 Cal. App. 601, 82 Pac. 701, holding failure to find was immaterial where it could not have affected judgment.

Prescriptive Title to Water. See note, 93 Am. St. Rep. 715.

109 Cal. 277-281, 41 Pac. 1097, **PEOPLE v. MARONEY.**

Decision of Jury in Criminal Case, upon legal evidence, is absolutely final and not subject to review on appeal.

Approved in *Keifer v. Myers*, 5 Cal. App. 678, 91 Pac. 169, holding verdict of guilty could not be reviewed on appeal on sole ground evidence was insufficient; *People v. Hines*, 5 Cal. App. 125, 89 Pac. 859, refusing to disturb verdict on conflicting evidence.

Defendant in Criminal Case cannot Complain of verdict more favorable to him than evidence warranted.

Approved in *People v. Oliver*, 7 Cal. App. 603, 95 Pac. 174, holding defendant could not complain of sentence for less than minimum term.

Indictment may Properly Charge prior convictions under pseudonyms.

Reaffirmed in *State v. Howard*, 30 Mont. 521, 77 Pac. 51.

109 Cal. 294-298, 41 Pac. 1037, PEOPLE v. EPPINGER.

Judgment Based on Verdict, and assumed truth of charge of prior conviction on which jury failed to find, must be reversed, and prior conviction disregarded.

Approved in *People v. Chadwick*, 4 Cal. App. 74, 87 Pac. 388, holding where verdict was guilty of felony and of prior conviction, latter not being supported, judge was presumed to have considered both in passing sentence, though term was within limit allowed for felony alone, and judgment must be reversed.

109 Cal. 299-301, 41 Pac. 1038, HILDRETH v. JAMES.

Mortgagor cannot Maintain Ejectment against mortgagee in possession until debt is paid.

Approved in *Kelso v. Norton*, 65 Kan. 790, 93 Am. St. Rep. 308, 70 Pac. 900, following rule.

109 Cal. 304-312, 41 Pac. 1087, HIGGINS v. CALIFORNIA PETROLEUM ETC. CO.

Joint Lease by Several Owners of their lands for purpose of operating asphalt mine lying partly on land of each gives each lessor right to share equally in royalty, regardless of whose land asphalt was taken from.

Distinguished in *Rymer v. South Penn. Oil Co.*, 54 W. Va. 540, 46 S. E. 563, holding individual owners of oil lands entitled to royalties on oil taken from their lands under joint lease.

"Gross" Ton is Two Thousand Pounds.

Approved in *Hale Bros. v. Milliken*, 5 Cal. App. 356, 90 Pac. 370, holding legal standard of weights and measures entered into contract, and evidence of local usage was inadmissible to show different standard.

Miscellaneous.—Cited in *Price v. Black*, 126 Iowa, 306, 101 N. W. 1057, to point that lessee under coal lease impliedly contracts to work mine with reasonable diligence.

109 Cal. 315-323, 41 Pac. 1093, SOUTH PASADENA v. LOS ANGELES TERMINAL RY. CO.

Authority of City Officers to Grant Use of streets for railways is legislative in its nature, and is not referable for support to power of making contracts.

Approved in *City of Arcata v. Green*, 156 Cal. 763, 106 Pac. 87, holding city could not grant franchise for street railway on condition company complete road to another town in given time.

City has No Power to Regulate Rates of street railroad connecting with another city on territory outside city limits.

Disapproved in *Manitowoc v. Manitowoc etc. Traction Co.*, 145 Wis. 25, 129 N. W. 929, holding city could limit fares between cities as condition to granting interurban railroad franchise over streets.

Privilege of Using Streets as a Contract, within constitutional provision against impairing obligation. See note, 50 L. R. A. 151.

109 Cal. 323-332, 50 Am. St. Rep. 43, 41 Pac. 1089, NICHOLS v. EMERY.

To Create Valid Trust, Estate must Pass at once, but immediate enjoyment is not essential.

Approved in *Noble v. Learned*, 153 Cal. 251, 94 Pac. 1050, following rule; *Lewis v. Curnutt*, 130 Iowa, 431, 106 N. W. 918, holding valid trust

created by deed and instrument conveying title and limiting trustee's right to control until death of settler.

Termination of Trusts and of Trustee's Title. See note, 100 Am. St. Rep. 104.

Settler of Trust may Reserve Right to revoke it.

Approved in *Estate of Podhajsky*, 137 Iowa, 746, 115 N. W. 592, following rule; *Carr v. Carr*, 15 Cal. App. 493, 115 Pac. 266, upholding trust in money subject to right of settler to withdraw from fund; *Totten v. Pocahontas Coal & Coke Co.*, 67 W. Va. 649, 68 S. E. 377, *arguendo*.

Instrument Considered and Held not to be will but deed creating trust.

Approved in *Cribbs v. Walker*, 74 Ark. 116, 85 S. W. 245, *O'Day v. Meadows*, 194 Mo. 616, 92 S. W. 644, and *Dexter v. Witte*, 138 Wis. 80, 119 N. W. 893, all following rule; *Treadway v. Veterans' Home*, 14 Cal. App. 87, 111 Pac. 115, holding agreement of inmate of soldiers' home to have pension paid to home for his life and on his death accumulation paid to relatives was valid trust.

What Constitutes a Testamentary Writing. See notes, 89 Am. St. Rep. 487; 5 Cof. Prob. 10.

109 Cal. 332-335, 42 Pac. 434, TURNER v. SISKIYOU COUNTY.

Section 5, Article XI, Constitution, only permits counties to be classified for purposes therein specified, but in all other respects legislature must establish system of county government uniform throughout state.

Approved in *Johnson v. Gunn* (Cal. App.), 84 Pac. 373, holding void act regulating compensation of justices in counties of given class where method of determining population differed from that employed for other counties.

109 Cal. 336-340, 41 Pac. 1095, SPENCER v. BRANHAM.

Application for Relief from Default Judgment in justice's court must be by motion made within time limited; mere making of written application without calling court's attention to it is insufficient.

Approved in *Thomas v. Superior Court*, 6 Cal. App. 632, 92 Pac. 740, serving and filing of notice of motion to set aside default within six months is not making of application within six months; *People v. Long*, 7 Cal. App. 30, 93 Pac. 389, holding motion for new trial must be made by calling court's attention to it and moving it be granted.

Distinguished in *Brownell v. Superior Court*, 157 Cal. 710, 109 Pac. 94, holding creditor of estate who filed affidavits in support of motion for relief from decree of distribution and presented same in court within six months sufficiently complied with law to protect his rights.

Writ of Prohibition. See note, 111 Am. St. Rep. 946, 947.

109 Cal. 340-346, 42 Pac. 437, LIND v. SAN LUIS OBISPO.

Private Person may Maintain Suit for abatement of public nuisance where specially injurious to himself.

Approved in *Donahue v. Stockton Gas etc. Co.*, 6 Cal. App. 280, 92 Pac. 198, upholding complaint by private person to abate nuisance; *McLean v. Llewellyn Iron Works*, 2 Cal. App. 348, 349, 83 Pac. 1084, 1085, holding abutting owner could sue to abate nuisance consisting of obstruction to one-half of street opposite his property; *Harniss*

v. Bulpitt, 1 Cal. App. 142, 81 Pac. 1023, upholding complaint at suit of private person to abate obstruction to public alley.

Duty and Liability of Municipality with respect to drainage. See note, 61 L. R. A. 711.

109 Cal. 346-352, 42 Pac. 439, **BONNEY v. TILLEY**.

Director of Insolvent Corporation who is also a creditor cannot receive any advantage or preference over other creditors.

Approved in Nixon v. Goodwin, 3 Cal. App. 363, 85 Pac. 172, Napanee Canning Co. v. Reid, Murdoch & Co., 159 Ind. 631, 64 N. E. 1116, 59 L. R. A. 199, and City Nat. Bank v. Goshen Woolen Mills Co., 35 Ind. App. 575, 580, 69 N. E. 210, 212, all following rule.

109 Cal. 353-360, 42 Pac. 435, **HOLT MFG. CO. v. EWING**.

Where Right to Reclaim Property sold for nonpayment is reserved, vendor can elect upon breach to retake property or to treat sale as absolute and recover purchase price.

Approved in Manson v. Dayton, 153 Fed. 267, 82 C. C. A. 588, Muncy v. Brain, 158 Cal. 306, 110 Pac. 946, Mark Means etc. Co. v. MacKinzie, 9 Idaho, 174, 73 Pac. 137, and Madison Livestock Co. v. Osler, 39 Mont. 250, 133 Am. St. Rep. 558, 102 Pac. 326, all following rule.

Rights and Remedies of Conditional Seller on buyer's default in payment. See note, 133 Am. St. Rep. 564.

Instrument Termed Lease but Giving Lessee right to title upon certain payments is contract of sale.

Reaffirmed in McCollough v. Home Ins. Co., 155 Cal. 662, 102 Pac. 815.

What Constitutes a Transaction a Sale. See note, 94 Am. St. Rep. 213.

Miscellaneous.—Cited in Thompson v. Bank of California, 4 Cal. App. 670, 88 Pac. 990.

109 Cal. 360-365, 42 Pac. 35, **FREEMAN v. CAMPBELL**.

Where Mortgage Includes Rents, Receiver may be appointed to take charge of mortgaged property and apply rents to mortgage.

Approved in Moncrieff v. Hare, 38 Colo. 233, 87 Pac. 1086, 7 L. R. A. (n. s.) 1001, following rule.

109 Cal. 365-373, 42 Pac. 29, **DUNLAP v. NEW ZEALAND ETC. INS. CO.**

Defendant in Suit for Malicious Prosecution need only show he acted in good faith, in disclosing facts to prosecuting attorney, even though he might have discovered by diligent search facts which would acquit accused.

Approved in Johnson v. Southern Pacific Co., 157 Cal. App. 338, 107 Pac. 613, Holliday v. Holliday (Cal.), 53 Pac. 45, 46, King v. Apple River Power Co., 131 Wis. 583, 120 Am. St. Rep. 1063, 111 N. W. 670, and Missouri etc. Ry. Co. v. Groseclose, 50 Tex. Civ. 530, 110 S. W. 479, all following rule; Ahrens etc. Mfg. Co. v. Hoeher, 106 Ky. 698, 51 S. W. 196, holding advice of counsel would constitute probable cause only when reasonable diligence was used to learn facts on which advice was sought.

Advice of Counsel as Defense to Action for malicious prosecution. See note, 18 L. R. A. (n. s.) 50, 51, 58, 61, 64.

109 Cal. 373-378, 42 Pac. 32, DE SILVA v. SUPREME COUNCIL OF PORTUGUESE UNION.

Power of Insured to Destroy Rights of beneficiary. See note, 49 L. R. A. 750.

109 Cal. 378-381, 50 Am. St. Rep. 49, 42 Pac. 34, MOLINEAUX v. STATE.

Act of 1893, Section 5, Does not Give Right to recover from state interest on matured Indian war bonds prior to date of statute.

Approved in *Union Trust Co. v. State*, 154 Cal. 729, 99 Pac. 189, 24 L. R. A. (n. s.) 1111, holding failure of state agents to levy and collect assessments for Montgomery avenue bonds did not render state liable.

109 Cal. 381-384, 42 Pac. 32, PEOPLE v. LOWEN.

Miscellaneous.—Cited in *People v. Davis*, 1 Cal. App. 13, 81 Pac. 718.

109 Cal. 395-396, 42 Pac. 31, ERLANGER v. SOUTHERN PACIFIC R. R. CO.

Judgments and Orders by Consent will not be reviewed on appeal.

Approved in *Kritzer v. Tracy Engineering Co.*, 16 Cal. App. 290, 116 Pac. 701, *Gibson v. Berryman*, 14 Cal. App. 333, 111 Pac. 927, and *Pacific Paving Co. v. Vizelich*, 1 Cal. App. 283, 82 Pac. 82, all following rule; *Hibernia Savings etc. Society v. Waymire*, 152 Cal. 288, 92 Pac. 646, dismissing appeal from consent judgment.

109 Cal. 396-406, 42 Pac. 149, LOS ANGELES v. STATE LOAN & TRUST CO.

Loan Company Engaged in General Banking and safe deposit business in addition to that of receiving savings deposits is not exempt as savings bank, from taxation on savings deposits.

Approved in *Levinson v. Boas*, 150 Cal. 189, 88 Pac. 826, 12 L. R. A. (n. s.) 575, holding pawnbroker's business not less subject to police regulation because he also conducts business of loaning money on mortgage.

Duties of Savings Banks Toward Depositors. See note, 105 Am. St. Rep. 730.

109 Cal. 406-413, 42 Pac. 159, PIMENTAL v. MARQUES.

To Constitute Novation, Holder of Obligation must have consented to substitution of new debtor and to look to him alone.

Approved in *Kyle v. Hamilton (Cal.)*, 68 Pac. 485, holding execution and interchange of deed and contract to return deed on payment of debt, intended to take place of mortgage securing debt, is novation of mortgage; *Gimble v. King*, 43 Tex. Civ. App. 189, 95 S. W. 8, holding taking by creditor of new note from one who assumed debt was not novation releasing old debtor in absence of agreement to that effect.

109 Cal. 417-427, 42 Pac. 139, MADDOCK v. RUSSELL.

Objects of Probate Proceedings are to Administer, settle, and distribute estates of deceased persons.

Approved in *Estate of Vance*, 152 Cal. 764, 93 Pac. 1011, holding probate court could order payment of note of deceased in corporate stock when right was reserved in note.

Party Seeking to Rescind Contract for mistake must restore or offer to restore everything of value received thereunder.

Distinguished in *Richards v. Farmers' etc. Bank*, 7 Cal. App. 393, 94 Pac. 397, holding complaint to rescind partnership settlement need not aver offer to restore money received when accounting was demanded and greater sum claimed due.

109 Cal. 427-430, 50 Am. St. Rep. 52, 42 Pac. 447, **HIBERNIA SAVINGS & LOAN SOCIETY v. THORNTON.**

Where Mortgage on Homestead is Extinguished by failure to present claim against estate of deceased wife, judgment on note cannot thereafter be had.

Approved in *Hibernia Sav. etc. Society v. Laidlaw*, 4 Cal. App. 629, 88 Pac. 731, following rule; *First Nat. Bank v. Glenn*, 10 Idaho, 237, 109 Am. St. Rep. 204, 77 Pac. 627, holding mortgage could be foreclosed against estate of deceased mortgagor though it had been presented to administrator.

109 Cal. 430-433, 42 Pac. 443, **HERMANN v. LITTLEFIELD.**

Where Labor Continues After Expiration of contract time, it is presumed terms of original contract are continued.

Approved in *Perry v. Noonan Furniture Co.*, 8 Cal. App. 39, 95 Pac. 1129, following rule; *Inman v. White Lumber Co.*, 14 Cal. App. 554, 555, 112 Pac. 561, holding goods delivered and accepted in excess of contract quantity should be paid for at contract rates; *Donegan v. Houston*, 5 Cal. App. 631, 90 Pac. 1074, holding in assumpsit special contract was admissible to establish reasonable value of services done under it.

Rights of Employer and Employee with respect to things produced by labor of employee. See note, 5 L. R. A. (n. s.) 1171.

109 Cal. 433-436, 42 Pac. 443, **DEANE v. GRAY BROS. ETC. PAVING CO.**

Failure of Corporation to Object, though it knew physician was treating on its account person injured in its employ, does not render it liable for physician's services.

Distinguished in *Treis v. Berlin Dye Works etc. Co.*, 11 Cal. App. 425, 105 Pac. 277, holding failure of purchaser to state in reasonable time after being informed vendor could not deliver all goods contracted for that it would not accept less amount estopped him to refuse to accept such less amount.

109 Cal. 437-445, 42 Pac. 557, **SCHULTZ v. McLEAN.**

Where Evidence is not in Bill of Exceptions, it will be presumed on appeal it was sufficient to support findings.

Reaffirmed in *Cheda v. Skinner*, 6 Ariz. 199, 57 Pac. 65.

109 Cal. 451-467, 42 Pac. 307, 30 L. R. A. 403, **PEOPLE v. HECKER.**

In Homicide Case, Where Plea is Self-defense, evidence of former dispute leading up to fatal affray is admissible to show state of mind of parties.

Approved in *State v. Hanlon*, 38 Mont. 573, 100 Pac. 1041, holding previous specific acts of violence on part of deceased toward accused could be shown upon question whether accused believed himself in danger; *McHugh v. Territory*, 17 Okl. 25, 86 Pac. 440, holding in

prosecution for assault to murder, where plea was self-defense, accused could show previous assault upon himself by prosecuting witness.

Acts Which may be Justified Under Plea of self-defense depend primarily upon conduct of defendant, and secondarily upon conduct of deceased.

Reaffirmed in *People v. Brown*, 15 Cal. App. 397, 114 Pac. 1005.

Self-defense is not Available as Plea to defendant who has sought a quarrel with design to force deadly issue and thus create necessity for killing.

Approved in *State v. Short*, 121 La. 1033, 46 So. 1007, upholding verdict of guilty when accused armed himself after quarrel and deliberately met deceased under circumstances likely to provoke combat.

Right of Self-defense by Original Aggressor. See note, 109 Am. St. Rep. 810.

Self-defense Set Up by Accused who began conflict. See note, 45 L. R. A. 688, 692, 695, 704, 707, 710.

Right to Stand One's Ground When in Jeopardy should form element of instructions upon law of self-defense.

Approved in *People v. Maughs*, 149 Cal. 260, 86 Pac. 190, reversing judgment because of instruction that, to sustain self-defense, accused must have employed all reasonable means within his power consistent with safety to avoid danger and avert necessity of killing; *People v. Cyty*, 11 Cal. App. 710, 711, 106 Pac. 261, holding instruction in regard to right to stand one's ground was improperly refused.

Where One is First Wrongdoer, but his act is not felonious, he must in good faith seek to withdraw before he can be justified in killing adversary who then makes felonious assault on him.

Approved in *People v. Cook*, 148 Cal. 356, 83 Pac. 53, following rule; *People v. Reed* (Cal.), 52 Pac. 836, upholding verdict of guilty when accused, who began combat, stood ready armed to renew it upon first opportunity.

"Retreat to the Wall" in Homicide. See note, 2 L. R. A. (n. s.) 55, 60, 64, 68.

Correct Instruction Addressed to Theory permissible under evidence should be given.

Approved in *People v. Williamson*, 6 Cal. App. 339, 92 Pac. 314, following rule; *Hans v. State*, 72 Neb. 298, 100 N. W. 422, holding erroneous instruction limiting right of self-defense to one in lawful pursuit of his business.

Expulsion of Trespasser. See note, 93 Am. St. Rep. 258, 259.

109 Cal. 468-481, 42 Pac. 249, **JOHNSON v. SAN DIEGO.**

Municipal Corporations in Their Public and political aspect are not only creatures of state, but are parts of machinery by which state conducts its governmental affairs.

Reaffirmed in *State v. Lawrence*, 79 Kan. 250, 100 Pac. 491.

Where Territory is Excluded from Municipal Corporation, legislature may adjust debts and change adjustment at pleasure, or relieve excluded territory altogether.

Approved in *Bisenius v. Randolph*, 82 Neb. 527, 118 N. W. 129, holding fact that bonded debt had been incurred was no defense in action to separate agricultural land from limits of municipality.

Where Territory is Excluded from Municipal Corporation, corporation may be asked to pay for what has been expended for its exclusive benefit, when no improvements have been made in excluded territory.

Approved in *Pass School District v. Hollywood etc. School District*, 156 Cal. 417, 419, 105 Pac. 123, 26 L. R. A. (n. s.) 485, holding where new school district was formed from territory of another, all buildings within its limits passed to new district.

Power of Legislature to Impose Burdens upon municipalities and to control their local administration and property. See note, 48 L. R. A. 475.

109 Cal. 481-489, 42 Pac. 152, WOODSIDE v. HEWEL.

Party Claiming Resulting Trust in land must clearly establish precise amount of consideration paid by him.

Approved in *Breitenbucher v. Oppenheim*, 160 Cal. 104, 116 Pac. 58, holding proportion paid was clearly established; *Eisenberg v. Goldsmith*, 42 Mont. 575, 113 Pac. 1130, holding resulting trust from purchase of property with money of another arose at time money was paid; *Scribner v. Meade*, 10 Ariz. 149, 85 Pac. 479, holding evidence did not show defendant constructive trustee of lands for plaintiff.

Distinguished in *Morrow v. Matthew*, 10 Idaho, 431, 79 Pac. 199, holding court would not refuse to enforce "grubstake" agreement simply because plaintiff could not produce great preponderance of evidence.

Resulting Trust in Favor of Spouse who pays purchase price and takes title in name of other spouse. See note, 127 Am. St. Rep. 264.

Miscellaneous.—Cited in *Woodside v. Tynan* (Cal.), 50 Pac. 424, on another appeal.

109 Cal. 489-492, 42 Pac. 446, GIESEKE v. SAN JOAQUIN COUNTY.

When Title of Statute Embraces only one subject, and what may be included thereunder. See note, 79 Am. St. Rep. 479.

109 Cal. 493-500, 41 Pac. 1081, BLOSS v. LEWIS.

Law is not General Which Confers particular privileges or imposes peculiar disabilities upon class of persons arbitrarily selected from general body.

Approved in *Johnson v. Gunn*, 148 Cal. 752, 84 Pac. 668, upholding act classifying townships in counties of given class with reference to population for purpose of fixing salaries of justices of peace; *Johnson v. Gunn* (Cal. App.), 84 Pac. 372, holding void act classifying townships in counties of given class, to fix salaries of officers, on ground method for computing population differed from that in other classes; *In re Kidd*, 5 Cal. App. 161, 89 Pac. 988, holding ordinance prohibiting sale of liquor, except by license to hotels, created proper classification.

Constitutional Inhibition Against Special Legislation where general law can be made applicable. See note, 93 Am. St. Rep. 111.

109 Cal. 504-522, 42 Pac. 243, 3 L. R. A. 409, BUCK v. EUREKA.

City Attorney Required by Virtue of Office to attend to all suits in which city may be interested cannot receive extra compensation for any service rendered.

Approved in *Dull v. Mining Co.*, 28 Utah, 477, 79 Pac. 1051, holding void as against public policy agreement of parties to pay more than legal fees to court stenographer appointed for single suit only.

De Facto City Officer Who Qualifies and receives salary of office is estopped from denying he held office.

Approved in *State v. Bailey*, 106 Minn. 142, 130 Am. St. Rep. 592, 118 N. W. 678, 19 L. R. A. (n. s.) 775, holding legal existence of court organized and created under color of law cannot be questioned on habeas corpus proceedings brought by one convicted by it.

De Jure Office as Condition of de facto officer. See note, 15 L. R. A. (n. s.) 104.

Liability of Municipality upon Implied Contract for labor or services. See note, 27 L. R. A. (n. s.) 1129.

Miscellaneous.—Cited in *In re Pfahler*, 150 Cal. 88, 88 Pac. 277, 11 L. R. A. (n. s.) 1092, to point that except where provisions of title 3, part 4, Political Code, are made part of city's charter by reference, they are not applicable.

109 Cal. 523-528, 42 Pac. 155, **NOBLE v. SUPERIOR COURT.**

Certiorari Lies Only When Jurisdiction has been exceeded, and there is no appeal or other plain, speedy and adequate remedy at law.

Approved in *St. Paul etc. Ry. Co. v. Blakemore*, 17 N. D. 73, 114 N. W. 732, and *Magee v. Superior Court*, 10 Cal. App. 160, 101 Pac. 535, both holding certiorari did not lie to annul appealable order.

109 Cal. 529-543, 50 Am. St. Rep. 57, 42 Pac. 142, 30 L. R. A. 182, **WEINSTOCK, LUBIN & CO v. MARKS.**

Law will Protect Against Unfair Competition of one who seeks by imitation to induce persons to deal with him under belief they are dealing with another.

Approved in *George G. Fox Co. v. Glynn*, 191 Mass. 351, 114 Am. St. Rep. 610, 78 N. E. 92, 9 L. R. A. (n. s.) 1096, and *Banzhaf v. Chase*, 150 Cal. 183, 88 Pac. 706, both enjoining sale of bread under name and design similar to those of established bakery; *Morton v. Morton*, 148 Cal. 144, 82 Pac. 665, 1 L. R. A. (n. s.) 660, enjoining use of name and badge of plaintiff; *Finney's Orchestra v. Finney's Famous Orchestra*, 161 Mich. 292, 126 N. W. 199, holding trade name of "Finney's Famous Orchestra" would be protected; *State v. Central Lumber Co.*, 24 S. D. 156, 123 N. W. 510, upholding statute providing penalties for dealer who sells commodity for less in one part of state than another for purpose of destroying competition; *O'Grady v. McDonald*, 72 N. J. Eq. 807, 66 Atl. 176, holding proprietor of hotel called "The Hotel Dominion" was entitled to restrain another from using "The New Dominion" for hotel name.

Distinguished in *Italian-Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 256, 259, 110 Pac. 914, 916, holding use of word "tipo" as applied to wines could not be enjoined at suit of one who had adopted it as trade name; *Esselstyn v. Holmes*, 42 Mont. 518, 114 Pac. 120, holding plaintiff not entitled to exclusive use of words "Owl Creek Coal" as trade name in district known as Owl Creek, in which there was competitive mining.

Injunction for Simulating Trade Name. See note, 17 Am. St. Rep. 793.

Relief Against Infringement of Trade Name not used in connection with manufactured article. See note, 15 L. R. A. (n. s.) 629.

Right of Members to Protection in Use of organization name which their efforts have made valuable. See note, 28 L. R. A. (n. s.) 459.

109 Cal. 544-547, 42 Pac. 452, ROSE v. ROSE.

In Taking Evidence for Purpose of allowing counsel fees in divorce, court is not bound by technical rules of evidence.

Reaffirmed in *Youree v. Youree*, 1 Cal. App. 155, 156, 81 Pac. 1025.

109 Cal. 547-551, 42 Pac. 450, DAVIS v. MACDONOUGH.

Prematurely Filed Claim of Lien cannot be enforced.

Reaffirmed in *Baker v. Lake Land Canal etc. Co.*, 7 Cal. App. 484, 94 Pac. 774.

109 Cal. 552-557, 42 Pac. 448, RODGERS v. BACHMAN.

Owner of Property may Sell It on Condition title is not to pass until price has been fully paid.

Approved in *Houser & Haines Mfg. Co. v. Hargrove* (Cal.), 59 Pac. 949, holding sale of harvester was conditioned that title should not pass until purchase notes were paid.

Retention of Title to Personalty until payment as characterizing sale as executory. See note, 5 L. R. A. (n. s.) 476.

Conditional Sale, Reserving Title in Vendor, is valid against third persons.

Approved in *Peasley v. Noble*, 17 Idaho, 692, 134 Am. St. Rep. 270, 107 Pac. 404, 27 L. R. A. (n. s.) 216, holding where vendee in conditional sale was vested with power to sell property, purchaser from vendee acquired good title and was not bound to see to application of purchase price.

Right of One Leaving Chattels in Another's Possession as against latter's vendees or creditors. See note, 25 L. R. A. (n. s.) 783.

Whether Sale is Conditional is question of intention.

Approved in *Harron, Rickard & McCone v. Wilson, Lyon & Co.*, 4 Cal. App. 493, 86 Pac. 514, holding contract by which personal property was transferred for use with option to purchase was intended as lease; *Freed Furniture etc. Co. v. Sorensen*, 28 Utah, 430, 107 Am. St. Rep. 731, 79 Pac. 567, holding contract was conditional sale.

109 Cal. 558-566, 42 Pac. 39, ROYAL v. DENNISON.

Neither Party to Exchange of Property can put the other in default except by bona fide offer to perform.

Reaffirmed in *Dunn v. Oneida Community*, 177 Fed. 547.

When Deed from Third Party is Tendered in performance of contract to sell land, it is sufficient unless objection is made on that ground.

Reaffirmed in *Backman v. Park*, 157 Cal. 613, 137 Am. St. Rep. 153, 108 Pac. 688.

109 Cal. 566-570, 42 Pac. 154, PACIFIC MUTUAL LIFE INS. CO. v. FISHER.

Motion for Nonsuit Should be Denied when evidence conflicts, but same sustains plaintiff's case.

Approved in *The Union Ice Co. v. Doyle*, 6 Cal. App. 294, 92 Pac. 116, holding nonsuit properly denied; *Kramm v. Stockton Electric R. R. Co.*, 3 Cal. App. 609, 86 Pac. 739, and *Archibald Estate v. Matteson*, 5 Cal. App. 446, 90 Pac. 725, both holding nonsuit improperly granted.

109 Cal. 571-602, 42 Pac. 225, MARKET STREET RY. CO. v. HELLMAN.

Stockholder in Corporation Impliedly Assents to right of legislature to amend laws under which it is formed.

Approved in *Matter of College Hill Land Assn.*, 157 Cal. 598, 108 Pac. 682, *Allen v. Ajax Mining Co.*, 30 Mont. 506, 77 Pac. 49, and *Germer v. Triple-State etc. Oil Co.*, 60 W. Va. 154, 54 S. E. 514, all following rule; *Application of Bunkers*, 1 Cal. App. 67, 81 Pac. 750, *arguendo*.

In Case of Death of Stockholder, his administrator becomes, by operation of law, vested with legal title to stock, and may vote it without transfer on stock-book.

Approved in *Miller & Lux v. Katz*, 10 Cal. App. 577, 102 Pac. 946, holding estate of stockholder liable for debts of corporation incurred after his death.

Trustee of Stock is Legal Owner, and may vote it for all purposes except as against his cestui que trust.

Approved in *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 758, 137 Am. St. Rep. 165, 110 Pac. 133, holding where necessary majority of stockholders as appearing from books voted for proposition, court could inquire into equities not appearing on books; *Union Savings Bank v. Willard*, 4 Cal. App. 693, 88 Pac. 1099, holding trustee of stock liable for assessment thereon, though appearing as trustee only on books.

Stockholder can Vote by Proxy Only when authorized by statute or by laws of corporation.

Reaffirmed in *McKee v. Home Sav. etc. Co.*, 122 Iowa, 736, 98 N. W. 611.

Effect of Consolidation of Corporations. See note, 89 Am. St. Rep 613, 615, 621, 646.

Right of Corporations to Consolidate. See note, 52 L. R. A. 373, 379, 382, 383.

109 Cal. 602-607, 42 Pac. 147, DUNCAN v. TIMES-MIRROR CO.

Undertaking on Appeal from Order Denying new trial is ineffectual to confer jurisdiction of appeal if it does not recite or allude to order.

Approved in *Rhoads v. Gray (Cal.)*, 48 Pac. 972, and *Sucker State Drill Co. v. Brock*, 18 N. D. 599, 120 N. W. 758, both holding undertaking on appeal from judgment and order denying new trial was ineffectual when it merely recited appeal from judgment.

Distinguished in *Edwards v. Superior Court*, 159 Cal. 713, 715, 115 Pac. 650, 651, holding undertaking on appeal for payment of costs was sufficient though it also purported to be for stay of execution.

Miscellaneous.—Cited in *Duncan v. Times-Mirror Co. (Cal.)*, 42 Pac. 148, on another appeal.

109 Cal. 607-610, 42 Pac. 236, PEOPLE v. DEMASTERS.

Ruling of Court on Motion for New Trial on ground of newly discovered evidence will not be disturbed unless discretion is clearly abused.

Approved in *James v. Oakland Traction Co.*, 10 Cal. App. 803, 103 Pac. 1090, *State v. Jones*, 32 Mont. 454, 80 Pac. 1099, *In re Colbert's Estate*, 31 Mont. 487, 107 Am. St. Rep. 439, 80 Pac. 251, and *State v. Fleming*, 17 Idaho, 505, 106 Pac. 318, all following rule.

109 Cal. 610-613, 42 Pac. 159, **PEOPLE v. WALLACE.**

Circumstantial Evidence. See note, 97 Am. St. Rep. 774.

109 Cal. 611-613, 42 Pac. 159, **PEOPLE v. WALLACE.**

In Action for Seduction, Previous Chaste Character of prosecutrix must be affirmatively shown.

Reaffirmed in *Harvey v. Territory*, 11 Okl. 161, 65 Pac. 838.

To Warrant Conviction for Seduction under promise of marriage, it is sufficient if circumstances warrant deduction act would not have been accomplished in absence of such promise.

Approved in *State v. O'Hare*, 36 Wash. 519, 104 Am. St. Rep. 970, 79 Pac. 40, 68 L. R. A. 107, upholding conviction when prosecutrix submitted solely on conditional promise of marriage.

109 Cal. 616-618, 42 Pac. 158, **STEWART v. JUSTICE'S COURT.**

When Defendant Fails to Appear at hearing of demurrer, justice of peace has jurisdiction to overrule demurrer, require answer at once, and give judgment upon failure to do so.

Approved in *Maxson v. Superior Court (Cal.)*, 54 Pac. 620, following rule; *Griffiths v. Justice Court*, 35 Utah, 449, 100 Pac. 1067, holding justice, after filing of answer, could not proceed to trial without first setting cause and giving notice of parties.

109 Cal. 618-627, 42 Pac. 240, **TYLER v. TEHAMA COUNTY.**

County is Liable for Damage to Property and to diversion of stream caused by abutment of bridge.

Approved in *Williams v. Los Angeles Ry. Co.*, 150 Cal. 597, 89 Pac. 332, holding city could not authorize erection of switch tower in street to injury of private property without compensating owner; *McPherson v. San Joaquin County (Cal.)*, 56 Pac. 804, holding county could not escape liability under its contract to furnish suitable casings for well being bored for it because of neglect of its officers in selecting designs.

Liability of County for Injuries to adjoining property by construction or maintenance of bridge. See note, 21 L. R. A. (n. s.) 210.

Liabilities of Counties for Torts and Negligence. See note, 39 L. R. A. 64, 81.

Liability for Acts of Independent Contractor where injury is direct result of work contracted for. See note, 65 L. R. A. 754.

109 Cal. 630-633, 42 Pac. 298, **NICHOLLS v. REID.**

Necessity of Writing to Transfer Shares of Stock. See note, 2 L. R. A. (n. s.) 805.

109 Cal. 633-643, 50 Am. St. Rep. 67, 42 Pac. 295, **PIONEER LAND CO. v. MADDUX.**

Equitable Owner of Swamp Land who has paid state fully therefor has sufficient title to support action to quiet title against subsequent patentee from state.

Approved in *Shields v. Johnson*, 10 Idaho, 481, 79 Pac. 393, holding action lay to quiet title to leasehold estate; *Johnson v. Hurst*, 10 Idaho, 326, 77 Pac. 791, holding one who took possession of larger area granted by government than it received pay for could main-

tain suit to quiet title to such excess; dissenting opinion in *Williams v. San Pedro*, 153 Cal. 52, 94 Pac. 237, majority holding, in action to quiet title to tide lands, defendants, though not in possession, could defend by showing certificate of purchase from state, under which plaintiff claimed, was void.

Holder of Certificate of Purchase of State Land who has fully paid therefor is equitable owner, and state holds legal title in trust.

Cited in *Blakeley v. Kingsbury*, 6 Cal. App. 713, 93 Pac. 132, *arguendo*.

Title of Individual to Public Lands. See note, 79 Am. St. Rep. 916.

109 Cal. 643-662, 42 Pac. 428, EX PARTE MILLER.

Probate Court has Jurisdiction to appoint guardians of estates of minors.

Approved in *In re Sall*, 59 Wash. 543, 110 Pac. 34, holding superior court had jurisdiction to appoint guardian for estate of nonresident incompetent.

Decree from Which Appeal may be Taken becomes final unless appeal is taken within statutory time.

Approved in *Estate of Dunphy*, 158 Cal. 3, 109 Pac. 628, dismissing appeal taken before entry of judgment; *Looney v. Browning*, 112 Mo. App. 197, 86 S. W. 565, holding no appeal lay from order of probate court appointing curator for estate of minor.

Judgment as to Rights of Parties to guardianship of minors is conclusive as to parties to proceeding after time for appeal has expired and cannot be attacked in habeas corpus proceeding.

Approved in *Guardianship of Snowball*, 156 Cal. 242, 104 Pac. 445, holding former judgment as to fitness of another to act as guardian for children was *res adjudicata* as to all parties.

When Parent is Deprived of Custody of child by summary proceedings, he is no longer liable for its support and education.

Approved in *Matter of Ross*, 6 Cal. App. 600, 92 Pac. 672, holding where father had been deprived of custody of child, he could not be compelled to compensate guardian for his support; *Calegaris v. Calegaris*, 4 Cal. App. 267, 87 Pac. 562, holding where custody of children had been awarded to mother by divorce decree, omission therein to provide for payments by father for their support divested court of power to compel father to pay mother for their support.

Right of Parent to Guardianship. See note, 1 Cof. Prob. 181.

109 Cal. 662-672, 42 Pac. 303, EMMONS v. BARTON.

Under Section 1590, Code of Civil Procedure, executor is bound to bring action to set aside fraudulent conveyance of decedent on demand of creditors and advance of costs therefor.

Approved in *Beswick v. Dorris*, 174 Fed. 507, holding application must be made by creditor to court to have executor bring suit to set aside fraudulent conveyance before he is himself entitled to bring suit; *Moore v. Waldstein*, 74 Ark. 276, 85 S. W. 417, holding where executor refused to move to set aside deed to self, which was fraudulent as to creditors, heirs could institute such suit.

Where Property is Fraudulently Conveyed, any residue not required to satisfy creditors is property of grantee and not of heirs.

Reaffirmed in *Shiels v. Nathan*, 12 Cal. App. 622, 108 Pac. 41.

Conveyance by Husband to Wife on consideration of love and affection alone is valid against creditors unless made with intent to defraud them.

Approved in *Shiels v. Nathan*, 12 Cal. App. 620, 108 Pac. 41, following rule; *Stevens v. Meyers*, 14 N. D. 404, 104 N. W. 531, holding fraudulent intent not shown.

Declarations of Grantor of Land are not admissible against grantee when made after grant, though grantor is still in possession.

Approved in *First Nat. Bank of Enid v. Yoeman*, 17 Okl. 617, 90 Pac. 414, holding declarations of mortgagor made at time subsequent to execution of chattel mortgage were inadmissible to show it was without consideration.

Relief from Fraudulent Conveyance after death of grantor. See note, 135 Am. St. Rep. 337, 341.

109 Cal. 673-682, 42 Pac. 315, PEOPLE v. SHATTUCK.

Court Should not Instruct Jury they may bear in mind relationship of kindred of accused who are witnesses in determining weight and credibility of their testimony.

Distinguished in *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 466, 88 Pac. 589, upholding instruction as to what jury could consider in determining preponderance of evidence.

109 Cal. 682-694, 34 Pac. 98, RUED v. COOPER.

Adjudication of Insolvency Vests Title of all insolvent's property in assignee as trustee for creditors.

Approved in *Depauli v. Espitallier*, 3 Cal. App. 240, 84 Pac. 999, holding any creditor could maintain suit to prevent fraudulent misappropriation of property of insolvent in hands of assignee.

Property not Included in Insolvent's Schedule, or known to assignee until after discharge, passes to assignee by virtue of his interest.

Approved in *Newlove v. Mercantile Trust Co.*, 156 Cal. 665, 105 Pac. 975, holding failure to include certain property of insolvent in inventory did not affect jurisdiction of court.

Right to Recover Money Paid under contract declared void by Constitution may be assigned.

Approved in *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 720, 103 Pac. 194, holding husband could relinquish to wife all his interest in right of action for injury to wife.

NOTES

ON THE

CALIFORNIA REPORTS.

CASES IN 110 CALIFORNIA.

110 Cal. 1-7, 42 Pac. 300, WITTENBROCK v. CASS.

Delivery of Deed in Escrow Without Power to withdraw is effectual to pass title upon condition of escrow.

Approved in *Rogers Dev. Co. v. California Real Estate Inv. Co.*, 159 Cal. 740, 115 Pac. 936, holding conveyance in escrow by one party and promise to pay fine by other were sufficient consideration to support contract to convey interest in land; *Rowley v. Bowyer*, 75 N. J. Eq. 84, 71 Atl. 400, *Simpson v. Miller*, 7 Cal. App. 253, 94 Pac. 254, and *Estate of Cornelius*, 151 Cal. 552, 91 Pac. 330, both holding delivery of deed in escrow without power to recall to be delivered to grantees on death of grantor passed title to grantees; *Kerney v. Parks* (Cal.), 54 Pac. 253, holding deeds executed by husband and wife conveying each to other their separate properties and delivered to third person with directions to record that of one dying first were not revocable; *Crozer v. White*, 9 Cal. App. 621, 100 Pac. 134, holding delivery of deed to notary to be delivered to grantee was absolute though not delivered until after death of grantor; *Hayden v. Collins*, 1 Cal. App. 263, 81 Pac. 1122, holding delivery of deed in escrow was insufficient to pass title where not irrevocable.

Delivery of Deed to Third Person, or record, or delivery for record, by grantor. See note, 54 L. R. A. 907.

Proof of Escrow Agreement by Parol. See note, 18 L. R. A. (n. s.) 337.

Creation of Trusts in Land by parol. See notes, 115 Am. St. Rep. 786, 794; 5 Cof. Prob. 257, 264.

110 Cal. 8-12, 42 Pac. 299, IN RE FIFE.

Habeas Corpus Does not Lie to correct error which may be corrected on appeal.

Approved in *Ex parte Blake*, 155 Cal. 587, 102 Pac. 270, following rule; *Goodman v. Superior Court*, 8 Cal. App. 234, 96 Pac. 395, holding certiorari did not lie to correct error in refusing jury trial in justice's court; *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 250, 91 Pac. 1018, holding prohibition did not lie to prevent condemnation proceeding of which court had jurisdiction because of alleged error of court.

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 188.

Vagrancy. See note, 137 Am. St. Rep. 967.

110 Cal. 18-23, 42 Pac. 462, HAINES v. SNEDIGAR.

Court will Take Judicial Notice of time of harvesting grain in county.

Distinguished in *Hohn v. Pauly*, 11 Cal. App. 733, 106 Pac. 269, holding court would not take judicial notice of manner of constructing and using homes in mountain counties.

110 Cal. 37-41, 42 Pac. 457, HENIGAN v. ERVIN.

When Amount Demanded is Less than three hundred dollars, jurisdiction of justice's court and of supreme court must be tested by amount demanded in complaint exclusive of costs.

Approved in *Pecos & North Tex. Ry. Co. v. Canyon Coal Co.*, 102 Tex. 480, 119 S. W. 295, holding amount demanded in body of complaint was test of appellate jurisdiction of county court on appeal from justice's court.

110 Cal. 41-44, 42 Pac. 456, PEOPLE v. THOMAS.

Enhancing Penalty for Crimes Committed by habitual criminals or prior offenders. See note, 24 L. R. A. (n. s.) 437.

110 Cal. 45-53, 42 Pac. 460, COSBY v. SUPERIOR COURT.

Contempt of Court is Specific criminal offense.

Approved in *Reymert v. Smith*, 5 Cal. App. 382, 90 Pac. 471, holding charge, finding and judgment of court in contempt must be strictly construed in favor of accused.

Appeal Does not Lie from Judgment of contempt.

Reaffirmed in *Estate of Wittmeier*, 118 Cal. 256, 50 Pac. 394, and *Mott v. Clarke* (Cal.), 56 Pac. 546.

Prohibition Does not Lie Where Action of inferior court is fully completed.

Approved in *Primm v. Superior Court*, 3 Cal. App. 210, 84 Pac. 787, holding prohibition lay to restrain further action of lower court beyond jurisdiction in proceeding partly completed; *Powhatan Coal etc. Co. v. Ritz*, 60 W. Va. 409, 56 S. E. 263, 9 L. R. A. (n. s.) 1225, holding prohibition lay to prevent contempt proceedings based on disobedience of void injunction.

Writ of Prohibition. See note, 111 Am. St. Rep. 931, 950, 978.

110 Cal. 54-59, 42 Pac. 471, WHITE v. SUPERIOR COURT.

Special Order Made After Final Judgment is appealable.

Approved in *Shumake v. Shumake*, 17 Idaho, 657, 107 Pac. 45, holding appealable order made after final judgment vacating such judgment.

Certiorari Does not Lie to Review Judgment when there is remedy by appeal.

Approved in *Canadian Bank of Commerce v. Wood*, 13 Idaho, 805, 93 Pac. 260, following rule.

Prohibition Does not Lie where there is adequate remedy by appeal.

Approved in *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 247, 91 Pac. 1017, and *State v. Fort*, 107 Mo. App. 339, 81 S. W. 479, both

following rule; *Hamberger v. Police Court*, 12 Cal. App. 160, 107 Pac. 616, holding writ did not lie to prevent trial of civil action by police court; *Johnston v. Superior Court*, 4 Cal. App. 92, 87 Pac. 212, holding writ did not lie to prevent hearing of contest between rival applicants for letters of administration when court had jurisdiction.

Writ of Prohibition. See note, 111 Am. St. Rep. 961.

110 Cal. 60-68, 42 Pac. 480, WHITE v. SUPERIOR COURT.

Certiorari Does not Lie to Correct Errors within jurisdiction of court.

Approved in *Matter of Hughes*, 159 Cal. 364, 113 Pac. 686, *Times-Mirror Co. v. Superior Court*, 15 Cal. App. 517, 115 Pac. 248, and *Dahlgren v. Superior Court*, 8 Cal. App. 628, 97 Pac. 683, all following rule; *Hall v. Justice's Court*, 5 Cal. App. 139, 89 Pac. 872, holding certiorari did not lie to annul judgment by default in justice's court entered eight years after return of service of summons.

Transfer of Cause from One Department of superior court to another does not effect change of jurisdiction.

Reaffirmed in *People v. Carantan*, 11 Cal. App. 566, 105 Pac. 770.

110 Cal. 69-78, 42 Pac. 476, FIRST NATIONAL BANK OF FRESNO v. DUSY.

Findings and Conclusions of Law may be changed at any time before entry of judgment.

Approved in *Brownell v. Superior Court*, 157 Cal. 707, 708, 109 Pac. 93, holding oral order distributing estate remained in breast of court and was ineffective until officially entered on minutes; *Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 383, holding entry of judgment was sufficient to make judgment effective.

Trial Court has No Jurisdiction to amend findings and judgment after entry thereof.

Approved in *Worth v. Emerson*, 3 Cal. App. 160, 85 Pac. 664, holding default judgment not void upon face could not be vacated by order made upon judgment-roll.

Distinguished in *City and County v. Brown*, 153 Cal. 649, 96 Pac. 283, holding trial court could vacate judgment other than one rendered entered by error of clerk.

110 Cal. 79-84, 42 Pac. 466, McGRATH v. CARROLL.

Equity will Enforce Trust against personal representatives of deceased trustee.

Reaffirmed in *Austin v. Wilcoxson*, 149 Cal. 27, 84 Pac. 418.

Claim Based on Trust must be Presented to administrator for allowance, when trust property cannot be traced into estate, before suit can be brought to enforce trust.

Approved in *Miller v. Ash*, 156 Cal. 565, 105 Pac. 608, and *Burke v. Maguire*, 154 Cal. 462, 98 Pac. 23, both following rule; *Enscot v. Fletcher*, 1 Cal. App. 662, 82 Pac. 1076, holding complaint against executor based on note presented same claim as was presented against estate and rejected; *Franklin v. Trickey*, 9 Ariz. 285, 80 Pac. 353, holding where assets of partnership passed into hands of survivor, administrator of partner first deceased could maintain suit for accounting against administrator of surviving partner without first presenting demand.

Claim Based on Trust must be Presented to administrator as such before suit can be brought thereon to enforce trust.

Approved in *Bechtel v. Chase*, 156 Cal. 712, 106 Pac. 83, and *Grubb v. Chase*, 158 Cal. 355, 111 Pac. 91, both holding claim presented against estate of deceased for money owing, as upon express promise to pay, under executed contract of sale, would not support cause of action for damages in causing sale; *Pollitz v. Wickersham*, 150 Cal. 250, 88 Pac. 916, holding statement of claim presented against estate was sufficient to support action; *Scott Stamp etc. Co., Ltd., v. Leake*, 9 Cal. App. 514, 515, 99 Pac. 732, holding claim based on trust was presented to administrator in such form as to allow suit thereon; *Columbia Savings Bank v. Clause*, 13 Wyo. 178, 78 Pac. 710, holding complaint based on trust contained insufficient averment as to manner of presentation to administrator.

Statement of Claims Against Estates of decedents. See notes, 130 Am. St. Rep. 311, 312; 5 Cof. Prob. 297, 298.

110 Cal. 85-89, 42 Pac. 464, **TERRY v. SUPERIOR COURT.**

Adverse Parties are Those Who by Record appear to be interested in judgment so they will be affected by its reversal or modification.

Approved in *Ford & Sanborn Co. v. Braslan etc. Co.*, 10 Cal. App. 765, 183 Pac. 947, holding codefendants whom appealing defendant claimed to be alone liable were adverse parties who must be served with notice of appeal.

Defendants not Served With Process and not appearing are not adverse parties on whom notice of appeal must be served.

Reaffirmed in *Nason v. John*, 1 Cal. App. 540, 82 Pac. 566.

110 Cal. 94-101, 42 Pac. 468, **SISKIYOU COUNTY v. GAMLICH.**

Action of Supervisors in Determining Necessity for new road is judicial determination and not subject to collateral attack.

Approved in *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 675, 87 Pac. 30, holding court could determine whether particular railroad was for public use; *Mendocino Co. v. Peters*, 2 Cal. App. 28, 29, 82 Pac. 1124, holding adoption of report of viewers by supervisors foreclosed inquiry as to sufficiency of petition and report.

Complaint in Action to Establish Road considered and upheld.

Reaffirmed in *Mendocino County v. Peters*, 2 Cal. App. 26, 82 Pac. 1123.

Presumption is in Favor of Regularity of action of supervisors in proceedings to condemn right of way.

Approved in *Santa Barbara v. Yates*, 13 Cal. App. 46, 108 Pac. 727, holding order of supervisors directing district attorney to begin action to condemn right of way for road was judgment adjudicating sufficiency of all prior proceedings requisite to order.

110 Cal. 107-117, 42 Pac. 473, **BOYCE v. FISK.**

Mortgagor cannot Quiet Title Against Mortgagee in possession without payment of debt secured though action on mortgage is barred by limitations.

Approved in *Cory v. Santa Ynez Land etc. Co.*, 151 Cal. 782, 91 Pac. 648, following rule; *Tracy v. Wheeler*, 15 N. D. 250, 107 N. W. 69, 6 L. R. A. (n. s.) 516, refusing to cancel mortgage securing unpaid debt when only defense is statute of limitations.

Distinguished in *Marshutz v. Seltzor*, 5 Cal. App. 143, 89 Pac. 878, holding rule did not apply where mortgage was by third party and plaintiff's title originated from state subsequent to mortgage.

Quieting Title as Against Barred Encumbrance. See note, 6 L. R. A. (n. s.) 517.

Fact That Bargain is Hard or Unreasonable is not sufficient to allow court of equity to set it aside.

Approved in *Gunby v. Armstrong*, 133 Fed. 433, 66 C. C. A. 627, upholding contract for purchase of stock and note given therefor as not being usurious or fraudulent.

110 Cal. 117-121, 42 Pac. 420, PEOPLE v. WONG CHONG SUEY.

When There is Evidence Tending to Sustain Fact, whether it amounts to proof is question for jury.

Approved in *People v. Ward*, 10 Cal. App. 526, 102 Pac. 680, and *People v. Gibson*, 16 Cal. App. 349, 116 Pac. 988, both holding whether proof of guilt was sufficient was question of fact for jury and for trial judge on motion for new trial; *People v. Maltais*, 7 Cal. App. 123, 93 Pac. 891, circumstantial evidence held sufficient to justify verdict of guilty; *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 566, 86 Pac. 822, holding on appeal evidence in support of findings would be construed in light most favorable to judgment; *Showers v. Zanone* (Cal. App.), 85 Pac. 858, refusing to disturb findings on conflicting evidence when there was some evidence on which they could be based.

Identity of Stolen Money Determined from circumstantial evidence.

Reaffirmed in *McDonald v. State*, 56 Fla. 80, 47 So. 487.

110 Cal. 122-128, 42 Pac. 453, SMITH v. HAWKINS.

Appropriator of Water on Public Domain acquires easement, and title from government when it passes into private ownership is burdened with easement.

Approved in *Rasmussen v. Blust*, 85 Neb. 203, 133 Am. St. Rep. 650, 122 N. W. 864, holding one who constructed on public lands system of reservoirs and ditches for irrigation, secured approval of state board of irrigation, and was using system before lands were entered, had vested right; *State v. Quantic*, 37 Mont. 55, 94 Pac. 499, *arguendo*.

Uninterrupted Use of Water for Five Years adverse to all others gives prescriptive right.

Approved in *Hubbs etc. Co. v. Pioneer Water Co.*, 148 Cal. 417, 83 Pac. 257, holding evidence showed prescriptive right acquired by adverse user.

Cessation for Five Years of Beneficial Use of water right, acquired by prescription, amounts to abandonment as against subsequent appropriator.

Approved in *Land v. Johnston*, 156 Cal. 256, 104 Pac. 451, holding failure to use water right for one year was not abandonment.

Abandonment or Loss of Rights of Prior appropriators of water. See note, 30 L. R. A. 267.

110 Cal. 129-145, 42 Pac. 561, FISCHER v. SUPERIOR COURT.

Receiver will not be Appointed to take property from hands of another without notice, save in case of irreparable pending injury.

Approved in *Henderson v. Reynolds*, 168 Ind. 527, 81 N. E. 496, 11 L. R. A. (n. s.) 960, and *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 102, 89 Pac. 869, both holding void ex parte order appointing receiver on complaint which failed to state cause of action for receiver.

When and at Whose Instance receiver of corporation may be appointed. See note, 118 Am. St. Rep. 199.

Appointment of Receiver to Take Property and business out of hands of person in possession who claims ownership, without requiring bond, is, in most cases, gross abuse of discretion.

Approved in *Davila v. Heath*, 13 Cal. App. 372, 109 Pac. 893, holding void ex parte appointment of receiver made without requiring bond.

Writ of Prohibition. See note, 111 Am. St. Rep. 935, 949.

110 Cal. 145-149, 42 Pac. 465, **SMITH v. HAZARD.**

Defects in Work as Objection to Assessment for local improvement. See note, 56 L. R. A. 908, 912.

110 Cal. 150-155, 52 Am. St. Rep. 70, 42 Pac. 576, **GREGORY v. SPIEKER.**

In Action by Buyer to Recover Damages for breach of contract of sale, measure of damages is loss to buyer.

Approved in *Foss v. Roby*, 195 Mass. 298, 81 N. E. 201, 10 L. R. A. (n. s.) 1200, holding where defendant violated implied covenant, in sale of business, not to engage in same business in city, plaintiff was entitled to money damages measured by injuries sustained.

Validity of Agreement in Restraint of Trade, ancillary to sale of business or profession, as affected by territorial scope. See note, 24 L. R. A. (n. s.) 930.

Divisibility in Respect of Time or territorial extent of contracts in restraint of trade. See note, 24 L. R. A. (n. s.) 947.

110 Cal. 155-159, 42 Pac. 479, **PEOPLE v. JAMES.**

Where Names are Idem Sonans, demurrer to information for variance should be overruled.

Reaffirmed in *People v. Harrison*, 14 Cal. App. 550, 112 Pac. 735.

Test of Forgery of Contract is whether, upon face, it may have effect to defraud those who may act on it as genuine, and it is immaterial whether contract is void as against public policy.

Reaffirmed in *People v. Collins*, 9 Cal. App. 623, 99 Pac. 1109.

110 Cal. 159-164, 42 Pac. 569, **WISE v. ROSE.**

Conjunctive Denial of Several Allegations connected by "and" is not denial of any one of them.

Reaffirmed in *Toomey v. Knobloch*, 8 Cal. App. 588, 97 Pac. 530.

110 Cal. 164-168, 52 Am. St. Rep. 75, 42 Pac. 566, **FERNANDEZ v. BURLESON.**

Where Description in Notice of Lien is insufficient to identify mining claim on which work was done with reasonable certainty, notice is ineffective.

Approved in *Nofziger Lumber Co. v. Waters*, 10 Cal. App. 91, 101 Pac. 39, holding notice of lien which described other property was ineffective.

Distinguished in *Union Lumber Co. v. Simon*, 150 Cal. 759, 89 Pac. 1079, holding imperfect description by metes and bounds was sufficient with aid of parol evidence to identify land on which lien was claimed.

110 Cal. 169-173, 42 Pac. 568, DAGGETT v. GRAY.

Grounds for Special Demurrer are Waived by filing of general demurrer only.

Approved in *Hunt v. Jones*, 149 Cal. 300, 86 Pac. 688, holding upon appeal from judgment rendered on general demurrer, grounds for special demurrer could not be considered.

Omitted Allegation in Complaint may be aided by averment in answer so as to uphold judgment, though demurrer to complaint was improperly overruled.

Reaffirmed in *Donegan v. Houston*, 5 Cal. App. 632, 90 Pac. 1075.

110 Cal. 173-179, 42 Pac. 570, BROOKS v. SAN FRANCISCO & NORTH PAC. RY. CO.

Order Granting New Trial for Insufficiency of evidence will not be disturbed unless it appears discretion was abused.

Approved in *Crouse-Prouty v. Rogers*, 13 Cal. App. 562, 110 Pac. 142, following rule; *Wolfe v. Ridley*, 17 Idaho, 177, 104 Pac. 1015, upholding order granting new trial.

110 Cal. 179-182, 42 Pac. 575, GRUNSKY v. PARLIN.

Transfer by Insolvent cannot be Vacated because of fraud of seller in which purchaser had no part or knowledge.

Reaffirmed in *Schilling v. Curran*, 30 Mont. 380, 76 Pac. 1002.

Participation in Fraud of Vendor which will invalidate transfer for good consideration as against creditors. See note, 32 L. R. A. 33, 39.

110 Cal. 183-190, 42 Pac. 580, KNOWLTON v. MACKENZIE.

When Court Authorizes Filing of Copy of lost paper in record, it is entitled to same weight as original.

Reaffirmed in *Estate of Douglass*, 4 Cal. Prob. 353.

110 Cal. 191-198, 42 Pac. 578, BIDDICK v. KOBLER.

Deed of Superior Judge, Under Act of March 30, 1868, so far as it purports to convey land not occupied by plaintiff, is ineffective.

Approved in *Roberts v. Ward*, 3 Cal. App. 102, 84 Pac. 431, holding townsite conveyed to county judge by act of Congress, 1901, could only be conveyed by him to actual occupants.

In Suit to Recover Possession by Grantee of trustee, who was never occupant or entitled to be, against occupant, and so entitled at date of entry, equity of latter is complete defense.

Distinguished in *Callahan v. James* (Cal.), 71 Pac. 107, upholding deed of townsite trustee to one not occupant of land.

General Offer to Prove Matters without producing witness or evidence is improper, and should not be allowed except by consent of parties.

Approved in *Rose v. Doe*, 4 Cal. App. 686, 89 Pac. 137, holding such offer properly refused.

110 Cal. 198-203, 42 Pac. 640, ROSENTHAL v. MERCED BANK.

Homestead cannot be Declared upon land held in cotenancy, in favor of one cotenant.

Approved in Schoonover v. Birnbaum, 148 Cal. 549, 550, 83 Pac. 999, 1000, holding void homestead declared by bankrupt on undivided half interest in land.

Genuineness and Due Execution of Deed annexed to answer are admitted by failure to file affidavit denying same.

Distinguished in Tonopah Lumber Co. v. Riley, 30 Nev. 318, 95 Pac. 1002, holding where contract set up in answer did not appear to have been signed by parties, affidavit denying due execution need not be filed.

110 Cal. 204-214, 42 Pac. 634, KUMLE v. GRAND LODGE A. O. U. W.

In Action on Mutual Benefit Certificate, such certificate is evidence of good standing of member at its date, which is presumed to continue, and burden is on defendant to prove loss of such standing in defense.

Approved in Kinney v. Brotherhood of Am. Yeomen, 15 N. D. 32, 106 N. W. 48, and Wagner v. Supreme Lodge, 128 Mich. 664, 87 N. W. 904, both following rule.

Improper Specifications of Error will not be considered on appeal.

Approved in Ball v. Gussenhoven, 29 Mont. 332, 74 Pac. 874, holding specification which merely stated evidence did not justify certain special verdicts could not be considered; Smith Table Co. v. Madsen, 30 Utah, 317, 84 Pac. 892, holding objections and exceptions would not be considered where no attempt was made to have specification of errors settled in bill.

110 Cal. 215-218, 52 Am. St. Rep. 78, 42 Pac. 638, WULFF v. SUPERIOR COURT.

Certiorari or Writ of Review. See note, 82 Am. St. Rep. 355.

110 Cal. 219-221, 42 Pac. 560, MARONEY v. HELLINGS.

In Action for Unlawful Detainer, tenant holding over cannot set up failure of landlord to repair as defense or offset for rent.

Approved in Hunter v. Porter, 10 Idaho, 83, 77 Pac. 437, holding claim for unliquidated damages arising from breach of covenant by lessor was not proper counterclaim in action of unlawful detainer.

110 Cal. 224-226, 42 Pac. 807, WITTE v. TAYLOR.

Performance by Real Estate Broker of Contract to find purchaser or effect exchange. See note, 44 L. R. A. 630.

110 Cal. 231-236, 42 Pac. 643, ESTATE OF BLYTHE.

Action to Determine Heirship Under Section 1664, Code of Civil Procedure, is proceeding in rem.

Approved in Title etc. Restoration Co. v. Kerrigan, 150 Cal. 307, 119 Am. St. Rep. 199, 88 Pac. 359, 8 L. R. A. (n. s.) 682, upholding McEnerney Act; Weidenhoft v. Primm, 16 Wyo. 353, 94 Pac. 456, holding provisions for new trials and appeals apply to proceeding to determine heirship.

110 Cal. 236-238, 42 Pac. 638, YEARSLEY v. SUNSET TEL. & TEL. CO.

Telephone Lineman Who Climbed Tree to adjust wires and was injured by breaking of limb cannot recover from company for injury.

Distinguished in *Miner v. Franklin Co. Tel. Co.*, 83 Vt. 316, 75 Atl. 655, holding telephone lineman injured while working on poles of power company used by telephone company could recover for injury caused by coming in contact with power wires.

110 Cal. 238-242, 52 Am. St. Rep. 81, 42 Pac. 808, YORE v. BOOTH.

Assignment of Life Insurance Policies. See note, 87 Am. St. Rep. 498, 500, 503.

Power of Insured to Destroy Rights of beneficiary. See note, 49 L. R. A. 738, 750.

Statements by Assured Outside of Application as evidence against beneficiary. See note, 11 L. R. A. (n. s.) 93.

110 Cal. 252-259, 42 Pac. 645, ESTATE OF MULLIN.

Communications Between Attorney and Client are inadmissible, except by consent of client.

Approved in *Humphrey v. Pope*, 1 Cal. App. 378, 82 Pac. 225, holding statements of husband to wife were inadmissible, without his consent, in action for alienation.

Privilege of Communications to Attorney during preparation of will. See note, 17 L. R. A. (n. s.) 110.

Waiver of Statutory Provisions as to Disclosures to physicians. See note, 1 L. R. A. (n. s.) 1069.

Circumstances Surrounding Execution of Will held to show testator was of sound and disposing mind.

Reaffirmed in *Estate of Dolbeer*, 3 Cal. Prob. 243, 244, 245, 246.

Declarations of Testator, to Sustain, defeat or aid in construction of will. See note, 4 Cal. Prob. 521.

Miscellaneous.—Cited in *Murphy v. Southern Pac. Co.*, 31 Nev. 144, 101 Pac. 332, to point that testimony of physician of hypothetical nature was properly excluded.

110 Cal. 259-267, 42 Pac. 820, GRISWOLD v. PIERATT.

Where Parties have Accounting and Settlement under prior contract, and time of performance and mode of compensation modified, new contract is formed, and action does not lie upon former contract unless settlement is impeached.

Approved in *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 412, 117 Pac. 1045, holding compromise in payment for stock was effective, though residue was not paid until after note formerly given for stock fell due.

110 Cal. 267-277, 40 Pac. 961, 42 Pac. 819, IN RE BEISEL.

Amount of Allowance for Maintenance of minor children is in discretion of court.

Approved in *In re Averill's Estate* (Cal.), 66 Pac. 15, upholding award of court making allowance for minors.

Parent's Duty to Support Child as Affected by child's interest in trust or other property. See note, 57 L. R. A. 740.

Common-law Powers of Guardians. See note, 89 Am. St. Rep. 300.

Who may Plead Statute of Limitations. See note, 104 Am. St. Rep. 750.

Miscellaneous.—Cited in *Estate of Boyes*, 151 Cal. 155, 90 Pac. 459, to point that previous order of court fixing sum to be paid to guardian for support of minors is not necessary to enable court to allow guardian credit for such support on his account.

110 Cal. 277-292, 42 Pac. 822, **REDFIELD v. OAKLAND CONSOL. ST. RY. CO.**

Damages for Wrongful Death are Limited to pecuniary loss suffered by heirs of deceased by reason of his death.

Approved in *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 710, 87 Pac. 379, and *Christensen v. Floriston Pulp etc. Co.*, 29 Nev. 570, 572, 92 Pac. 217, both following rule.

Elements of Damages Recoverable by Child for death of mother. See note, 19 L. R. A. (n. s.) 130.

Loss of Mother's Guidance and Ability to train children are elements of damage in action for her wrongful death.

Approved in *Valente v. Sierra Ry. Co.*, 158 Cal. 419, 111 Pac. 98, and *Johnson v. Southern Pacific R. R. Co.*, 154 Cal. 298, 97 Pac. 526, both following rule; *Peters v. Southern Pac. Co.*, 160 Cal. 70, 116 Pac. 409, holding loss to wife and children of comfort, society, support, and protection of deceased were elements of damage; *Green v. Southern Cal. Ry. Co. (Cal.)*, 67 Pac. 5, holding loss of society and protection of mother were elements of damages in action for her wrongful death.

Pecuniary Interest of Children in Lives of parents does not end with their majority.

Approved in *Peters v. Southern Pac. Co.*, 160 Cal. 69, 116 Pac. 409, *Simoneau v. Pacific Electric Ry.*, 159 Cal. 505, 115 Pac. 326, *Valente v. Sierra Ry. Co.*, 158 Cal. 416, 111 Pac. 97, *Butte Electric Ry. Co. v. Jones*, 164 Fed. 310, 18 L. R. A. (n. s.) 1205, 90 C. C. A. 240, and *Hollingsworth v. Davis-Daly E. C. Co.*, 38 Mont. 163, 99 Pac. 149, all following rule; *Bond v. United Railroads*, 159 Cal. 278, 113 Pac. 369, holding parent not limited to recovery for earnings of son during minority in action for wrongful death.

Whether Minor's Right to Damages for negligent killing of parent is limited to period of minority. See note, 18 L. R. A. (n. s.) 1205.

Discussed but not Decided that in determining damages for wrongful death measure would be based on expectancies of life of deceased, and of each of beneficiaries.

Cited in *Valente v. Sierra Ry. Co.*, 151 Cal. 543, 91 Pac. 484, holding admission of tables of life expectancy proper when jury is instructed it cannot award damages for period beyond probable life of deceased.

Verdict will not be Disturbed on ground damages are excessive unless amount justifies conclusion they were given under influence of passion and prejudice.

Approved in *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 316, 84 Pac. 1011, following rule; *Christensen v. Floriston Pulp etc. Co.*, 29 Nev. 573, 92 Pac. 218, upholding verdict.

Grounds of Special Demurrer not Presented in trial court cannot be considered on appeal.

Reaffirmed in *Conde v. Dreisam Gold Min. Co.*, 3 Cal. App. 590, 86 Pac. 828.

What is Community Property. See notes, 126 Am. St. Rep. 120; 4 Cof. Prob. 62.

110 Cal. 292-297, 52 Am. St. Rep. 84, 42 Pac. 804, CASTRO v. GEIL.

Deed of Person of Unsound Mind, not under guardianship, vests title and is voidable only.

Approved in *Ratliff v. Baltzers*, 13 Idaho, 159, 89 Pac. 73, following rule; *Maionchi v. Nicholini*, 1 Cal. App. 693, 696, 82 Pac. 1054, holding contract made by taking advantage of old, feeble man was voidable only; *Murphy v. Crowley* (Cal.), 70 Pac. 1026, holding conveyance by one given to drink and not able to intelligently transact business was voidable.

110 Cal. 297-311, 42 Pac. 887, LEVY v. MAGNOLIA LODGE NO. 29, I. O. O. F.

Court has No Jurisdiction to Hear and dispose of complaint against lodge for refusal to allow sick benefits until remedy provided by lodge has been pursued and exhausted.

Approved in *Kelly v. Grand Circle etc. Woodcraft*, 40 Wash. 696, 697, 82 Pac. 1009, holding expulsion of member from mutual benefit association will not be reversed by courts, except to determine good faith in proceeding.

Conclusiveness of Decisions of Tribunals of associations or corporations. See note, 49 L. R. A. 367, 370, 375, 383.

Member of Lodge Waives Right to object to report of committee on charges against him when he signs by-laws providing members could be expelled for contempt for failure to appear and stand trial.

Approved in *Evans v. Chamber of Commerce*, 86 Minn. 455, 91 N. W. 11, upholding by-law which provided members of commercial exchange must submit their disputes to arbitration.

110 Cal. 311-318, 42 Pac. 811, EASTERBROOK v. FARQUHARSON.

When Account is Settled by Action, it bears interest only from date of its judicial ascertainment.

Approved in *Erickson v. Stockton etc. R. R. Co.*, 149 Cal. 208, 82 Pac. 962, following rule; *Grangers' Union v. Ashe*, 12 Cal. App. 759, 108 Pac. 534, holding court improperly allowed interest on open account for goods sold from date of sale.

Distinguished in *Courteney v. Standard Box Co.*, 16 Cal. App. 615, 117 Pac. 784, holding where contract of sale was for agreed price subject to deduction of freight charges, plaintiff was entitled to interest on such balance from commencement of action.

Interest on Unliquidated Damages. See note, 28 L. R. A. (n. s.) 28.

110 Cal. 318-320, 42 Pac. 804, MULLER v. ROWELL.

Formal Findings are not Required where facts are agreed upon.

Approved in *Crisman v. Lanterman*, 149 Cal. 654, 117 Am. St. Rep. 167, 87 Pac. 92, following rule; *Grunsky v. Field*, 1 Cal. App. 626, 82 Pac. 980, holding appellant could not predicate error on record to which he had consented.

110 Cal. 320-331, 42 Pac. 914, BAILEY v. MARKET STREET CABLE RY. CO.

Plaintiff in Damage Suit Held to have been negligent in stepping backward on track in front of approaching street-car.

Approved in *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 779, 780, 89 Pac. 1110, holding bicycle rider was negligent in riding bicycle on

street railway track; *Higgins v. Los Angeles Ry. Co.*, 5 Cal. App. 753, 91 Pac. 346, holding decedent was negligent in crossing railroad track.

Distinguished in *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 600, 602, 112 Pac. 55, holding question of plaintiff's negligence in crossing street railway was for jury.

One Crossing Railroad is Bound to be on guard and look both ways.

Approved in *Spear v. United Railroads*, 16 Cal. App. 663, 117 Pac. 968, approving instruction as to exercise of care in crossing railroad track; *Jansen v. Southern Pacific Co.*, 5 Cal. App. 17, 89 Pac. 618, holding plaintiff failed to exercise ordinary care in crossing track; *Ames v. Waterloo & Cedar Falls R. T. Co.*, 120 Iowa, 643, 95 N. W. 161, holding plaintiff negligent in stepping on track from behind covered wagon.

Duty to Look and Listen Before Crossing electric road. See note, 15 L. R. A. (n. s.) 256.

110 Cal. 332-335, 42 Pac. 893, **WICKERSHAM v. CRITTENDEN.**

Resolution of Directors of Corporation, illegal because voted for by member for whose benefit it was made, can be ratified by subsequent board of which such person is not member.

Approved in *Bassett v. Fairchild (Cal.)*, 61 Pac. 796, holding stockholders could ratify action of directors in ratifying payment to director for services outside duties as director.

Action by Stockholder to Recover Money paid to president of corporation on account of salary is for benefit of corporation, and whatever would have estopped corporation also estops stockholder.

Cited in *Shively v. Eureka Tellurium Gold Min. Co.*, 5 Cal. App. 239, 89 Pac. 1074, arguendo.

110 Cal. 335-338, 42 Pac. 891, **RYAN v. HOLLIDAY.**

Where Defect in Complaint goes to cause of action, it is not waived by failure to demur.

Reaffirmed in *Flood v. Templeton*, 148 Cal. 377, 83 Pac. 150.

In Action on Mortgage Securing Note, failure to allege nonpayment of note is fatal defect.

Approved in *Krieger v. Feeny*, 14 Cal. App. 542, 112 Pac. 902, holding nonpayment of amount claimed due was sufficiently alleged; *Preston v. Central Cal. etc. Irr. Co.*, 11 Cal. App. 196, 104 Pac. 464, holding averment of nonpayment of balance due sufficiently alleged breach of contract; *Stewart v. Burbridge*, 10 Cal. App. 624, 102 Pac. 962, holding that sum claimed was unpaid was sufficiently alleged; *Dessart v. Bonyng*, 10 Ariz. 39, 85 Pac. 724, holding trustee in trust deed could not maintain action to reform it so as to include other lands without showing debt secured had not been paid.

Distinguished in *Burke v. Dittus*, 8 Cal. App. 177, 96 Pac. 331, holding objection to form of allegation in suit to foreclose mechanic's lien that "whole amount due" was sum claimed was waived by general demurrer only.

Overruled in *Kilillea v. Wilson*, 5 Cal. App. 7, 89 Pac. 621, holding averment "that defendant within two years last past became indebted to plaintiff" supported judgment by default.

110 Cal. 339-347, 52 Am. St. Rep. 88, 42 Pac. 900, 31 L. R. A. 862, **BUCKLEY v. GRAY.**

Attorney is Liable Only to Client employing him for injury arising from mere negligence, however gross, and cannot be held liable to third party with whom he had no privity of contract.

Approved in *Minneman v. Fox*, 43 Wash. 47, 86 Pac. 214, holding stockholder of corporation could maintain no action against third persons for injuries sustained by their fraud in performance of contract with corporation.

Distinguished in *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 532, 53 Atl. 810, 60 L. R. A. 116, holding party contracting with landlord to heat building was liable to tenant for injury caused by bursting of water-pipe frozen by his neglect.

Right to Recover for Negligence in absence of privity. See note, 100 Am. St. Rep. 203.

110 Cal. 348-361, 52 Am. St. Rep. 94, 42 Pac. 918, **CAVALLARO v. TEXAS & PAC. RY. CO.**

Carrier Who Delivers Goods to wrong person is liable to shipper for value.

Approved in *Adrian Knitting Co. v. Wabash R. Co.*, 145 Mich. 326, 108 N. W. 707, holding carrier liable for delivery to wrong person who presented unindorsed receipt for goods.

To Whom may Delivery be Made Under Bill of Lading. See note, 38 L. R. A. 362.

Delivery to Imposter by Carrier. See note, 37 L. R. A. 179.

Law of Foreign State is Presumed to be same as law of forum.

Reaffirmed in *Schwartz v. Panama R. R. Co.*, 155 Cal. 747, 103 Pac. 198, *O'Sullivan v. Griffith*, 153 Cal. 507, 95 Pac. 876, and *Miller v. Fireman's Fund Ins. Co.*, 6 Cal. App. 400, 92 Pac. 333.

How Case Determined When Proper Foreign Law not proved. See note, 67 L. R. A. 43.

General Exception to Each and All Instructions given by court on its own motion is not sufficient to authorize review of them.

Approved in *Waldteufel v. Pacific Vineyard Co.*, 6 Cal. App. 628, 92 Pac. 748, holding such exception sufficient when addressed to instructions asked by plaintiff.

Negotiability of Warehouse Receipts. See note, 82 Am. St. Rep. 778.

Liability of Carriers for Loss on Connecting Lines. See note, 93 Am. St. Rep. 221.

When Carrier's Liability is Reduced to that of warehouseman. See note, 97 Am. St. Rep. 94.

110 Cal. 361-369, 42 Pac. 902, **RAUER v. FAY.**

Right to Perfect Lien is not Assignable.

Approved in *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 711, 118 Pac. 111, following rule; *Soule v. Borelli*, 80 Conn. 400, 68 Atl. 982, holding perfected mechanic's lien passed with assignment of debt secured.

Miscellaneous.—Cited in *Rauer v. Welsh* (Cal.), 42 Pac. 904, companion case.

110 Cal. 369-374, 42 Pac. 894, PEOPLE v. WARD.

Indictment is Ordinarily Sufficient when it charges offense in language of statute prohibiting it.

Approved in *People v. Silva*, 8 Cal. App. 351, 97 Pac. 203, upholding indictment charging in language of statute offense of living in open and notorious adultery; *Ex parte Mogensen* (Cal. App.), 90 Pac. 1064, upholding complaint in language of ordinance prohibiting saloons.

Where Particular Circumstances of Offense are necessary to constitute complete offense, they must be particularly set forth in indictment so as to enable defendant to answer specific charge.

Approved in *People v. Bradbury*, 155 Cal. 810, 103 Pac. 217, holding indictment for perjury sufficiently alleged perjurious matter; *Application of Bunkers*, 1 Cal. App. 69, 81 Pac. 751, upholding indictment charging bribery; *Daggs v. Territory*, 11 Ariz. 454, 94 Pac. 1108, holding indictment to charge attempt to commit rape was insufficient in not charging it was done with intention to do act without female's consent; *Value v. State*, 84 Ark. 287, 105 S. W. 362, holding indictment for bribery must allege inducement for official misconduct; dissenting opinion in *People v. Glass*, 158 Cal. 677, 112 Pac. 287, majority upholding indictment for bribery.

Distinguished in *Matter of Winston*, 160 Cal. 20, 116 Pac. 391, holding indictment charging misdemeanor cognizable by justice's court was sufficiently specific; *In re Myrtle*, 2 Cal. App. 390, 84 Pac. 338, holding information sufficiently charged robbery; *State v. Collett*, 9 Idaho, 613, 75 Pac. 272, holding information charging larceny of one horse contained sufficient description.

110 Cal. 374-386, 42 Pac. 896, BANCROFT v. BANCROFT.

Where Contract is Induced by Fraud or undue influence, failure to rescind promptly is affirmance of contract.

Distinguished in *Shevlin v. Shevlin*, 96 Minn. 406, 105 N. W. 260, holding ratification of sale of stock by younger to elder brother not shown when relations of confidence existed between them.

110 Cal. 387-400, 52 Am. St. Rep. 104, 42 Pac. 815, 30 L. R. A. 460, ESTATE OF WALKER.

In Construing Statute, Court is to Ascertain what is declared therein, not to insert what has been omitted, or omit what has been inserted.

Approved in dissenting opinion in *Louisville etc. R. R. Co. v. Daniel*, 131 Ky. 707, 115 S. W. 1200, majority holding section 341, Code of Civil Practice, precluded reversal of judgment on ground verdict is not sustained by evidence when there had been already three verdicts on same evidence though first two were set aside for errors of law.

"Signature" has by Long Usage become synonymous with "autograph."

Approved in *Cummings v. Landes*, 140 Iowa, 83, 117 N. W. 23, holding printed signature of attorney to notice was sufficient; *Loughren v. Bonniwell*, 125 Iowa, 520, 106 Am. St. Rep. 319, 101 N. W. 288, holding signing of notice by justice by stamped signature was sufficient; *Meyers v. Moore*, 78 Neb. 450, 110 N. W. 990, holding contract was "subscribed" by parties when signature was placed

thereon for purpose of giving force and effect to contract regardless of position.

Statutory Formalities for Execution of Will cannot be waived by courts.

Approved in *In re Noyes' Estate*, 40 Mont. 185, 186, 105 Pac. 1015, following rule; *In re Tyler's Estate* (Cal.), 50 Pac. 928, holding will must show on face it was signed in presence of witnesses; *Irwin v. Jacques*, 71 Ohio St. 409, 73 N. E. 687, 69 L. R. A. 422, holding void will not signed at end.

Attestation and Witnessing of Wills. See notes, 114 Am. St. Rep. 211, 222; 1 Cof. Prob. 26, 37.

What Constitutes a Testamentary Writing. See notes, 89 Am. St. Rep. 489; 5 Cof. Prob. 12.

110 Cal. 405-407, 42 Pac. 905, **EX PARTE CLARK.**

Release of Prisoner on Habeas Corpus after judgment and sentence. See note, 87 Am. St. Rep. 182.

110 Cal. 408-413, 42 Pac. 906, **ESTATE OF CONNORS.**

Improvvidence Which is Ground for Exclusion of relative of deceased from administration is that want of care or foresight in management of property which would be likely to render estate unsafe.

Approved in *Estate of Piercy*, 3 Cof. Prob. 477, holding fact that one had pursued profession of baseball, conducted saloons and gaming resorts, and gambled and lost heavily thereby, did not disqualify him as administrator on score of improvvidence.

Failure to Make Finding cannot be Complained of when it must have been adverse to appellant.

Reaffirmed in *Aydelotte v. Billing*, 8 Cal. App. 674, 97 Pac. 699, and *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 571, 86 Pac. 824.

Evidence of Specific Instances to prove character. See note, 14 L. R. A. (n. s.) 748.

110 Cal. 414-418, 42 Pac. 909, **VANCE v. RICHARDSON.**

Where One Party Does not Exercise His Right to peremptorily challenge in his turn after other expresses his satisfaction with full panel, he cannot afterward be allowed peremptory challenge.

Distinguished in *State v. Hunter*, 118 Iowa, 691, 92 N. W. 874, holding where accused had not exercised three peremptories and his counsel said "defendant waives one more challenge," and state's attorney did likewise, remaining challenges were not waived.

Rule That Whole of Conversation may be brought out in regard to which there has been any evidence in chief does not apply when mass of irrelevant matter is involved, and only relevant declarations can be demanded.

Reaffirmed in *Zibbell v. Southern Pacific Co.*, 160 Cal. 250, 116 Pac. 519.

110 Cal. 418-422, 42 Pac. 904, **BARNES v. BARNES.**

Right of Party in Default to enforce antenuptial marriage settlement. See note, 26 L. R. A. (n. s.) 858, 860.

110 Cal. 423-428, 42 Pac. 908, **PREY v. STANLEY.**

Husband is not Necessary Party to action brought to quiet title of separate property of wife although covered by homestead for joint benefit of both.

Approved in *MacLeod v. Moran*, 11 Cal. App. 627, 105 Pac. 934, holding wife could sue alone to cancel certain deeds to homestead and quiet title thereto.

Conditions in Restraint of Alienation are void when repugnant to an interest created in property.

Approved in *Ripperdan v. Weldy*, 149 Cal. 675, 87 Pac. 279, holding provision that grantee should not alien estate granted during lifetime of grantor was void.

Validity of Conditions and Restrictions in Deed. See note, 95 Am. St. Rep. 217.

110 Cal. 433-440, 52 Am. St. Rep. 111, 42 Pac. 910, **CURTISS v. BACHMAN.**

Preliminary Injunction cannot be Dissolved until after trial of cause on merits.

Approved in *Ots v. Superior Court*, 10 Cal. App. 171, 101 Pac. 432, holding power of court to modify injunctions is limited to those given without notice; *Humphrey v. Buena Vista Water Co.*, 2 Cal. App. 542, 544, 84 Pac. 297, 298, holding preliminary injunction granted on notice and hearing could not be arbitrarily dissolved merely because words "until further order of court" were contained therein.

Unsuccessful Motion to Dissolve Injunction does not authorize recovery of attorneys' fees therefor when trial upon merits results in favor of defendant.

Approved in *Chicago etc. Ry. Co. v. Whitney*, 143 Iowa, 516, 121 N. W. 1046, following rule; *Spooner v. Cady* (Cal.), 44 Pac. 1020, holding counsel fees not recoverable as damages in action for conversion of property.

Recovery on Injunction Bond of Attorneys' Fees necessarily expended in dissolving injunction. See note, 16 L. R. A. (n. s.) 55, 63, 66.

Costs Incurred on Trial and Appeal are not within terms of injunction bond given for preliminary injunction.

Approved in *Jameson v. Bartlett*, 63 Neb. 645, 88 N. W. 862, holding in action on bond given for injunction ancillary to main action, cause could not be submitted to jury on theory that counsel fees incurred in trying issues were rendered in disposing of unlawful restraint.

Order Restraining Defendant "until further order of court" has no other meaning than "in the meantime," or until decision upon order to show cause.

Approved in *Ex parte Grimes*, 1 Okl. Cr. 111, 20 Okl. 456, 94 Pac. 672, following rule.

110 Cal. 441-447, 42 Pac. 965, **RICHARDSON v. EUREKA.**

Action to Abate Nuisance is suit in equity.

Reaffirmed in *Meek v. De Latour*, 2 Cal. App. 263, 83 Pac. 301.

In Equity Case Verdict by Jury is advisory only.

Reaffirmed in *Meek v. De Latour*, 2 Cal. App. 263, 83 Pac. 301.

Absence of Findings in Equity Case is not fatal defect unless it affirmatively appears they were not waived.

Approved in *Cushing Wetmore Co. v. Gray*, 152 Cal. 120, 125 Am. St. Rep. 47, 92 Pac. 70, following rule.

110 Cal. 455-457, 42 Pac. 975, BAKER v. SOUTHERN CALIFORNIA RY. CO.

Only Owner of Property Through or along which railroad passes is entitled to benefit of railroad fence law.

Approved in *Barbee v. Southern Pacific Co.*, 9 Cal. App. 460, 99 Pac. 542, holding, where county road separated land of owner from railroad right of way, he could not recover for injured stock under railroad fence law; *Or. Short Line R. Co. v. District Court*, 30 Utah, 377, 85 Pac. 363, holding Utah statute gives right of action to owner of animal killed, and he need not allege he is owner of land along railroad.

Miscellaneous.—Cited in *Barbee v. Southern Pacific Co.*, 9 Cal. App. 458, 99 Pac. 542, to point that railroad fence law is intended to provide for division fences and for benefit of adjoining owners only.

110 Cal. 457-462, 42 Pac. 974, WILLIAMS v. SOUTHERN PACIFIC R. R. CO.

One Member of Partnership may Recover whole amount due firm in absence of plea of defect of parties plaintiff.

Approved in *Baker & Hamilton v. Lambert*, 5 Cal. App. 711, 91 Pac. 341, following rule; *Russ v. Tuttle*, 158 Cal. 231, 110 Pac. 814, holding one of several parties jointly interested in claim could recover whole in absence of demurrer for nonjoinder of others.

Instructions must be Excepted to to be reviewed on appeal.

Reaffirmed in *Randall v. Freed*, 154 Cal. 301, 97 Pac. 671.

Erroneous Instruction in Favor of appellant is not ground for reversal.

Approved in *People v. Hower*, 151 Cal. 644, 91 Pac. 509, and *Smith v. San Pedro, Los Angeles etc. R. R. Co.*, 35 Utah, 399, 100 Pac. 677, both following rule.

110 Cal. 463-467, 42 Pac. 966, MEHERIN v. SAUNDERS.

Acts for Which Sureties on Official Bonds are liable. See note, 91 Am. St. Rep. 548.

Miscellaneous.—Cited in *Meherin v. Saunders* (Cal.), 56 Pac. 1111, referring historically to principal case.

110 Cal. 467-471, 42 Pac. 978, FREESE v. PENNIE.

Trial Court is not Bound by Opinion of experts as to value of attorney's services.

Approved in *In re Averill's Estate* (Cal.), 66 Pac. 15, holding trial court not bound by uncontradicted testimony of witnesses as to their opinion of amount that should be allowed guardian; *Estate of Richmond*, 9 Cal. App. 415, 99 Pac. 560, refusing to interfere with discretion of court in fixing allowance for attorney to administration.

Conclusiveness of Testimony of Experts. See note, 42 L. R. A. 765, 768, 769.

110 Cal. 471-480, 42 Pac. 968, MAHONEY v. SAN FRANCISCO & SAN MATEO RY. CO.

Street Railroad has No Exclusive Use of any portion of street, its right being in common with public, and peculiar only so far as its inability to move from tracks makes it so.

Approved in *Acton v. Fargo & Moorhead St. R. Co.*, 20 N. D. 450, 129 N. W. 229, following rule; dissenting opinion in *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 322, 67 N. E. 1048, majority holding person who passed behind standing car upon second track without looking or listening was guilty of contributory negligence.

It is not Negligent Per Se to Travel along or near track in same direction in which electric car is going.

Approved in *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 780, 89 Pac. 1111, holding failure to see or hear approaching car is not per se proof of negligence; *Ablard v. Detroit United Ry.*, 139 Mich. 255, 102 N. W. 744, holding it not negligence per se to drive along track at night, though street was wide enough to allow safe driving alongside; dissenting opinion in *Robards v. Indianapolis St. R. Co.*, 32 Ind. App. 310, 67 N. E. 950, majority holding bicycle rider was negligent in riding near street-car track without listening for car.

In Action for Wrongful Death, brought by wife and minor children of deceased, it is error to allow proof that children have no means of their own.

Approved in *Johnston v. Beadle*, 6 Cal. App. 253, 91 Pac. 1012, holding general financial condition of plaintiff irrelevant on question of damages in personal injury suit; *Seattle Electric Co. v. Hartless*, 144 Fed. 381, 75 C. C. A. 317, holding evidence of physical conditions of plaintiffs was inadmissible in action for wrongful death.

Distinguished in *Simoneau v. Pacific Electric Ry.*, 159 Cal. 506, 115 Pac. 326, holding in such action evidence of crippled condition of children could be given as bearing on question of damages.

Urging or Coercing Verdict. See note, 105 Am. St. Rep. 572.

110 Cal. 480-487, 42 Pac. 980, McKUNE v. SANTA CLARA VALLEY MILL ETC. CO.

Where Reasonable Minds Might Differ as to whether facts showed negligence, it is question of fact for jury.

Approved in *Payne v. Oakland Traction Co.*, 15 Cal. App. 148, 113 Pac. 1082, following rule; *Mugford v. Atlantic etc. Co.*, 7 Cal. App. 675, 95 Pac. 675, holding facts showed no negligence of defendant as matter of law.

Where Lumber Piled on Sidewalk alongside mill was owned by mill, it is presumed it was so piled with knowledge and consent of owner.

Approved in *Wile v. Los Angeles Ice etc. Co.*, 2 Cal. App. 191, 83 Pac. 272, holding where injury resulted from projecting spike in temporary driveway over sidewalk leading to plaintiff's building, it would be presumed plaintiff's driveway and spike maintained by his knowledge.

One Who Maintains Unauthorized Obstruction upon highway by means of which another is injured, without fault, is liable in damages.

Approved in *Williams v. San Francisco etc. Ry. Co.*, 6 Cal. App. 725, 93 Pac. 127, holding railroad liable for injury caused by frightened horse running against woodpile placed on highway by railroad.

Violation of Ordinance is Negligence Per Se.

Approved in *Cragg v. Los Angeles Trust Co.*, 154 Cal. 667, 98 Pac. 1065, holding failure to comply with ordinance requiring license for elevator operator was negligence per se; *Manning v. App Cons. Gold Min. Co.*, 149 Cal. 45, 84 Pac. 661, holding facts did not show violation of statute which constituted negligence per se.

Negligent Act or Omission must have contributed directly to injury, so, however improper or illegal it may have been in abstract, no action can be founded on it.

Approved in *Fenn v. Clark*, 11 Cal. App. 81, 82, 103 Pac. 945, following rule; *Scott v. San Bernardino Valley Traction Co.*, 152 Cal. 612, 93 Pac. 680, holding negligent failure to see car did not contribute to injury in crossing street in front of it.

Husband and Wife are Necessary Parties to action brought for damages for injuries to wife.

Reaffirmed in *Gomez v. Scanlan*, 155 Cal. 530, 102 Pac. 13, and *Gomez v. Scanlan*, 2 Cal. App. 580, 84 Pac. 50.

Objection to Improper Joinder of causes of action is waived by failure to demur thereto.

Approved in *Ennor v. Raine*, 27 Nev. 218, 74 Pac. 4, holding failure to object in trial court that facts set up in answer did not constitute proper counterclaim constituted waiver of objection.

Miscellaneous.—Cited in *Basler v. Sacramento Gas etc. Co.*, 158 Cal. 518, 111 Pac. 531, to point that where wife is in care and custody of husband, his contributory negligence bars recovery for her injuries.

110 Cal. 490-493, 42 Pac. 962, BAILEY LOAN CO. v. HALL.

In Suit on Partnership Note, liability being several, judgment may be entered against any of them.

Approved in *Redwood City Salt Co. v. Whitney*, 153 Cal. 423, 95 Pac. 886, holding in suit against partnership and individual member thereof on joint obligation, judgment against partnership alone could be sustained; *Morgan v. Righetti (Cal.)*, 45 Pac. 260, holding in suit on alleged partnership debt, judgment could be given against partner found individually liable.

110 Cal. 494-502, 42 Pac. 971, ESTATE OF CLOS.

Executor is Entitled to Allowance for cost of repairs and improvements made upon property of estate, when necessary to maintain it.

Approved in *Estate of Hincheon*, 159 Cal. 760, 761, 116 Pac. 49, holding executor could make such expenditures as were reasonably necessary to preserve building being erected by decedent at time of his death; *Estate of O'Connor*, 2 Cal. App. 478, 84 Pac. 320, holding court could allow claim of trustees under will, upon settlement of their account, for counsel fees incurred by one of them in obtaining distribution to trustees.

Allowance to Administrator for Interest on disbursements. See note, 5 Cof. Prob. 395.

110 Cal. 502-505, 42 Pac. 1064, KIRSCHNER v. DIETRICH.

Court cannot Review Judgment for divorce after death of one party.

Approved in *Hite v. Mercantile Trust Co.*, 156 Cal. 768, 106 Pac. 104, following rule; *Day v. Nottingham*, 160 Ind. 417, 66 N. E. 1001, holding judgment for divorce, though obtained on service by publication, could not be reopened after death of party.

Attack on Decree of Divorce after death of one of the parties. See notes, 125 Am. St. Rep. 234, 235; 1 L. R. A. (n. s.) 553; 57 L. R. A. 584, 605.

When Rights as to Community Property are not settled by divorce decree, they may be determined in subsequent action.

Approved in *Coats v. Coats*, 160 Cal. 679, 118 Pac. 445, holding action lay to determine rights to property accumulated by joint efforts of parties during continuance of voidable marriage.

Effect of Divorce on Community Property in absence of adjudication. See note, 11 L. R. A. (n.s.) 103.

110 Cal. 506-512, 42 Pac. 986, WARREN v. HOPKINS.

When Record is Properly Certified to appellate court, it is conclusive of facts therein stated.

Reaffirmed in *Mendocino County v. Peters*, 2 Cal. App. 27, 82 Pac. 1123.

Lot upon Which Lien is Authorized under section 1191, Code of Civil Procedure, for improvement, is not limited to any artificial subdivision or official designation on map, but includes whatever territory is caused by owner to be improved under single contract.

Approved in *California etc. Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 707, 118 Pac. 109, upholding lien for grading and improvement on hotel lot; *Southern Cal. Lumber Co. v. Peters*, 3 Cal. App. 480, 86 Pac. 817, holding claim of lien for lumber furnished to be used on several buildings was valid against all jointly, though there was nothing to show what portion was used on each; *Eccles Lumber Co. v. Martin*, 31 Utah, 254, 87 Pac. 718, holding where contract was to build two houses on single lot, claim of lien setting forth amount due but not amount on each building separately was sufficient; *Park City Meat Co. v. Comstock Min. Co.*, 36 Utah, 160, 103 Pac. 260, holding claim of miner's lien describing particular property included as well adjacent land over which company had easement.

Uncertainty in Findings is to be Construed so as to support judgment rather than defeat it.

Approved in *Ripperdan v. Weldy*, 149 Cal. 674, 87 Pac. 279, *Aetna Indem. Co. v. Altadena Min. etc. Co.*, 11 Cal. App. 173, 104 Pac. 474, *Murphy v. Stelling*, 8 Cal. App. 705, 97 Pac. 674, *Brenneke v. Smallman*, 2 Cal. App. 308, 83 Pac. 303, *Santos v. Silva*, 1 Cal. App. 616, 82 Pac. 981, and *Eastwood v. Standard Mines etc. Co.*, 11 Idaho, 203, 81 Pac. 384, all following rule; *Bruce v. Bruce*, 16 Cal. App. 357, 116 Pac. 996, holding where findings were waived, it would be assumed court found all facts necessary to support judgment.

110 Cal. 513-523, 42 Pac. 983, HOWLAND v. OAKLAND CONSOL. ST. RY. CO.

Verdict will not be Set Aside on ground of excessive damages unless so large as to plainly suggest passion or prejudice on part of jury.

Approved in *Lanigan v. Neely*, 4 Cal. App. 772, 89 Pac. 446, *Kimie v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 277, 104 Pac. 314, and *Hale v. San Bernardino Valley Traction Co.*, 156 Cal. 715, 106 Pac. 84, all holding damages not excessive; *Maloney v. Winston Bros. Co.*, 18 Idaho, 766, 111 Pac. 1089, holding damages excessive.

General Objection to Hypothetical Question is not available on appeal.

Approved in *Longan v. Weltmer*, 180 Mo. 341, 103 Am. St. Rep. 573, 79 S. W. 661, 64 L. R. A. 969, following rule; *Davey v. Southern Pac. Co. (Cal.)*, 45 Pac. 171, holding general objection to evidence was in-

sufficient to raise point of variance; *Spear v. United Railroads*, 16 Cal. App. 647, 117 Pac. 961, holding general motion to strike out testimony as incompetent was not available on appeal.

Determination of Qualification of Witness offered as expert rests in discretion of trial judge.

Approved in *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 41, 95 Pac. 1130, *Mabry v. Randolph*, 7 Cal. App. 427, 94 Pac. 406, and *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 678, 84 Pac. 258, all following rule.

In Negligence Cases Assessment of Damages rests in good sense and judgment of jury.

Approved in *James v. Oakland Traction Co.*, 10 Cal. App. 800, 103 Pac. 1089, following rule; *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 467, 88 Pac. 590, upholding instruction as to measure of damages.

Opinion of Expert as Basis of Question to other witnesses. See note, 29 L. R. A. (n. s.) 538.

110 Cal. 530-537, 42 Pac. 1077, **RICHTER v. HENNINGSAN.**

Formal Finding on Plea of Limitations, in absence of evidence on which facts found were based, is conclusion of law.

Approved in *Towle v. Sweeney*, 2 Cal. App. 32, 83 Pac. 75, holding where plea of limitations was submitted on agreed statement of facts, finding thereon could be inserted as finding of fact or conclusion of law.

After Judgment has Been Entered on findings, court cannot file omitted finding on plea of limitations.

Approved in *Dillon Implement Co. v. Cleaveland*, 32 Utah, 8, 88 Pac. 672, holding when findings had not been made on all material issues, new trial should be granted.

Action for Contributions not Founded on express promise. See note, 98 Am. St. Rep. 43.

110 Cal. 543-547, 42 Pac. 1065, **SCHWIESAN v. MAHON.**

Miscellaneous.—Cited in *Diggins v. Mahon* (Cal.), 42 Pac. 1066, companion case.

110 Cal. 547-553, 42 Pac. 1079, **NORTHEY v. BANKERS' LIFE ASSN.**

Policy of Life Insurance is to be Construed most strongly in favor of insured.

Approved in *Lewine v. Knights of Pythias*, 122 Mo. App. 561, 99 S. W. 825, holding beneficiary not bound by subsequent by-law reducing recovery in case of suicide when no mention of suicide was made in application, though insured agreed to be governed by by-laws.

110 Cal. 553-555, 42 Pac. 1080, **ARBOS v. SAN BERNARDINO COUNTY.**

Statutes Requiring Presentation of Claims against county are framed for purpose of avoiding useless litigation, and to give county opportunity to avoid such expense.

Approved in *Farmers' etc. Bank v. Los Angeles*, 151 Cal. 656, 91 Pac. 796, holding demand for repayment of taxes paid under protest was essential to right to sue for their recovery.

When Supervisors have Partly Allowed Claim against county, claim for rejected part must be again presented before right to sue county accrues.

Approved in *Manon v. San Diego*, 8 Cal. App. 246, 96 Pac. 815, following rule; *San Diego County v. Riverside County* (Cal.), 55 Pac. 7, holding rule did not apply to claim wholly rejected.

110 Cal. 556-562, 42 Pac. 1082, ESTATE OF RYER.

Matters Occurring Prior to Judgment or order appealed from cannot be considered on motion to dismiss appeal on ground it has not been perfected.

Approved in *Gardner v. Stare* (Cal.), 66 Pac. 4, refusing to consider motion to dismiss appeal from order denying new trial made on ground adverse parties were not served with notice, since it involved merits of appeal and examination of record.

Motion for New Trial Lies in proceedings for partial distribution of estate.

Reaffirmed in *Carter v. Waste*, 159 Cal. 26, 112 Pac. 728, and *Estate of Sutro*, 152 Cal. 257, 92 Pac. 490.

Notice of Appeal from Order Denying New Trial need be served only on parties to motion in trial court.

Approved in *Niles v. Gonzalez*, 155 Cal. 360, 361, 100 Pac. 1080, *Bell v. San Francisco Savings Union*, 153 Cal. 69, 73, 94 Pac. 227, 229, *Niles v. Gonzalez*, 152 Cal. 96, 92 Pac. 76, and *O'Rourke v. Finch*, 8 Cal. App. 265, 96 Pac. 785, all following rule; *McKenzie v. Hill*, 9 Cal. App. 80, 98 Pac. 55, 56, and *Potrero etc. Land Co. v. All Persons*, 155 Cal. 372, 101 Pac. 12, holding notice of appeal need only be served on parties appearing from record to be adverse; *Johnson v. Phenix Ins. Co.*, 152 Cal. 198, 92 Pac. 183, holding failure to serve such notice on adverse party necessitated affirmance of order denying motion; *Estate of Young*, 149 Cal. 176, 177, 85 Pac. 145, 146, holding bill of exceptions to order denying petition for partial distribution of estate must be served on all who from record appear to be adverse parties.

There is No Judgment-roll, Strictly Speaking, in probate proceedings, but papers which are declared to constitute judgment-roll in civil action may be held to constitute such roll on appeal from probate order.

Approved in *Estate of Parsons*, 159 Cal. 427, 114 Pac. 571, following rule; *Dougherty's Estate*, 34 Mont. 342, 86 Pac. 40, holding on appeal from order settling administrator's account, account, record objections thereto, findings and order certified by clerk as judgment-roll, and copy of notice of appeal, constitute proper appeal record.

110 Cal. 568-579, 42 Pac. 1086, ROBERTSON v. BURRELL.

Heirs of Deceased Partner are not Proper Parties to maintain action for accounting and settlement of partnership between decedent and surviving partner.

Approved in *Miller v. Ash*, 156 Cal. 547, 556, 105 Pac. 601, 604, holding, upon death of ward, his personal representatives and not his heirs could alone sue guardian to recover ward's property.

Right of Next of Kin to Maintain Action in interest of estate. See note, 22 L. R. A. (n. s.) 455.

Heirs' Title is Subject to Performance by administrator of all his trusts, and they come into possession only of such portion of estate as may then remain.

Approved in *Estate of Vance*, 152 Cal. 764, 93 Pac. 1011, holding where will made absolute devise of property but codicil subjected it to given trust, property passed to devisee subject to trust.

Where Bill in Equity is Brought after lapse of many years to enforce trust, it will only be retained upon fullest possible credible showing that applicants are entitled to relief.

Approved in *Burke v. Maguire*, 154 Cal. 466, 98 Pac. 25, holding complaint to enforce trust after lapse of fourteen years was insufficient; *Marks v. Evans* (Cal.), 62 Pac. 79, holding action to set aside assessment and sale of stock on ground of fraud was barred when eight years had elapsed since its discovery.

Ejectment by Executor or Administrator. See note, 136 Am. St. Rep. 82.

110 Cal. 579-582, 52 Am. St. Rep. 116, 42 Pac. 1063, **SCHLICKEER v. HEMENWAY.**

Capacity in Which Executor or Administrator may be sued for personal tort. See note, 51 L. R. A. 264.

110 Cal. 582-586, 42 Pac. 1091, **DIXON v. SCHERMEIER.**

Water Ditch Constituting Independent Property disassociated from land over which it passes is servitude thereon.

Approved in *Rubio Canyon etc. Assn. v. Everett*, 154 Cal. 32, 96 Pac. 813, following rule.

Mortgage of Mining Claim to Which Ditch is appurtenant covers easement over other lands of mortgagor for line of ditch.

Distinguished in *Miller v. Hoeschler*, 126 Wis. 267, 105 N. W. 791, 8 L. R. A. (n. s.) 327, holding use as dooryard of piece of property adjoining house and lot did not pass easement therein on transfer of house and lot.

Easements Created by Severance of Tract with apparent benefit existing. See note, 26 L. R. A. (n. s.) 322.

110 Cal. 590-598, 42 Pac. 976, **RANDOL v. SCOTT.**

Covenant by Two Joint Lessees not to assign lease or permit assignment without consent of lessor is not violated by assignment in insolvency of one lessee of his interest in lease, which other lessee could not have prevented.

Approved in *Gazlay v. Williams*, 147 Fed. 682, 77 C. C. A. 662, following rule; *Spangler v. Spangler*, 11 Cal. App. 323, 104 Pac. 996, holding assignment of one lessee to other was not breach of similar covenant.

What Amounts to Violation of Covenant in lease against assignment or sale. See note, 14 L. R. A. (n. s.) 1201.

Delay of Landlord in Enforcing Forfeiture as waiver. See note, 24 L. R. A. (n. s.) 1064.

110 Cal. 598-604, 43 Pac. 2, **PEOPLE v. SHAUGHNESSY.**

Obtaining Money by Conspiracy between defendant and manager of lottery to cheat prosecuting witness who did not intend to part with his property in money may be prosecuted as larceny.

Approved in *Stewart v. Wright*, 147 Fed. 333, 77 C. C. A. 499, holding party who thought himself participating in fraudulent scheme did not lose right to recover money of which he was defrauded by conspiracy, of which he was merely intended victim; *State v. Ryan*, 47 Or. 347, 82 Pac. 706, 1 L. R. A. (n. s.) 862, holding obtaining money by deception by one who intended to appropriate it was larceny, where

owner intended to part with title as well as possession; *State v. Donaldson*, 35 Utah, 102, 136 Am. St. Rep. 1041, 99 Pac. 449, holding obtaining money under pretext of betting at cards where party had no chance to win and was only player who risked anything was larceny.

Larceny. See note, 88 Am. St. Rep. 573.

Instruction as to Reasonable Doubt Approved.

Reaffirmed in *People v. Manasse*, 153 Cal. 14, 94 Pac. 94.

110 Cal. 605-609, 42 Pac. 1089, ESTATE OF WELCH.

Administrator cannot be Deprived of actual custody of assets of estate by order directing him where and how he shall keep them.

Approved in *In re Bolin's Estate*, 22 Okl. 857, 98 Pac. 936, holding general guardian of estate of minor could not be required on annual settlement to pay amount due minor to clerk of court.

Grounds for Removal of Executors and Administrators. See note, 138 Am. St. Rep. 548.

110 Cal. 609-614, 42 Pac. 1090, PEOPLE v. KAMAUNU.

Confession is Admissible Without Preliminary Proof that it was voluntary when under circumstances it could not have been otherwise.

Approved in *State v. Landers*, 21 S. D. 610, 114 N. W. 718, holding where evidence as to voluntary character of confession was not conflicting, court properly refused to submit its competency to jury; *State v. Wells*, 35 Utah, 402, 136 Am. St. Rep. 1059, 100 Pac. 682, holding hearing as to voluntariness of confession could be had in presence of jury.

When Confession Voluntary. See note, 18 L. R. A. (n. s.) 829.

Reversal of Conviction Because of Unfair or irrelevant argument or statements by prosecuting attorney. See note, 46 L. R. A. 662.

110 Cal. 614-621, 43 Pac. 4, 386, BUTLER v. ASHWORTH.

Where Several Persons are Jointly Liable for tort, suit and recovery against one alone releases others.

Approved in *Cleveland etc. Ry. Co. v. Hilligoss*, 171 Ind. 424, 131 Am. St. Rep. 258, 86 N. E. 488, holding release of one joint tort-feasor released all.

Effect of Judgment Against One Joint Tort-feasor upon liability of other. See note, 58 L. R. A. 423.

Duty and Liability of Municipality with respect to drainage. See note, 61 L. R. A. 711.

110 Cal. 624-627, 42 Pac. 1081, CONLAN v. SULLIVAN.

Conveyance Induced by Mistake can be Rescinded when parties can be placed in original position.

Approved in *Murray v. Sanderson*, 62 Wash. 481, 114 Pac. 426, canceling agreement so drawn by mistake of scrivener that it did not effectuate intention of parties.

110 Cal. 627-632, 43 Pac. 14, KEENER v. EAGLE LAKE L. & IRR. CO.

Laborer Seeking to Enforce Lien for weekly or monthly wages must bring himself within terms of statute, and aver wages due were earned weekly or monthly.

Approved in *Kuschel v. Hunter* (Cal.), 50 Pac. 398, 399, following rule; *Spaulding v. Mammoth Spring Min. Co.* (Cal.), 49 Pac. 184, holding plaintiff not entitled to lien under statute.

Miscellaneous.—Cited in *Purser v. Cady* (Cal.), 49 Pac. 181, historically referring to principal case; *Riggs v. Eagle Lake Land etc. Co.* (Cal.), 43 Pac. 15, companion case.

110 Cal. 632-637, 52 Am. St. Rep. 136, 43 Pac. 106, **VISALIA & TULARE R. R. CO. v. HYDE.**

Purchaser of Stock in Corporation on which there are unpaid assessments assumes liability therefor upon transfer of stock on books.

Approved in *Perkins v. Cowles*, 157 Cal. 632, 137 Am. St. Rep. 158, 108 Pac. 713, and *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 72, 97 Pac. 8, both following rule; *Union Savings Bank v. Willard*, 4 Cal. App. 692, 88 Pac. 1098, holding trustee of stock appearing on books as trustee for person named was liable for assessment thereon.

Effect of Transfer of Stock upon Liability for unpaid subscription. See note, 47 L. R. A. 261.

Corporation can Look Only to its books to determine who is liable for stock assessments.

Approved in *Perkins v. Cowles*, 157 Cal. 630, 137 Am. St. Rep. 158, 108 Pac. 713, *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 108, 88 Pac. 281, and *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 195, 197, 81 Pac. 1031, 1032, all following rule.

Liability of Stockholder for Unpaid Subscription and liability to creditors for its debts are entirely distinct.

Reaffirmed in *Union Savings Bank v. Willard*, 4 Cal. App. 694, 88 Pac. 1099, following rule.

Stockholder is Liable to Corporation for unpaid portion of subscription whenever called for.

Approved in *Perkins v. Cowles*, 157 Cal. 633, 137 Am. St. Rep. 158, 108 Pac. 714, holding unpaid subscriptions of stock were part of corporation's assets in bankruptcy; *Burke v. Maze*, 10 Cal. App. 209, 101 Pac. 439, holding unpaid subscriptions were part of assets of insolvent bank; *Vaughn v. Alabama Nat. Bank*, 143 Ala. 578, 42 So. 65, holding stockholder who purchased stock of corporation for less than par value was liable to creditors for difference between purchase price and par.

Liability to Corporations of Subscribers to Stock. See note, 93 Am. St. Rep. 384, 387, 388.

110 Cal. 638-643, 42 Pac. 1084, **KROUSE v. WOODWARD.**

Specific Performance of Contract to return pledged stock may be had if stock has no market value, and pledgor purchased with view to increase in value, and other shares cannot be purchased.

Approved in *Sherwood v. Wallin*, 1 Cal. App. 537, 82 Pac. 568, upholding complaint for specific performance of contract to transfer certain shares of stock in corporation; *Bernier v. Griscom-Spencer Co.*, 161 Fed. 442, holding complaint for specific performance of agreement to deliver stock failed to show plaintiff had no adequate remedy at law.

Specific Performance of Contract for sale of corporate stock. See note, 135 Am. St. Rep. 694, 699.

Pledgor of Shares of Stock has Right to recover only same number of shares as he pledged, not the same shares.

Approved in *Bell v. Bank of California*, 153 Cal. 240, 94 Pac. 892, following rule; *Sherwood v. Wallin*, 1 Cal. App. 538, 82 Pac. 568, holding change in number of certificate did not affect identity of stock.

Conversion of Pledged Property by Invalid Sale. See note, 43 L. R. A. 764.

Miscellaneous.—Cited in *Krouse v. Woodward* (Cal.), 42 Pac. 1085, *Bell v. Woodward* (Cal.), 42 Pac. 1085, *Krouse v. Woodward* (Cal.), 42 Pac. 1086, and *Bell v. Woodward* (Cal.), 42 Pac. 1086, all companion cases.

110 Cal. 644-651, 43 Pac. 126, BROWN v. CAMPBELL.

Entire Proceeding from Commencement of action to execution is in one court, though carried on in different departments of superior court of county.

Approved in *People v. Carantan*, 11 Cal. App. 566, 105 Pac. 770, holding change of case from one department of court to another did not have effect to vacate any preceding orders.

Prior Action Pending Should be Pleaded as defense, and if not so pleaded it is not available after adverse judgment.

Approved in *Michelin Tire Co. v. Webb*, 143 Mo. App. 682, 127 S. W. 949, holding when petition did not show on face another action pending, it could not be attacked by motion to dismiss.

110 Cal. 651-655, 43 Pac. 9, EX PARTE NICHOLS.

Legislature has Power to Provide for Detention and education of minor offenders.

Approved in *In re Sharp*, 15 Idaho, 128, 96 Pac. 565, 18 L. R. A. (n. s.) 886, holding act to provide for care of delinquent children was not penal or criminal, and due process of law was observed in taking custody of minor thereunder; *Hunt v. Wayne Circuit Judges*, 142 Mich. 115, 105 N. W. 540, holding state had power to define status of infants requiring guardianship and to enforce state control and education thereof; *Mill v. Brown*, 31 Utah, 480, 120 Am. St. Rep. 935, 88 Pac. 612, upholding statute creating juvenile courts in cities.

Constitutionality of Statutes Concerning Reformatories and juvenile courts. See note, 120 Am. St. Rep. 958.

Restraint on Freedom as Impairment of child's constitutional rights. See note, 18 L. R. A. (n. s.) 894.

110 Cal. 655-658, 43 Pac. 1, WHEELER v. DONNELL.

Proceeding by Accusation for Alleged Misdemeanors in office under section 772, Penal Code, is criminal proceeding not prosecuted by information or indictment, and is not within appellate jurisdiction of supreme court.

Approved in *Coffey v. Superior Court*, 2 Cal. App. 456, 83 Pac. 581, holding proceedings under section 758 et seq. of Penal Code were criminal in nature; *Larue v. Davies*, 8 Cal. App. 755, 97 Pac. 905, *arguendo*.

Distinguished in *Skeen v. Craig*, 31 Utah, 28, 86 Pac. 489, holding proceeding for removal of officer for malfeasance in office was civil in nature.

Miscellaneous.—Cited in *Guttery v. Wishon* (Cal.), 43 Pac. 2, companion case.

110 Cal. 658-667, 43 Pac. 202, PARKE & LACY CO. v. WHITE RIVER LUMBER CO.

Contract Considered and Held to be Conditional Sale and not lease.

Reaffirmed in McCollough v. Home Ins. Co., 155 Cal. 662, 102 Pac. 815.

110 Cal. 674-682, 43 Pac. 388, POTTER v. AHRENS.

Contract for Sale of Goodwill of Business containing covenant not to engage in like business in same city may stipulate specified sum as liquidated damages for breach.

Reaffirmed in Shafer v. Sloan, 3 Cal. App. 338, 85 Pac. 163.

Agreements Purporting to Liquidate Damages. See note, 108 Am. St. Rep. 60.

110 Cal. 687-693, 43 Pac. 391, McCARTHY v. MT. TECARTE LAND ETC. CO.

Assignment of Claim for Goods sold to corporation, of which it had notice, is not affected by subsequent settlement of accounts between assignor and corporation.

Approved in Frese v. Moore, 1 Cal. App. 592, 82 Pac. 544, holding indorsement and transfer of contracts to charter vessel and furnish lumber transferred all assignor's rights thereunder.

Where Bill of Particulars is Demanded and furnished forty days before trial, objection cannot be made to reception of evidence at trial on ground bill was not furnished in five days after demand, when no objection was made to sufficiency of account as furnished.

Approved in Miller v. Mullan, 17 Idaho, 39, 104 Pac. 664, Ames v. Bell, 5 Cal. App. 5, 89 Pac. 620, Flynn v. Seale, 2 Cal. App. 671, 84 Pac. 266, all holding where no objection was taken to insufficiency of bill of particulars furnished several months before trial, objection to admission of evidence thereon on ground of insufficiency was untenable.

